ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 10, 2001

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

Civil Misc. Writ No. 51928 of 2000

Constable CP 117 Yad Ali and others ...Petitioners
Versus
Superintendent of Police, Chandauli and another ...Respondents

Counsel for the Petitioners:
Sri C.B. Yadav

Counsel for the Respondents:
Sri M.S. Pipersenia
Standing Counsel

U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991, Rule 17-Interim Suspension- Whether an Police Constable can be placed under suspension at the stage of preliminary enquiry ?- Held- "Yes'- Suspension is a right of an employer- in absence of any provision the delinquent employee is entitled for full salary.

Held – Para 21

The fact that the appointing authority should in the normal course await the receipt of report of informal enquiry or for the outcome of the probe is beyond the pale of dispute but it cannot be treated to be an inflexible rule of law. There may be certain circumstances when this rule may not sub-serve the real purpose as suspension of a delinquent employee may be immediately necessary even before the receipt of the preliminary enquiry report.
Case law discussed.
1999 (82) FLR-262,
1974 ALJ-862 (FB)
JT (1996) (6) SCV 221
1967(15) FLR 347 (SC)
AIR 1951 SC-41
AIR (1967) SC-884,
AIR 1959 SC-1342
AIR 1961 SC-1342,
(1964) 5 SCR-431-AIR 1964 SC-78
AIR 1970 SC-1794
AIR 1968 SC-800: (1968) 2 SCR 577
AIR 1994 SC-2296
AIR 1977 SC 1466
1999 (2) FLR-627
AIR 1964 SC-1262
1994 (3) UPLBEC 1051
1996 (2) UPLBEC-1423

Constitution of India, Article 226- Service law- Suspension- keeping in view of settled principle of law by the Apex court as well as the High Court, 20 points guide line issued to the employers to deal with the Government Servant under suspension during preliminary or contemplated or pending enquiry.

Held- Para 29

The conclusions which are deducible from various decisions of the apex court as well as of this court, as discussed above may be stated in a condensed form for the sake of clarity and future guidance of the appointing/disciplinary authority concerned dealing with the matters of government servants, particularly in relation to orders of suspension, pending enquiry or in contemplation thereof or during investigation, enquiry or trial of a criminal charge.

By the Court

1. A fine point of controversy in this writ petition has come to be raised whether a 'Police officer' within the meaning of U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as 'the Rules of 1991') can be placed under suspension even before the receipt of report of the preliminary enquiry. This

question naturally involves the interpretation of Rule 17 of the Rules of 1991 which reads as follows:

" 17. Suspension-1 (a) A Police Officer against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of the enquiry in the discretion of the appointing authority or by any other authority not below the rank of Superintendent of Police, authorised by him in this behalf.

(b) A Police Officer in respect of or against whom an investigation, enquiry or trial relating to a criminal charge is pending may at the discretion of the appointing authority under whom he is serving be placed under suspension, until the termination of all proceedings relating to that charge, if the charge is connected with his position as a Police Officer or is likely to embarrass him in the discharge of his duties or involves moral turpitude, if the prosecution is instituted by a private person on complaint, the appointing authority may decide whether the circumstances of the case justify the suspension of the accused……."

2. The controversy has come up in the wake of the following facts. Civil Police Constables Yad Ali. Bhim Yadav and Om Prakash Tewari- petitioners are posted at Police Station Sayed Raja in district Chandauli. They were placed under suspension by the Superintendent of Police, Chandauli by order no. 123/2000 dated November, 2000 in contemplation of the departmental enquiry with immediate effect in connection with the allegation that they had stopped Truck No. DL-1 G/4896 in the night of 21.11.2000 for checking the papers relating to registration etc., of the vehicle and in the process misbehaved and ill treated its driver. Simultaneously with the order of suspension, the Circle Officer, Chandauli was directed to hold a preliminary enquiry and submit his report within seven days (endorsement no. 4 of the suspension order).

3. Besides taking the plea that the order of suspension has been passed in a mala fide manner and on the basis of non-existent or incorrect facts, it has been emphatically canvassed on behalf of the petitioners that the order of suspension could not be passed unless the report of the preliminary enquiry had been received and, therefore, the mention of the fact in the text of the order of suspension that the petitioners were being suspended 'as an enquiry is contemplated', is of no relevance or consequence. In support of his contention learned counsel for the petitioners placed reliance on the oft quoted decision of this court in the case of **Tej Pal Singh Vs. Deputy Inspector General of Police, PAC Agra and another-** 1999 (82) FLR-262 in which the scope, object and purpose of the preliminary enquiry as well as regular disciplinary enquiry has been made clear relying upon a decision of this court in **State of UP Vs. Jai Singh Dixit-**1974 ALJ-862 (FB) and the two decisions of the apex court, namely, **A.G. Benjamin Vs. Union of India**-1967 (15)FLR 347 (SC) and **Rt. Rey.B.P. Sugandhar Bishop in Medak Vs,. Smt,.D.Dorothy Dayasfheela Ebeneser-**JT.1996 (6) SCV-221. It was asserted that the decision in **Tej Pal Singh's** case (supra) squarely applies to the facts of the present case and consequently, the order of suspension against the petitioners cannot be legally sustained as it has been passed even

before the disciplinary authority had an occasion to make up his mind on the objective assessment of the facts as could be disclosed in the preliminary enquiry report (which was yet to be received and considered).

4. Learned Standing Counsel has brought on record a short counter affidavit to indicate that the Circle Officer, Chandauli who was entrusted with the task of conducting the preliminary enquiry has submitted his report, a copy of which is Annexure SCA 1 to the Short Counter Affidavit. The preliminary enquiry discloses that out of the three petitioners. Yad Ali and Om Prakash Tewari, Constables were on duty on 21.11.2000 during the period 12 noon to 10 P.M. at Taxi Stand, tri-junction, Qasba Sayed Raja, district Chandauli. Both of them chased truck no. DL-1 G/4896 from the Taxi stand upto Sakaldeeha tri-Junction in Chandauli town which is about 10 Kilometers from the Taxi stand of Qasba Sayed Raja. It was found that the Constables, above named, were not authorised to check or look into the papers of the vehicle, in question, and on account of the fact that the driver of the vehicle was subjected to assault, a commotion and tension prevailed in the area and the trucks which were coming from both the sides on the G.T. road, blocked the road and jammed the traffic. On getting the information, Senior Sub Inspector Sri J.P. Singh of Police Station Chandauli reached the situs of the trouble and tried of pacify the rowdy public. The driver of the truck-victim of assault- was required to accompany up-to the Police Station to lodge an FIR but he was not willing to do so as he apprehended that in future, the police officials may harass him. Constables Om Prakash Tewari and Yad Ali escaped from the scene and after great difficulty and at the intervention of senior police officers who held out assurance that stern action against the delinquent Constables shall be taken, traffic problem could be sorted out and jam from the road lifted. Hectic search was made for the aforesaid two constables but they were not available for explaining their conduct in the matter or to put forth their version of the incident. The preliminary enquiry report indicates that the allegations are only against Om Prakash Tewari and Yad Ali, Constables and that Constable CP 431- Bhim Yadav-petitioner no. 2, prima facie had no part to play in the episode.

5. The factual controversy is beyond the pale of writ jurisdiction. The order of suspension has been challenged on legal matrix. Since the relevant material has been brought on record and the legal controversy is to be set at rest, this writ petition, with the consent of learned counsel for the parties, is being finally disposed of , at the admission stage.

Heard Sri C.B. Yadav, learned counsel for the petitioners and Sri M.S. Pipersenia, learned Standing counsel for the respondents.

6. Let us first analyse the powers of the appointing/disciplinary authority to suspend an employee with reference to the implications of the relationship of ‘master and servant’. It is one of the implied terms of the relationship between the employer and employee. The disciplinary matters include any kind of disciplinary action proposed to be taken by the employer against the employee. The power of disciplinary control is an indicia of the relationship of master and

servant. This principle has been recognised by the apex court in the case of **Charanjeet Lal Chaudhary Vs. Union of India**- AIR 1951 SC-41 and **State of Assam Vs. Kanak Chandra Dutta**- AIR 1967 SC-884. The order of **suspension** comes within the sweep of disciplinary action. To place an employee under suspension is an unqualified right of the employer. This right is conceded to the employer in service jurisprudence everywhere. The above propositions are now well established by a series of pronouncements of the apex court. In **Management of Hotel Imperial v. Hotel workers Union-** AIR 1959 SC 1342, the Supreme Court while, considering the question as to whether a master could suspend his servant during the pendency of an enquiry, observed that in the absence of a power either in express terms in the contract or under statutory rules governing the service, the master could not direct interim suspension, and even if he did so in the sense that he forbids the employee to work, he will have to pay the wages during the so called period of suspension. Imperial Hotel (supra) was explained in **T. Cajee Vs. U. Jormanik Siem**- AIR 1961 SC-1342. In the latter case the court pointed out that **Imperial Hotel** did not lay down that there could not be interim suspension nor did it lay down that the master could not forbid the servant from working while he was inquiring into his conduct with a view to removing him from service. All the Imperial Hotel said was that if the master did so forbid the servant and in fact, suspended him as an interim measure, he would have to pay wages during the period of interim suspension. Referring to **Imperial Hotel** the Constitution Bench in **T. Cajee** (supra) observed:-

"The effect of that decision is that in the absence of such power the master can pass an order of interim suspension but he will have to pay the servant according to the terms of contract between them."

7. The Court held that though an order of interim suspension could be made against the respondent in the case before it while inquiry into his conduct with a view to his ultimate removal is going on, his remuneration according to the terms and conditions communicated to him could not be withheld unless there was some statute or rules framed thereunder which would justify the withholding of the whole or part of the remuneration. The Court emphasized that so far as there was no statute or rule the remuneration could not be withheld from the suspended employee even though an order of suspension in the sense he is told not to do the work of his office, might be made against him.

A Constitution Bench of the apex Court three decades and six years ago in **R.P. Kapur V. Union of India** (1964) 5 SCR-431 (AIR 1964 SC-787 at 792) laid the law that:

"The general principle therefore is that an employer can suspend an employee pending an enquiry into his conduct and the only question that can arise on such suspension will relate to the payment during the period of such suspension. If there is no statutory provision in any law or rule, the employee is entitled to his full remuneration for the period of his interim suspension, on the other hand if there is a term in this respect in the contract or there is a provision in this respect in the contract or there is a provision in the statute or the rules framed

thereunder providing for the scale of payment during suspension, the payment would be in accordance therewith. These general principles in our opinion apply with equal force in a case where the Government is the employer and a public servant. On general principle therefore the authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding which may eventually result in a departmental enquiry against him".

8. The legal position was authoritatively summed up by the Supreme Court in **V.P. Gindroniya Vs. State of M.P.** (AIR. 1970 SC-1494) after particularly approving **Balvantrai Ratilal Patel Vs. State of Maharashtra** (AIR 1968 SC-800), the Supreme Court said:

"The law on the subject was exhaustively reviewed in **Balvantrai Ratilal Patel Vs. State of Maharashtra** (1968)2 SCR-577: AIR 1968 SC-800. Therein the legal position was stated thus: The general principle is that an employer can suspend an employee of his pending an enquiry into his misconduct and the only question that can arise in such a suspension will relate to the payment of his wages during the period of such suspension. It is now well settled that the power to suspend, in the sense of a right to forbid an employee to work, is not an implied term in an ordinary contract between master and servant, and that such a power can only be the creature either of a statute governing the conduct, or of an express term in the contract itself. Ordinarily, therefore, the absence of such a power either as an express term in the contract or in the rules framed under some stature would mean that an employer would have no power to suspend an employee of his and even if he does so in the sense that he forbids the employee to work, he will have to pay the employee's wages during the period of suspension. Where, however, there is power to suspend either in ;the contract of employment or in the statute or the rules framed thereunder, the order of suspension has the effect of temporarily suspending the relationship of master and servant with the consequence that the servant is not bound to render service and the master is not bound to pay. It is equally well settled that an order of interim suspension can be passed against the employee while an enquiry is pending into his conduct even though there is no such term in the contract of employment or in the rules, but in such a case the employee would be entitled to his remuneration for the period of suspension if there is no statute or rule under which, it could be withheld. The distinction between suspending him from performing the duties of his office on the basis that the contract is subsisting is important. The suspension in the latter case is always an implied term in every contract of service. When an employee is suspended in this sense, it means that the employer merely issues a direction to him that he should not do the service required of him during a particular period. In other words, the employer is regarded as issuing an order to the employee which because the contract is subsisting, the employee must obey."

9. The above principles have come to be reiterated in subsequent decisions, including the one- **State of Orisa Vs. Bimal Kumar Mohanty**- AIR 1994 SC-2296. The order of suspension does not put an end to an employee's service and

he continues to be a member of the service though he is not permitted to work and is paid only subsistence allowance which is less than his salary (see **State of M.P. Vs. State of Maharashtra**- AIR 1977 SC-1466).

The principles stated above have received statutory recognition under service rules framed by various authorities, including Government of India and the State Governments. For example Rule 10 of the Central Civil Services (Classification, Control and Appeal) Rules. Even under the General Clauses Act, this right is conceded to the employer by Section 16 which, inter alia provides that power to appoint includes power to suspend or dismiss. The latest addition in the series appears to be the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (published in U.P. Gazettee (Extraordinary) dated 9th June, 1999) (see Rule 4). The service rules usually provide that an employee may be placed under suspension:

(a) where disciplinary proceeding against him is contemplated or is pending;
(b) where a case against him of a criminal offence is under investigation, enquiry or trial.

Clauses (a) and (b) of sub- rule (1) of Rule 17 of the Rules 1991 embrace within their ambit the same situations. There is no doubt the fact that a Police Officer against whose conduct an enquiry' is contemplated and/or is proceeding, may be placed under suspension pending conclusion of the enquiry in the discretion of the appointing authority or by any other authority not below the rank of Superintendent of Police. The appointing/disciplinary authority, therefore, has the discretion to suspend a Police Officer if an enquiry as incorporated in Rule 17 is restricted only to a regular disciplinary enquiry or has something to do with a preliminary probe or fact-finding enquiry.

10. In order to reach the proper conclusion and to construe the term 'enquiry' in its true perspective, as used in Rule 17 of the Rules of 1991 one has to consider the purpose, object and scope of the preliminary enquiry as well as the regular departmental enquiry. The object of the preliminary enquiry is to collect material for prima facie satisfaction of the disciplinary authority to form an opinion whether full fledged enquiry should be initiated against the delinquent officer or not. The purpose of the preliminary enquiry is to verify the correctness or otherwise of the allegations leading to the delinquency on the part of a Government servant. The preliminary enquiry and the formal disciplinary enquiry are mutually exclusive and cannot go together. If a preliminary enquiry against a delinquent employee fails to prima facie substantiate the allegation, regular disciplinary enquiry would not be necessary. The evidence from the material collected during the course of preliminary enquiry generally is without giving an opportunity to the concerned employee and, therefore, though it may be made the basis to launch a regular disciplinary enquiry but on its basis an order of punishment cannot be passed. The only purpose of the preliminary enquiry is to provide the authority concerned a foot-board to make up his mind whether it is necessary in the circumstances of the case, to initiate formal disciplinary enquiry. It is only a fact finding enquiry

preceding the actual disciplinary proceeding. The preliminary enquiry, therefore, is informal probe or fact finding in nature and proceeds the initiation of a formal enquiry.

11. The distinction between preliminary enquiry and the formal disciplinary enquiry came to be succinctly drawn in the Full Bench decision of this Court in the case of **Jai Singh Dixit** (supra) with reference to the provisions of Rule 49-A of the U.P. Civil Services (Classification, Control and Appeal) Rules (hereinafter referred to as 'the CCA Rules). It was ruled as follows:

"The enquiry contemplated by Rule 49-A cannot have reference to an informal preliminary inquiry or a fact finding inquiry preceeding the actual disciplinary proceeding, otherwise it shall be permissible to suspend a Government servant pending such informal enquiry, but not after charges have been framed and regular departmental proceeding is pending. This shall lead to an anomalous situation. We are, therefore, of opinion that the 'enquiry' contemplated by Rules 49-A and 1-A has reference to the formal departmental inquiry, and not to any informal preliminary or fact finding inquiry preceding the initiation of the formal disciplinary proceeding."

12. The firm view taken by the Full Bench was that an order of suspension pending an enquiry as contemplated under Rule 49-A may be ordered at any stage prior to or after framing of charges when on objective consideration the authority concerned is of the view that a formal departmental enquiry under Rules 55 and 55-A of the CCA Rules or Rules 5 or 5-A of the U.P. Punishment and Appeal Rules is expected or such an enquiry is pending. At least one thing is clear from this decision that during the pendency of the regular departmental enquiry, a delinquent employee can be suspended in the discretion of the disciplinary authority. Before the initiation of the disciplinary enquiry or in the expectation that formal enquiry may be necessary, a delinquent employee may be suspended on objective consideration of the allegations and supporting material. The supporting material may be in the form of a preliminary enquiry.

13. It is usual that when a preliminary enquiry makes out a prima facie case against the delinquent employee that a formal departmental enquiry is commenced into the conduct of such an employee. In **A. G. Benjamin's** case (supra) Hon'ble Supreme Court took the view with reference to the power to terminate the services of a temporary public servant that where it is intended to take action by way of punishment it often happens that something in the nature of preliminary enquiry is first held in accordance with the alleged misconduct or unsatisfactory work. It was observed that:-

"… It is usual when such a preliminary enquiry makes out a prima facie case against the Government servant that a formal departmental enquiry is started into the conduct of the Government servant... When a preliminary enquiry of this nature is held in the case of a temporary Government servant, it must not be mistaken for the regular departmental enquiry made by the government in order to inflict one of the three major punishment already indicated. So far as the preliminary enquiry is

concerned there is no question of its being governed by Article 311 (2) for the preliminary enquiry is really for the satisfaction of Government to decide whether punitive action should be taken under the contract of the rules in the case of the temporary Government servant concerned. There is no element of punitive proceedings in such an enquiry, the idea in holding such an enquiry is not to punish the temporary Government servant but just to decide whether he deserves to be continued in service or not."

14. A clear cut distinction with regard to a preliminary enquiry and the regular departmental enquiry came to be laid down by the apex court in the case of **Rt. Rev. B.P. Sugandhar Bishop in Medak** (supra) by observing that the purpose of holding a preliminary enquiry is to ascertain whether there was some truth in the complaints made and whether there was enough material on the basis of which misconduct of the delinquent employee could be proved. At the stage of such an enquiry, no formal charge is required to be framed nor even participation by the delinquent employee is necessary. The disciplinary authority had only to broadly indicate the authority entrusted with the job of preliminary enquiry, the nature and scope of enquiry, which it has to make so that after the receipt of the report of preliminary enquiry, a decision may be taken as to whether a full fledged regular enquiry is required to be made or not.

15. Taking clue from the above decisions, this court in the case of **Tej Pal Singh** (supra) has held that:-

"From a perusal of the three judgements mentioned above, the scope, object and purpose of preliminary enquiry and subsequent disciplinary enquiry which follows, has been made clear. In Rule 17 of the Rules, only word ' enquiry' has been used. Rule 17, as it stands in para-meter to Rule 49-A of C.C.A. Rules. The Full Bench in the above case has already said that the word 'enquiry' has been used only to denote a full-fledged disciplinary enquiry. If Rules 5, 13 and 14 of the Rules are read together, there remains no doubt that the legislative authority had in mind both preliminary enquiry and full-fledged disciplinary enquiry but while framing Rule 17 it has used only word 'enquiry' which clearly demonstrates that the legislative intent was that order of suspension shall be passed only when the authority is satisfied that there is prima facie case for holding a full-fledged enquiry against the delinquent official and not before that."

16. It was further clarified and held in the case of **Tej Pal Singh** (supra) that mere mention of the rule in the text of the order of suspension cannot satisfy the requirement of Rule 17 that an enquiry is contemplated. A preliminary enquiry is ordered when the authority feels that the material is not sufficient for forming opinion that there is prima facie case for holding full fledged enquiry against the delinquent official. The view taken in **Tej Pal Singh's** case (supra) in nutshell is that unless the preliminary enquiry report is received a delinquent Police officer cannot be suspended by merely mentioning in the order of suspension that an enquiry is contemplated against him. The stage to suspend the delinquent official would reach only after the receipt

of the report of preliminary enquiry and on which an objective decision is taken-whether a full fledged enquiry is required to be initiated in the light of the delinquencies as prima facie disclosed (in the preliminary enquiry report). Mere mention of the expression that a 'departmental enquiry is contemplated' in the suspension order though, in fact, no departmental enquiry was contemplated would not validate the order of suspension. On this point, inspiration may be drawn from a recent decision of the apex court in **K. Sukhendar Reddy Vs. State of A.P. and another**- 1999 (6) SCC-257.

17. A passing reference may also be made to the decision of this court in the case of **Hari Nath Sharma vs. State of U.P.** –1997 (3) E.S.C.-1833 (Allahabad) on which reliance was placed by the learned counsel for the petitioners. The ratio of that decision is not applicable to the facts of the present case. The order of suspension in that case was held to have been passed by way of punishment solely on the basis of the finding of guilt in the preliminary enquiry but not in contemplation of any regular departmental enquiry. It was in the context of these facts that it was observed.

" that mere passing of order under rule (1) (a) of the Rules of 199, it does not absolve the respondents from indicating for motion of opinion that the order has been passed in contemplation of an enquiry is contemplated. The order of suspension can only be issued when an enquiry is contemplated and it is to be so indicated in the order itself either expressly or by necessary implication".

18. This decision does not apply to the facts of the present case as it has been specifically mentioned in the impugned order of suspension that the petitioners were being suspended in contemplation of departmental enquiry.

In **Dulal Krishna Kanjilal Vs. State of West Bengal-** AIR 1980 S.C.-840, it was contended that the expression 'pending inquiry' in the Police Regulation, Bengal must mean a regular departmental enquiry and not any probing or an informal enquiry prior thereto. Rejecting the contention, the apex court pointed out that the enquiry contemplated in the Police Regulation should be understood in a broader sense including probing enquiry and it would not be proper to limit it to the initiation of a departmental proceedings based on a formal charge sheet . This decision escaped consideration in **Tej Pal Singh's** case (supra).

There are three kinds of suspension. The meaning and implication of these kinds of suspension were explained by Constitutional Bench of the apex court in **V.P. Gindroniya's** case (supra) in the following terms :-

" Three kinds of suspension are known to law. A public servant may be suspended during the pendency of an enquiry against him if the order appointing him or statutory provisions governing his service provide for such suspensions. Lastly he may merely be forbidden from discharging his duties during the pendency of an enquiry against him which act is also called suspension. The right of suspend as a measure of punishment as well as the right to suspend the contract of service during the

pendency of an enquiry are both regulated by the contract of employment or the provisions regulating the conditions of service. But the last category of suspension referred to earlier is the right of the master to forbid his servant from doing the work which he had to do under the terms of the contract of service at the same time keeping in force the master's obligations under the contract. In other words the master may ask his servant to refrain from rendering his service but he must fulfil his part of contract."

Even in the absence of an express term in the contract of service provided for interim suspension or an express statutory provision or rule conferring power of interim suspension, there is implied power in the employer to direct suspension of performance of duties by the employee. The interim order of suspension is passed with a view to forbid the delinquent employee from discharging his duties during the pendency of the enquiry. There is no doubt that an order of suspension affects an employee injuriously. An interim order of suspension pending enquiry visits the employee with evil consequences. He is not only forbidden from performing his duties but is paid salary at a considerable reduced rates, which is known as subsistence allowance which hardly is sufficient to meet both ends. It is, therefore, necessary that even in a case of interim suspension, the disciplinary authority should apply its mind and pass an order of suspension only when it is necessitated taking into consideration the gravity of allegations and to maintain discipline in the department. This aspect of the matter was taken note of by the apex court in the case of **O.P. Gupta Vs. Union of India**- AIR 1987 SC-2257. The Hon'ble Supreme Court pointed out that having regard to the serious repercussions on live-lihood, an order of suspension is not to be passed lightly and where there was no question of inflicting any departmental punishment, the order of suspension would, prima facie, tantamount to imposition of a penalty which is manifestly repugnant to the principles to natural justice and fair play in action. An interim order of suspension can only be made after the authority comes to the conclusion that there is sufficient reason for keeping an employee under suspension, i..e., in other words, there has to be proper application of mind and satisfaction that suspension is called for in a given case. In **Capt. M. Paul Anthony Vs. Bharat Cold Mines Ltd. and another** (1999 (82) FLR- 627) the Hon'ble Supreme Court deprecated the practice of passing the orders of suspension on trivial grounds at the fancy and caprice of the disciplinary authority. It observed :

" Exercise of right to suspend an employee may be justified on facts of a particular case. Instances, however, are not rare where officers have been found to be afflicted by 'suspension syndrome' and the employees have been found to be placed under suspension just for nothing. It is their irritability rather thank the employee's trivial lapse which has often resulted in suspension."

19. However, the absence of a recital in the order of suspension regarding the requisite satisfaction will not invalidate the order as has been held by the apex court in the case of **State of Haryana Vs. Hari Ram Yadav**- AIR 1964 SC-1262. An order after preliminary enquiry is made with a view to prove the

correct facts and unless the correct facts are ascertained, it would be unwise to pass an order of suspension. The disciplinary authority is required to wait for the outcome of the preliminary enquiry and after the receipt of the report of preliminary enquiry if it is found that the allegations are so serious that in order to maintain the discipline, the delinquent employee is required to be placed under suspension, then only an order of suspension should normally be passed. This aspect of the matter was considered by this court in **Awadhesh Singh Vs. Chief Development Officer and others**- 1994 (3) U.P.L.B.E.C. –1051. That was a case under Rule 49-A which prompted the suspension of a Government servant by the appointing authority pending enquiry. It was held that the order of suspension, no doubt, is discretionary and can be exercised in diverse, varied and variegated circumstances giving rise to a misconduct warranting disciplinary enquiry but it being open to judicial review under Article 226 of the Constitution, can be tested on grounds of bad faith, malafide (personal or legal) or irrationality, unreasonableness or non application of mind. In that case, a sort of an informal enquiry had been ordered and a report called for but the appointing authority instead of waiting for the preliminary enquiry report suspended the employee. It was observed that in all fairness, the appointing authority ought to have awaited the enquiry report, or in the alternative, he ought to have applied his mind to the gravamen as contained in the complaint made against the petitioner to be decided on the facts and in the circumstances of the case, the accusations against him were trustworthy, substantial and serious enough to warrant dismissal, removal or reduction in rank in the event of being established at the end of the formal enquiry. Suspension order without application of mind to the conditions and circumstances relevant to exercise of discretion is held to be malafide. The appointing authority, while exercising the discretion under Rule 49-A (1) of the CCA Rules directs itself to the question whether the charges are substantial and supported by prima facie evidence or they are baseless, malicious or vindictive and have been made to harass the concerned Government servant or to keep him out of employment. Non application to mind to these aspects would vitiate the order.

20. A reference further came to be made to the decision of this Court in the case of **Vijay Shanker and another Vs. Senior Superintendent of Police Gorakhpur and others** –1996 (2) U.P.L.B.E.C. –1423 in which it was observed that in normal course, a disciplinary authority should await the result of preliminary enquiry before exercising the power of suspension. On the strength of this observation, it is urged that the order of suspension passed in this case without awaiting the report of preliminary enquiry cannot be said to have been passed by applying mind.

21. The fact that the appointing authority should in the normal course await the receipt of report of informal enquiry or for the outcome of the probe is beyond the pale of dispute but it cannot be treated to be an inflexible rule of law. There may be certain circumstances when this rule may not sub-serve the real purpose as suspension of a delinquent employee may be immediately necessary even before the receipt of the preliminary enquiry report. Certain contingencies may occur where the order of suspension

cannot brook delay or there may be certain pressing circumstances to pass an order of suspension without awaiting the preliminary enquiry report. A whisper of such exceptions is found in the case of **Awadhesh Singh** (supra). Suspension is not a punishment but is only one way of forbidding or disabling an employee to discharge the duties of office or post held by him. In other words, it is to refrain him to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruits and the offending employee could get away even pending enquiry without any impediment or to prevent an opportunity to the delinquent officer to scuttle the enquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc. Each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact it creates on the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation. It would be another thing if the action is actuated by malafides, arbitrary or for ulterior purpose. The suspension must be step in aid to the ultimate result of the investigation or enquiry. The authority also should keep in mind public interest of the impact of the delinquent's continuance in office while facing departmental enquiry to trial on a criminal charge (**State of Orissa Vs. Bimal Kumar Mohanty** (supra).

22. There is yet another aspect of the matter. Sometimes, a preliminary enquiry report is called for not for probing the true facts for the purpose of placing an employee under suspension but a preliminary enquiry report may be necessary to determine whether the disciplinary enquiry is to be held for the purpose of minor punishment or major punishment as the procedure for the two types of inquiries is entirely different. Under Rule 14 (1) of the Rules of 1991, the procedure to be followed in a case where major punishment may be imposed is one as laid down in Appendix 1 while the procedure in a case in which minor punishment can be imposed is one as prescribed in sub-rule (2) of Rule14, according to which. Police officials may be informed in writing of the action proposed to be taken against them and of the implications of the act and omission and commission on which it is proposed to be taken and give a reasonable opportunity of making such representation as he may wish to make against the proposal. No regular enquiry as comprehended by sub-rule (1) of Rule 14 read with Appendix 1 is undertaken in a case involving misconduct which warrants imposition of minor penalty. This aspect of the matter was considered by this court in Civil Misc. Writ No. 34161 of 2000- **M.B. Yadav Vs. State of U.P. and others**, which was decided on 28.8.2000 by Hon'ble S.R. Singh, J. It was observed that the disciplinary authority can adopt the proper course keeping in view the gravity of the misconduct alleged even without a preliminary enquiry but the mere fact that a preliminary enquiry has been ordered by the punishing authority while placing the delinquent under suspension would not, by itself, vitiate the suspension order. Sri M.S. Piperdsenia, learned Standing Counsel has rightly propounded the theory that the preliminary enquiry into the allegations against a police official is

ordered while placing such official under suspension also for the purpose of ascertaining as to whether it is a case of inflicting major penalty or minor penalty so as to enable the disciplinary authority to follow the relevant course of enquiry. According to the G.O. No. 820/43-2-14-2 (83)/83 Dated 28.2.1983 issued by Administrative Reform Anubhag- 2 and the G.O. no. 7/2/77- Karmik –1 dated 28.2.1977, the punishing authority can adopt the appropriate course keeping in view the gravity of the misconduct alleged, even without a preliminary inquiry.

23. This fact cannot be lost sight of that interests of administration demand that undesirable elements are thrown out and any charge of misdemeanor is enquired into promptly. The disciplinary proceedings are meant not only to punish the guilty but to keep the administrative machinery unsullied by getting rid of bad elements.

24. The delinquent petitioners belong to a disciplined force. Maintenance of discipline is of the highest priority. If the constables, who are placed in the lowest rung of hierarchy of the Police department, become unbridled the entire super structure is likely to collapse. Therefore, discipline has to be enforced at all costs. If the Superintendent of Police finds that the misdemeanor or the delinquencies committed by his subordinate are of such a nature that would tarnish the image of the department and the confidence of common people in the institution is shaken, he would be justified in placing such employee under suspension even without a preliminary enquiry provided the allegations are so serious as would justify their suspension.

25. In the instant case, the petitioners who were constables were not authorized to ask for, and inspect the documents of a motor vehicle. It is for the Enforcement Branch of the Transport Department to check the documents. If the police constables who have absolutely no authority to do so take upon themselves the task, they shall be presumed to have been actuated by extraneous consideration for illegal gains. The petitioners are alleged to have chased the truck for a distance of about 10 kilometers and when they were successful in stopping the vehicle, they ill-treated the driver. This unauthorised act and misbehavior on the part of the petitioners evoked immediate commotion and tension with the result, there was a total traffic jam for hours together and when the senior officer reached the spot to quell the crowd and to clear the road, the petitioners fled away and were not available for ascertaining their version of the incident. As a matter of fact, the facts as were obtaining on the spot were speaking for themselves and no further preliminary enquiry was required to be made. In the public interest, it became necessary to suspend the petitioners immediately with a view to clear the road and to pacify the enraged crowd. If any delay was brooked in the matter, it might have resulted in an insurmountable ugly situation. The road could be cleared only on the assurance of the higher authorities that the delinquent officials shall be placed under suspension. At least two petitioners, namely, Yad Ali and Om Prakash Tewari were identified to have generated the crisis. There was oblique reference to the name of Bhim Yadav, the third petitioner. It was, therefore, an eminently suited case in which delinquent employees against whom the allegations

were serious in nature, of necessity, were required to be suspended in public interest even without the receipt of the preliminary enquiry report.

26. The order of suspension of the petitioners may be viewed yet from another angle. The report of preliminary enquiry has come on record. It indicts petitioners nos. 1 and 3 – Yad Ali and Om Prakash Tewari, of the allegations, which, if proved would ultimately warrant infliction of major penalty upon them. They have been, prima facie, found guilty of the serious allegations and now a departmental enquiry is likely to be initiated against them on the basis of the preliminary enquiry. There is, therefore, no scope for this court to interfere with the order of suspension passed in respect of Yad Ali and Om Prakash Tewari.

27. The preliminary enquiry report does not indicate the complicity of Bhim Yadav, petitioner no. 2. . It has been found that he had no role to play in originating about the incident. Even his presence at the relevant point of time was not established.

28. In the conspectus of the above facts, the challenge on behalf of Yad Ali and Om Prakash Tewari, petitioner nos. 1 and 3 to the order of suspension dated 22.11.2000 is unwarranted. They have been rightly suspended in the contemplation of departmental enquiry which could be initiated against them by serving upon them the requisite charge sheet. The order of suspension of Bhim Yadav- petitioner no. 2 appears to be unwarranted in view of the report of preliminary enquiry. The Superintendent of Police, Chandauli would do well to revoke his order of suspension immediately.

29. The conclusions which are deducible from various decisions of the apex court as well as of this court, as discussed above, may be stated in a condensed form for the sake of clarity and future guidance of the appointing/disciplinary authority concerned dealing with the matters of government servants, particularly in relation to orders of suspension, pending enquiry or in contemplation thereof or during investigation, enquiry or trial of a criminal charge.

1. It is one of the implied terms of relationship between employer and employee that the employer is entitled to exercise disciplinary control over the employees. Power of disciplinary control is an indicia of the relationship of master and servant.

2. The order of suspension comes within the sweep of disciplinary action. To place an employee under suspension is an unqualified right of the employer.

3. In the absence of specific powers, the employer can always forbid the employee and, in fact, suspend him as an interim measure, but he would have to pay the wages during the period of interim suspension (which is popularly known as subsistence allowance).

4. The service Rules usually provide that an employee may be placed under suspension

(i) where any disciplinary proceeding against him is contemplated or is pending and

(ii) where a case of a criminal nature against him is under investigation, enquiry or trial.

5. The order of suspension may be passed by the appointing or disciplinary authority, (who may be an authority inferior in rank to the appointing authority) provided there is a specific rule or delegation or authorization in favour of the latter.

6. The order of suspension does not put an end to the employee's service and he continues to be member of the service though he is not permitted to work and is paid only subsistence allowance which is less that the normal salary or emoluments.

7. The order of suspension, no doubt, affects an employee injuriously. An interim order of suspension visits an employee with serious evil consequences. He is not only forbidden from performing his duties but is paid salary at considerable reduced rates which is hardly sufficient to meet both ends.

8. In view of the serious repercussions on the career and the livelihood of the suspended employee, it is, therefore, necessary that the order of suspension should not be passed at the fancy, frenzy or caprice of the authority concerned, meaning thereby, an employee should not be suspended just for nothing. A note of caution is sounded that the authority concerned should not be afflicted by 'suspension syndrome'.

9. Where the disciplinary authority seeks to suspend an employee pending enquiry or contemplated enquiry into grave charges of misconduct or serious acts of commission or omission, the order of suspension would be passed after taking into consideration the gravity of the misconduct though to be enquired into and the nature of the evidence placed before the disciplinary authority and on application of mind by such authority. Even in a case of interim suspension, the disciplinary authority should apply its mind and pass an order of suspension only when it is necessitated taking into consideration the gravity of the allegations and to maintain discipline in the department. The disciplinary authority should consider the above aspects and decide whether it is expedient to keep an employee under suspension pending aforesaid action. It would not be as an administrative routine and in every case of enquiry, automatic order of suspension is not to follow.

10. Normally suspension should not be resorted to unless the allegations against the government servant are so serious that in the event of their being established may ordinarily warrant major penalty. This has now come to be incorporated in the shape of a proviso to Rule 4 of the Uttar Pradesh Government Servant (Disciplinary and Appeal) Rules 1991 published in the U.P. Gazette (Extraordinary) dated 9th June 1999.

11. The preliminary enquiry by its nature implies that it is a sort of informal probe or to say, a fact finding exercise into the allegations made against the delinquent employee.

12. In order to ascertain the true facts and to gauze the veracity of the complaint or the allegations made against an employee, an order of suspension is passed after a preliminary enquiry. The order of preliminary enquiry is made with

a view to ascertain the correct facts and unless the correct facts are made available, it would be unwise to pass an order of suspension. The disciplinary authority is required to wait for the outcome of the preliminary enquiry and after the receipt of the report of such enquiry, if it is found that the allegations are so serious that in order to maintain discipline, the delinquent employee is required to be placed under suspension, then only an order of suspension should, in the ordinary course, be passed.

13. It is a rule of prudence that the disciplinary authority should await the result of the preliminary enquiry before passing an order of suspension but is not an inflexible rule of law. Since suspension is not a punishment but is only one way of forbidding from disobeying to discharge of duties by an employee of the office or post held by him, an order of suspension, even without a preliminary enquiry, may be passed to refrain the delinquent employee to avail further opportunity to perpetrate the alleged misconduct or to remove the impression among the members of service that dereliction of duty would pay fruit and the offending employee would get away even pending enquiry without any indictment. There may be cases where an employee may be suspended to prevent an opportunity to scuttle the enquiry or investigation or to win over the witnesses or the delinquent having had the opportunity in office to impede the progress of the investigation or enquiry etc.

14. The discretion of the disciplinary authority to suspend an employee pending enquiry or in contemplation of enquiry cannot be taken away by prescribing a strait jacket formula. Each case must be considered depending on the nature of the allegations, gravity of the situation and the indelible impact which creates in the service for the continuance of the delinquent employee in service pending enquiry or contemplated enquiry or investigation. The suspension must be a step in aid to the ultimate result of the investigation or enquiry.

15. Even without a preliminary enquiry, if the disciplinary authority feels satisfied or convinced that the accusations against a delinquent employee are trustworthy, substantial and serious enough and with a view to maintain discipline, it is necessary to suspend him, he shall brook no delay to pass an order of interim suspension in public interest.

16. The decision in **Tej pal Singh's** (supra) cannot be stretched to the unreasonable length that without receipt of the preliminary enquiry report an employee in no circumstance can be suspended in spite of the fact that the expression ' enquiry' occurring in the Rules of 1991 means a regular departmental enquiry.

17. The order of interim suspension, which is no doubt, discretionary in nature and is passed in diverse and variegated circumstances, is open to judicial view under Article 226 of the Constitution and can be tested on grounds of bad faith, malafide (personal or legal) or irrationality, unreasonableness or non-application of mind.

18. The court or the Tribunal must consider each case on its own facts and no general rule can be laid in that behalf.

19. Even in those cases where

preliminary enquiry has been ordered it would not necessarily mean that such an enquiry has been ordered with a view to collect prima facie material against the delinquent employee. In a case where the preliminary enquiry has been ordered, the order of suspension cannot be treated to have vitiated merely on the ground that the competent authority has not waited for the result of the preliminary enquiry. The preliminary enquiry may be ordered simultaneously with the order of suspension with a view to ascertain whether on the facts and in the circumstances and the nature of the allegations against a delinquent employee the procedure prescribed for inflicting the major punishment or the minor punishment is to be adopted.

20. The crux of the matter is that a government servant can be placed under suspension by the competent authority after objective consideration of the allegations, the material available and the telling circumstances requiring suspension in public interest, even without a preliminary enquiry. If a preliminary enquiry has been ordered simultaneously with the order of suspension, it shall not stand vitiated, and in all the cases it is not necessary for the competent authority to wait for the result of the preliminary enquiry.

30. This writ petition is disposed of with the direction that the contemplated departmental enquiry against the petitioners shall be brought to a logical end subject to active cooperation and regular participation of the petitioners within a period of four months from the date of production of a certified copy of this order before the appointing /disciplinary authority. It is further directed that the Superintendent of Police, Chandauli- respondent no. 1 shall consider the feasibility of revoking the order of suspension of Bhim Yadav-petitioner no. 2 as the preliminary enquiry report does not indicate his involvement in the case.

31. The Registrar General of this court is directed to ensure that a copy of the judgement and order is sent to each and every District Magistrate, Senior Superintendent of Police/Superintendent of Police of the State including the Chief secretary, Government of Uttar Pradesh, Vidhan Bhavan, Lucknow. The State Government is directed to issue appropriate instructions to all Heads of Departments (particularly, the District Magistrate, Senior Superintendent of Police and Superintendent of Police) in the light of the guidelines contained in the body of this judgement.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13TH MARCH, 2001

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

Special Appeal No. 311 of 2000

M.J.P. Rohilkhand University, Bareilly
...Appellant
Versus
Harjendar Singh and another
...Respondents

Counsel for the Appellant:
Shri Govind Saran

Counsel for the Respondents:
Shri D.S. Singh

Constitution of India- Article 226- once result has been declared and mark sheet sent to the candidate whereby the student has been declared passed and marks have been allotted, there is no scope for cancellation of the result subsequently. (Held in para 7).

In the present case we do not find any reason to differ from the view expressed in the above referred decisions. The petitioner's result for the B.Sc. Part II Examinations shall also be declared and he shall be permitted to appear at B.Sc. part III Examinations provided he has paid requisite charges and deposited the forms under the relevant rules.

By the Court

1. This appeal has been preferred by M.J.P. Rohilkhand University, Bareilly (hereinafter referred to as "the University") against the order dated 29th February 2000, passed by learned Single Judge, whereby the learned Single Judge allowed the writ petition. Although we do not agree with the way the learned Single Judge has allowed the writ petition by directing the University to award more marks to the writ petitioner.

2. We have heard Mr. Govind Saran, learned Advocate for the appellant-University and Mr. D.S. Singh, learned Advocate for the respondent- writ petitioner.

3. Having heard learned counsel for the parties we agree with the view taken by earlier Division Bench of this Court in **Tarkeshwar Lal and others Vs. University of Gorakhpur and others, 1984 UPLEBC 1437** as also by the learned Single Judge in **Pravesh Kumar Dubey Vs. University of Kanpur and another (1990) 2 UPLBEC 1053** that once result has been declared and mark sheet sent to the candidate whereby the student has been declared passed and marks have been allotted, there is no scope for cancellation of the result subsequently. In this connection, the Division Bench decision of this Court in the case of Tarkeshwar Lal and others (supra) may be taken note of. In the aforesaid decision, the University once declared the result and the concerned students (who were petitioners) on the basis of communication of the result of their L.L.B. IInd year, pursued their course of study and obtained admit cards for appearing in L.L.B. IIIrd year examination but subsequently the results of L.L.B. Part II examinations were cancelled on the ground that the petitioners committed fraud by conniving with Dealing Assistants in interpolating the tabulation chart of L.L.B. IInd year examination of 1975. The Bench held that the University was stopped from canceling the result of the petitioners and under such circumstances the students should not suffer for the default or laches on the part of the University. In this connection paragraph 9 of the said judgement may be quoted which reads as under:

"In the instant case the University of Gorakhpur had ample time to discover the fraud. It cannot be heard to say that on account of paucity of time or on account of lack of staff they accepted petitioners for appearance at the L.L.B. Part III Examination and issued them the admit cards. If the University Authorities have acquinced in permitting the petitioners to appear at the L.L.B. Part III Examination it obviously means that they are estopped from declaring the petitioners unsuccessful at L.L.B. Part II

Examination subsequent to their admissions at L.L.B. Part III Examination. Anil Kumar Srivastava V. University of Allahabad and another, AIR 1973 Alld. 442 was a case which was decided by one of us (Brother H.N. Seth, J.). It was a case where the petitioner wanted to appear at the M.Sc.(Final) Examination of 1972 conducted by the Allahabad University. It was due to commence on 15th of April 1972. On 13th of April 1972 the Registrar of the University informed him that he could not appear at the Examination as he had failed in the M.Sc. (Previous) Examination held in the year 1971. The candidate filed a writ petition claiming a writ of mandamus commanding the respondents to permit him to appear at the M.Sc. (Final) Examination. The result of the M.Sc.(Previous) Examination was pasted on the notice Board and was also published in the Northern India Patrika showing that the candidate was successful at the M.Sc.(Previous) Examination. A mark sheet was also issued by the University and on that basis the candidate had attended regular M.Sc. (Final) Classes. It was then revealed that the petitioner had failed at the M.Sc. (Previous) Examination as he had secured only 170 marks out of 500 but by mistake in the mark-sheet issued to the candidate marks obtained by another candidate whose roll number was 230 were communicated to him. The mistake was discovered when the candidate's application for appearing in the M. Sc. (Final) Examination was being scrutinized. He was, therefore, not permitted to appear at the M. Sc. (Final) examination. It was held that :-

"The principle of estoppel comes into operation and the University is estopped from taking up the stand or from producing evidence for showing that the mark-sheet issued to the petitioner ink which he was shown to have passed the M. Sc. (Previous) Examination was wrong and that the petitioner had, in fact, failed in the M. Sc. (Previous) Examination."

After considering the facts of the case and the legal position involved in the case, I have no hesitation in coming to the conclusion that it was not open to the University of Gorakhpur to cancel the results of the petitioners of L.L.B. Part II Examination as there is not an iota of evidence to suggest that the petitioners were party to the interpolations made or fraud committed in declaration of the results in their favour. The University on other hand, before admitting the petitioners for appearance at the L.L.B. Part III Examination had ample opportunity to discover the fraud committed and refuse them permission to appear at the L.L.B. Part II Examination 1976. However, communication of the results through mark-sheets issued by the principal of the College amounts to declaration of results by the University. The University, in my opinion, is therefore, clearly estopped from cancelling the results of the petitioners of L.L.B. Part II Examination 1975."

4. The other decision on which reliance has been placed on behalf of the writ petitioner/respondent is **Pravesh Kumar Dubey V. University of Kanpur (1990) 2 UPLBEC 1053** wherein, on the facts of that case, the learned Single Judge held as under:

"The question for consideration before me is as to who is to be punished

and who is to suffer for the mistake of the University in issuing incorrect mark sheet. Mistakes can be corrected by the authorities at any time provided some other person has not changed his position on the basis of those mistakes. Equities are to be adjusted in favour of one who will suffer most, if the mistakes are permitted to be corrected. Nobody will be allowed to suffer for the mistakes of others. In all fairness the University is to be estopped from refusing to declare the result of B.Sc. Part II of the petitioner.

5. In the aforesaid decision of learned Single Judge, a Supreme Court judgment in **Sanatan Gauda V. Berhampur University and others, JT 1990 (2) 57** was also considered and it was further held in paragraph 5 of the judgment at pages 1055 and 1056 as follows:

"In **Santan Gauda v. Berhampur University and others**, J.T. 1990 (2) 57, University withheld the result of a student of pre-Law and Inter Law examinations on the ground that he secured less than minimum marks in M.A. and was, as such, not eligible for admission to the Law course. Hon'ble Supreme Court held that student was admitted to Law College on the basis of the mark sheet issued by the University and the student cannot be punished for the negligence of the University authorities. The relevant extract from the judgment is quoted below:

"This is apart from the fact that I find that in the present case the appellant while securing his admission in the Law College had admittedly submitted his marks sheet along with the application for admission. The Law College had admitted him. He had pursued his studies for two years. The University had also granted him the admission card for the pre-law and intermediate Law examinations. He was permitted to appear in the said examinations. He was also admitted to the Final Year of the Course. It is only at the stage of the declaration of his results of the Pre Law and Inter Law Examinations that the University raised the objection to his so-called ineligibility to be admitted to the law course. The University is, therefore, clearly estopped from refusing to declare the result of the appellant's examination or from preventing him from pursuing his final year course."

It was further observed that a student cannot be punished for the negligence of the University authorities and it was the bounden duty of the University to have scrutinized the matter thoroughly before permitting the appellant to appear at the examination and not having done so it cannot refuse to publish his result."

6. The learned Single Judge in the said decision accordingly allowed the writ petition and quashed the order withholding the petitioner's result of B.Sc. Part II.

7. In the present case we do not find any reason to differ from the view expressed in the above referred decisions. It is not necessary for us to go into the question on the point relating to the direction given by the learned Single Judge to the University for awarding more marks, inasmuch as, the writ petitioner/respondent should be declared to have passed on the basis of original result of B.Sc. Part I as declared for the first time. The Petitioner's result for the B.Sc. Part II Examinations shall also be

declared and he shall be permitted to appear at B.Sc. Part III Examinations provided he has paid requisite charges and deposited the forms under the relevant rules.

8. In the result, the special appeal fails and is hereby dismissed.

9. Let a certified copy of the operative portion of this order be made available to the petitioner as early as possible.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 11.01.2001

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

I.T. R. No. 354 of 1983

M/s Ram Saran Nar Singh Prasad, Deoria ...Applicant

Versus

The Commissioner of Income Tax, Allahabad ...Respondent

Counsel for the Applicant:

Counsel for the Respondent:
Shri Shambhu Chopra

Income Tax Act 1961- Section 37(1)- the loss occasioned due to confiscation of gold is a loss springing directly from carrying on the business and the assessee would be entitled to set off the loss against the income of such gold. (held in para 10).

Our answer, to the question referred, is in affirmative i.e. in favour of the assessee and against the Department.

By the Court

1. The Income Tax Appellate Tribunal has referred the following question of law:-

"Whether on the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal was legally correct in holding that the cash and the value of the gold and gold ornaments confiscated by the Customs and Central Excise Department could not be allowed as a business loss or as an expenditure under section 37(1) of the Income-Tax Act, 1961 in the computation of the assessee's income for the assessment year 1974-75?"

2. The facts relating to this reference is as under:-

The assessee is a Hindu undivided family deriving income, inter alias, from sarrafa, money lending and utensils business. In one shop Sarrafa business was carried on, while in the other shop, utensils business was done. The preventive staff of the Customs and Central Excise Department searched both the shops on 31.5.1973. They seized the following things from the two shops:-

Sarrafa Shop

1.Cash Rs.90,000/-
2.Gold ornaments weighting 1,259 gms.
3.Primary gold 6 gms.

Besides some pronotes and books of account were also found and seized.

Utensils Shop

1. Gold ornaments. 1,142 gms.

2. Rolling Machine to manufacture ornaments.

3. After the seizure, the assessee submitted its explanation that it is not dealing in gold or gold ornaments and some of the seized articles belonged to the relative of the assessee or the pawnies who had pledged the gold ornaments when they had taken loan from it. This explanation was not accepted by the Collector of Customs and gold ornaments were seized. The Income-Tax Officer also assessed the seized gold and gold ornaments as income of the assessee. The assessee preferred an appeal before the Commission of Income-Tax (Appeals). The appeal was dismissed. He, however, reduced the income of the assessment years 1972-73 and 1973-74. The Department, as well as, the assessee both preferred appeals before the Tribunal. The Tribunal dismissed the appeals. The assessee filed an application for making reference to this Court arising out of the order of the Tribunal and the Tribunal has referred the question to us narrated above.

4. The admitted facts are that the primary gold and gold ornaments were seized from the petitioner by the Collector of Customs on the ground that the petitioner was carrying on the business without having any licence under the Gold Control Act. The Income Tax Officer also did not accept the explanation submitted by the assessee that the primary gold and gold ornaments belong to others and it was not carrying on any business in gold and gold ornaments. The Income-Tax Officer, taking into account the value of the gold and gold ornaments assessed the Income of the assessee. The question is whether in the facts and circumstances of the present case, the value of the gold and gold ornaments and cash confiscated by the Custom and Central Excise Department should be taken as a business loss or as an expenditure under Section 37(1) of the Income Tax Act, 1961 in the computation of the assessee's income for the assessment year 1974-75.

5. In **Commissioner of Income Tax, Gujrat Vs. S.C. Kothari** (1971) 82 ITR 794 (S.C.) the assessee claimed business loss but he was not allowed the set-off under the first proviso to section 24(1) of the Income Tax Act, 1922 on the ground that assessee had entered into illegal transaction in contravention of Section 15(4) of the Forward Contracts (Regulation) Act, 1952. The Hon'ble Supreme Court held that if the business in which the loss was sustained the same in which the profit was derived, then the loss had to be taken into account while computing the profits of the business under section 10(1) of the Income Tax Act, 1922.

6. Shri Shambhu Chopra, learned counsel for the respondents urged that assessee was carrying on the business of sarrafa. The seizure was made by the Custom Authorities in the shop and goods were confiscated. The fact remains that the petitioner was carrying on the business and such business was lawful and if the business was lawful but subsequently entered into illegal field by carrying on gold business, he is not entitled to claim any business loss. He has placed reliance upon the decision rendered in **Haji Aziz and Abdul Shakoor Bros. Vs. Commissioner of Income Tax, Bombay City II** (1961) 41 I.T.R.350(S.C.), wherein, the assessee, who carried on the business of importing dates from abroad and selling them in

India, imported dates from Iraq partly by steamer, his goods were confiscated by the Custom Authorities and he was also made liable to pay fine. The assessee claimed that he was entitled to deduct the amount of fine paid by him as an allowable expenditure under Section 10(2)(xv) of the Income Tax Act, 1922. The Hon'ble Supreme Court held that an expenditure is not deductible unless it is a commercial loss in trade and a penalty imposed for breach of the law during the course of trade cannot be described as such because in deducting it he has acted in a manner which has rendered him liable to penalty for an infraction of the law.

7. The **Haji Aziz's** case (supra) was considered and distinguished in Commissioner of **Income Tax, Patiala Vs. Piara Singh** (1980) 124 ITR 40 (S.C.). In this case the assessee was assessed on the Income in the business of smuggling gold. He claimed deduction under Section 10(1) of the Income Tax Act, 1922. The currency notes which he was taking to Pakistan was confiscated by the Custom Authorities and was liable to allowable expenditure. Hon'ble Supreme Court held that if the income from smuggling was treated as income, he was also entitled for business loss from such income. The case of Haji Aziz (supra) was distinguished on the ground that in that case the amount was paid by way of penalty for breach of law.

8. In Sri **Vishnu Kumar Soni Vs. Commissioner Income Tax** (1985) 155 ITR 34 (M.P.) the Tribunal found that the assessee was in possession of gold bar which was seized and confiscated by the Custom Authorities, and it was treated as an income. The High Court held that the confiscation of the gold was a loss incurred in the course of business and the view of the Tribunal to the contrary was not accepted.

9. The case of **C. Krishnalal Jail Vs. Commissioner Income Tax** (1987) 163 ITR page747 (Kar) wherein the assessee was carrying on business of dealing in smuggled gold and the gold was confiscated by the Customs Authorities, it was held that the loss occasioned due to confiscation of gold is a loss springing directly from carrying on the business and the assessee would be entitled to set-off the loss against the income of such gold. We do not see any reason to differ from the view taken in these decisions.

10. In view of the above, our answer, to the question referred, is in affirmative i.e. in favour of the assessee and against the Department.

11. The reference is, accordingly, decided.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.3.2001

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

Civil Misc. Writ Petition No. 44097 of 2000

Dr. Phool Chand Yadav ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Shri Rajeev Misra
Shri R.C. Yadav

Counsel for the Respondents:
S.C.

Financial Hand Book- Fundamental Rule 56(C)- entries of only 10 years prior to the order of compulsory retirement are to be seen.

(Held in para 10)

The entries of only 10 years prior to the order of compulsory retirement are to be seen. We feel persuaded to hold that there was no valid material before the Reviewing Authority and the Government for invoking the provision of Fundamental Rule 56(C). Financial Hand Book Vol. II Part II to IV retiring the petitioner from service compulsorily.

By the Court

1. Dr. Phool Chand Yadav, the petitioner herein, while working on the post of District Social Welfare Officer, Sidharthnagar was served with an order dated 28.9.2000 (Annexure-8) issued by the State Government in exercise of its power under Rule 56(C) of the Fundamental Rules, retiring him pre-maturely with immediate effect and three months' salary was directed to be paid in lieu of the notice. The legality and validity of the order dated 28.9.2000 has been questioned by means of this Writ Petition.

2. The facts, as borne out of the pleadings, are that the petitioner, while posted in the district Ghazipur as District Social Welfare Officer, he went on Medical leave from 25.9.1997. During leave period his wife developed lever cancer which resulted in her death. When he went to join his duties, he was not allowed as one Ratan Kumar had been posted in his place by the Director, Social Welfare, U.P., Lucknow. Aggrieved, the petitioner made a representation, which annoyed the Director Sri Kapil Dev who attached the petitioner to the office of the Director, Directorate of Social Welfare, U.P., Lucknow. His attachment continued from January, 1999 up to 5th May 1999 and during this period, as stated in para 10 of the Writ Petition, the Director became revengeful to the petitioner. In para 11 of the writ petition it has been stated that right from the date of joining i.e. in the year 1984 up to the year 1996-97 no adverse entry has ever been made against the petitioner. The work and conduct of the petitioner was always found to be excellent and no grudge of any kind was ever shown with regard to his work and conduct; he has always been given good entries by his superiors and by no stretch of imagination the petitioner could be considered unfit for the services of the State. He further alleged in para 12 that Sri Kapil Dev took a decision dated 7.4.1998 awarding special entry condemning the action of petitioner in respect of the act done within the period from 25.9.97 to 30th June, 1998. It has been averred that the representations dated 16.4.98 & 23.4.1998 (Annexure-6 to the Writ Petition) against the aforesaid adverse entry is still pending; there was no material before the Respondent No.2 to form an opinion to retire the petitioner pre-maturely under Rule 56 (C) of the Fundamental Rules Financial Hand Book Vol.2 Part II to IV except that of a single adverse entry for the year 1997-98 against which representation was pending as has been stated in paragraph no.17 of the Writ Petition. On the strength of these pleadings the order impugned is sought to be quashed.

3. No counter-affidavit has been filed by the Respondents though by order dated 16.10.2000 of this Court four weeks' time was granted to the learned Standing Counsel and the case was ordered to be listed on 30.11.2000.

4. Heard Sri Rajiv Misra and Sri R.C. Yadav, the learned counsel appearing for the petitioner and the learned Standing Counsel for the Respondents.

5. With the aid of uncontroverted pleadings Sri Rajiv Misra submitted that the order impugned dated 28.9.2000 retiring the petitioner compulsorily is patently illegal, without jurisdiction and suffers from malafide inasmuch as entire service record has not been considered and the sole foundation for the exercise of the power of retiring the petitioner compulsorily from service is the adverse remark for the year 1997-98. He further contended that the impugned decision is based on collateral grounds and is arbitrary and, therefore, can not be sustained in the eye of Law.

6. The learned Standing Counsel on the other hand submitted that there was sufficient material before the authorities for invoking the provisions of Fundamental Rule 56(C) , Vol. 2 Part II to IV of Financial Hand Book, the order impugned herein, therefore, is justified. He also urged that Annexure-6 cannot be said to be the representation against adverse entry as by the aforestated annexure, the petitioner demanded letters of D.M., Ghazipur and, thus, the adverse entry remained un-represented. Learned Standing Counsel further argued that in absence of counter-affidavit he can not countenance the averments set up in the Writ Petition that the order impugned has been passed on the basis of single adverse entry. He, however, further submitted that order impugned is not dismissal or removal within the meaning of Article 311 of the Constitution and is neither a punishment nor it visits with loss of retiral benefits.

7. Fundamental Rule 56(C) of the Financial Hand Book Vol. II Part II to IV as amended from time to time is reproduced as below:

"Notwithstanding anything contained in clause (a) or clause (b), the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary), without assigning any reason or such Government servant may, by notice to the appointing authority, voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service for twenty years."

8. On the subject the Constitutional Bench of the Apex Court in Shyam Lal Vs. State of U.P., AIR 1954 SC 369 have held that compulsory retirement does not amount to dismissal or removal from service within the meaning of Article 311 of the Constitution of India. It is neither punishment nor visits with loss of retiral benefits. It does not cast stigma. The Officer will be entitled to the pension i.e. actually earned and there is no diminution of the accrued benefits. In Union of India Vs. Col. J.N. Sinha, 1970 (2) SCC 458 the Supreme Court is of the view that the power can be exercised subject to the conditions mentioned in Rule 56(j) of the Fundamental Rules- one of which is that the authority concerned must be of the opinion that it is in the public interest to

do so. If that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before the Courts. It is open to the aggrieved party to contend that requisite opinion has not been formed or the opinion so formed is tainted with malafide.

9. In **Baikuntha Nath Das Vs. Chief District Medical Officer**, 1992 (2) SCC 299, the Supreme Court has observed thus; "This court considering the scope of Fundamental Rule 56(j) on the anvil of administrative law, held that the order of compulsory retirement has to be passed on forming the opinion that it is in the public interest to retire a government servant compulsorily. Though the order is passed on the subjective satisfaction of the Government, the Government or the Review Committee shall have to consider the entire record of service before taking a decision in the matter." In **S. Ramachandra Raju Vs. State of Orissa**, 1994 (Supp.)(3) SCC 424 the question before the Apex Court was that whether the appellant in that case was rightly retired compulsory considering the single adverse entry for the year 1987-88. The appellant in that case was initially appointed as a Lecturer on 29.9.1965 in a private college, which was taken over by the Government w.e.f. 9.3.1971. For the year 1987-88, the Principal made adverse remarks for the period 1.4.1987 to 29.2.1988. The appellant thereon submitted his representation alleging that the Principal was actuated by malafide. On 20.3.1991 the appellant was promoted as a Reader. His representation was rejected on 5.12.1991. By the proceedings dated 28.5.1991 he was compulsory retired from service. The Administration dismissed his petition. Allowing his appeal, the Supreme Court discussed the law in detail. After having discussed, the law laid down by the Apex Court in the decision referred to above, and while allowing the appeal, the Court held:

"Keeping these principles in mind and on considering the facts extracted here in before, we find that the exercise of power by the Government falls in the category of arbitrary exercise of power or failure to take the total record of service into consideration objectively. It has taken only the solitary adverse report for the year 1987-88 as a foundation to compulsorily retire the appellant from service. The Review Committee as well considered only that report, neither earlier report nor subsequent reports were considered. It is seen that admittedly the appellant was promoted as a Reader after the adverse report and the adverse comments were communicated to him and in a mechanical way they rejected the report (sic representation) to expunge the adverse remarks, even without going into the contention of the appellant that the then Principal was actuated with malafides by submitting wrongly or falsely in confidential reports which appear to have some foundation or suspicion for such a contention. Consistent record earlier and later periods would establish that the appellant has meritorious record of service as a teacher and that his devotion to the service is good and fair and that he maintains discipline, good relations with the students and imparts teaching to the students fairly with good knowledge as teacher. Therefore, in that background the exercise of the power is illegal."

10. In Civil Misc. Writ Petition No. 9949 of 1999, Vijay Kumar Jain Vs. State of U.P. and others, a Division Bench of

this Court in the judgment dated 1.3.2000 has viewed that "it is the settled law that the entries of only 10 years prior to the order of compulsory retirement are to be seen. ……" In the present case the petitioner in para 15 of the Writ Petition has stated that the Directorate of Social Welfare, U.P., Lucknow was itself not in possession of any entry for the years 1990-91, 1992-93, 1994-95, 1997-98, 1998-99 & 1999-2000. Further the annual entries for the years 1995-96 & 1996-97, which were good and remark excellent, were not before the reviewing authority. In para 17 of the Writ Petition the petitioner has stated that the impugned order of compulsory retirement has been passed on the basis of the single adverse entry against which the petitioner had filed his representation which is still pending. This fact coupled with the fact, as stated in para 11 of the Writ Petition, that right from the date of joining of his services from the year 1994 up to the years 1996-97 no adverse entry had ever been made against the petitioner and the fact that the last ten years' entries were not before the reviewing authority, we are of the view that the decision to retire the petitioner prematurely was not justified. In view of the law discussed above and the uncontroverted averments, we feel persuaded to hold that there was no valid material before the Reviewing Authority and the Government for invoking the provision of Fundamental Rule 56(C). Financial Hand Book Vol. II Part II to IV retiring the petitioner from service compulsorily.

11. In the result the Writ Petition succeeds is allowed. The impugned order dated 28.9.2000 (Annexure-8 to the Writ Petition) passed by the respondent no. 1 is quashed. The petitioner is entitled to consequential benefits. However, on the peculiar facts & circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 16, 2001

BEFORE
THE HON'BLE S.R. SINGH. J

Civil Misc. Writ Petition No. 5486 of 2001

Anil Sharma ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Shri Rajesh Tandon
Shri P.C. Shukla

Counsel for the Respondents:
S.C.

U.P. Civil Services (Classification, Control and Appeal) Rules, 1930 rescinded by rule 17 of U.P. Govt. Servant Rules 99- rule 49-A- The express language employed in sub rule (8) of rule 4 of the rules and in Sub-rule (5) of rule 49-A of the rescinded Rules, spares no room for doubt that any suspension deemed to have been ordered or to have been continued "shall continue in force until it is modified or revoked by the Competent Authority.

(Held in para 10)

Specific order of suspension has been passed and although the competent authority may be oblivious of the fact that the petitioner was ordered to be released on bail on the date the impugned order of authority competent to suspend within the meaning of clause (a) sub rule (3) of rule 4. The order does not suffer from the blemish of any illegality. The petitioner is, however, at liberty to make a representation as

envisaged in clause (b) of Sub-rule (3) of Rule 4, seeking revocation of the suspension order. In case, any representation is filed, the competent authority shall, after going into the tenability of the representation in the light of the facts and circumstances of the case, as well as the provisions embodied in the rules, pass appropriate order continuing the suspension from the date of release from custody or revoke or modify it.

By the Court

1. Impugned herein is the order dated 7.2.2001 (Annexure 3 to the Petition) whereby the petitioner-a Reader in the Court of Tahsildar Sadar Moradabad, was placed under suspension with retroactive effect i.e. with effect from the date a criminal case, it being case crime no. 69 of 2001 under section 7/13 of the Prevention of Corruption Act, 1988 was registered against him. A perusal of the First Information Report registered in case crime no. 69 of 2001 at Police Station Kotwali, Moradabad under section 7/13 of the Prevention of Corruption Act, would evince that the petitioner was caught by the Dy. Superintendent of Police, Anti-corruption/Crime investigation Branch Moradabad, flagrant delicto on 2.2.2001 accepting Rs. 1000/- as illegal gratification as quid pro quo for getting the restoration application filed in a mutation case in the court of Tahsildar Sadar decided in favour of the complainant Gulab Singh.

2. The main thrust of the submissions advanced across the bar by Sri Rajesh Tandon, learned Senior Advocate is two-fold: firstly, that the First Information Report taken in its entirety, does not spell out a prima facie case under section 7/13 of the Prevention of Corruption Act, 1988 and therefore, the impugned order of suspension suffers from error of law being an order passed without there being any valid justification, and secondly, that the impugned suspension comes in the category of a 'deemed suspension' which automatically petered out after the petitioner was enlarged from jail. To enforce this submission, the learned counsel has placed credence on a Full Bench decision of this Court in **Chandra Shekhar Saxena v. Director of Education (Basic) U.P. Lucknow and Anr**[1] wherein it has been held that the "deemed suspension should be confined to the period of detention in custody only and it cannot be carried further after release from detention" and if the appointing authority wants to continue the deemed suspension further, a specific order is required to be passed and for passing such order, all the requirements provided in the relevant rules should be taken into account.

3. As regards the first submission, though I forbear myself from pronouncing any opinion upon the truth or otherwise of the indictment against the petitioner, I would not scruple to say that the charge which has been made the basis for suspension of the petitioner, is grave enough to warrant imposition of major penalty, if it is established at the enquiry. In this conspectus, recourse to suspension cannot be branded as unwarranted or unjustified. The first proviso to rule 4 (1) of the Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 which envisages that suspension should not be resorted to unless the allegations against the Government Servant are so

[1] 1997 (1) UPLBEC 165

serious that if established at the enquiry, may ordinarily warrant major penalty, is not infringed upon in this case. The charge of graft as spelt out in the impugned order and the factum of arrest on the spot if establish at the enquiry, will be fraught with the consequence of dismissal or removal from service and therefore, the disciplinary authority cannot be anathematised to have erred in taking recourse to suspension in the fact-situation of the case.

4. The full Bench was called upon to consider the scope and ambit of the duration of 'deemed suspension' within the meaning of related sub-rules of rule 49-A of the U.P. Civil Services (Classification, Control and Appeal) Rules, 1930. These rules have since been rescinded by rule 17 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 (In short 'the Rules'). Sub-rules (2), (3), (7) and (8) of rule 4 of the Rules being germane are quoted below.

"[2] A Government Servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government Servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may, at the discretion of the Appointing Authority or the Authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge.

[3] [a] A Government Servant shall be deemed to have been placed or as the case may be, continued to be placed under suspension by an order of the Authority Competent to suspend, with effect from the date of his detention, if he is detained in custody, whether the detention is on criminal charge or otherwise, for a period exceeding forty eight hours.

[b] The aforesaid Government Servant shall, after the release from the custody, inform in writing to the Competent Authority about his detention and may also make representation against the deemed suspension. The Competent Authority shall, after considering the representation in the light of the facts and circumstances of the case as well as the provisions contained in this rules, pass appropriate order continuing the deemed suspension from the date of release from custody or revoking or modifying it.

x x x x

[7] Where a Government Servant is suspended or is deemed to have been suspended [whether in connection with any disciplinary proceeding or otherwise] and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the Authority Competent to place him under suspension may, for reasons to be recorded by him in writing, direct that the Government servant shall continue to be under suspension till the termination of all or any of such proceedings.

[8] Any suspension ordered or deemed to have been ordered or to have continued in force under this rule shall continue to remain in force until it is modified or revoked by the Competent Authority."

5. The question is as to what is meant by the expression 'shall be deemed to have been placed or as the case may be, continued to be placed under suspension by an order of the Authority competent to

suspend' used in clause ((a) of sub-rule (3) of rule 4 of the Rules. 'Deemed suspension' within the meaning of sub-rule (3) (a) of rule 4, in my opinion, is fictional and takes effect by operation of law irrespective of an order by the competent authority if a Government Servant is 'detained in custody, whether the detention is on criminal charge or otherwise for a period exceeding forty eight hours'. The petitioner was detained in custody on 2.2..2001 and he remained in custody until released on bail pursuant to the bail order dated 7.2.2001. He would be thus 'deemed to be under suspension' till he was actually released on bail. By the impugned order passed on 7.2.2001, the petitioner was in fact "continued to be placed under suspension" and but for the impugned order, the deemed suspension would have lapsed as per Full Bench decision in **C.S. Saxena** (supra) on the petitioner being released on bail. The impugned order which is covered by the second part of sub-rule (3) (a) of rule 4 of the Rules would not lapse automatically upon the petitioner being released from custody though it may be revoked, in the discretion of the competent authority, under sub-rule (3) (b) of rule 4 of the Rules after considering the representation, if any, in the light of the facts and circumstances of the case as well as the provisions contained in the rules. The Full Bench decision, therefore, is unavailing to the petitioner. It could have been pressed into service had he been not 'continued to be placed under suspension' by the order impugned herein.

6. Sub-rule (2) and (3) of rule (4) of the Rules are almost ipsissima verba with sub-rules (2) (a) and (5) of rule 49 A of the U.P. Civil Services (Classification, Control and Appeal) Rules 1930 which was up for consideration before the Full Bench in **C.S. Saxena's** case (supra). These sub-rules are excerpted below.

"[2] a Government servant shall be deemed to have been placed or as the case may be, continued to be place, under suspension by an order of the appointing authority.

[a] with effect from the date of his detention, he is detained in custody whether the detention as on criminal charge or otherwise, for a period exceeding forty eight hours; and

[b] with effect from the date of his conviction, if in the event of a conviction for an offence, he is sentenced to a term if imprisonment exceeding forty-eight hours and is not forthwith dismissed or removed consequent to such conviction.

Explanation: The period of forty eight hours referred to in clause [b] of this sub-rule shall be computed from the commencement of the imprisonment after the conviction and for this purpose, intermittent periods of imprisonment, if any, shall be taken into account.

5. [a] Any suspension ordered or deemed to have been ordered or to have continued in force under this rule shall continue to remain in force until it is modified or revoked by any authority specified in sub-rule [1].

[b] Whether a Government servant is suspended or is deemed to have been suspended [whether in connection, with any disciplinary proceeding or otherwise], and any other disciplinary proceeding is commenced against him during the continuance of that suspension, the

authority competent to place him under suspension may, for reasons to be recorded by him in writing, directed that the Government servant shall continue to be under suspension till the termination of all or any of such proceedings."

7. The expression "shall be deemed to have been placed under suspension" creates a legal fiction and applies to case of suspension sans an order by the competent authority. It is such a 'deemed suspension' which according to the Full Bench was not liable to be "carried beyond the period of detention in custody". The argument raised on the basis of the language used in sub-rule (5) (a) of the U.P. Civil Services (Classification, Control and Appeal) Rules, 1930 that 'deemed suspension……' shall continue to remain in force until it is modified or revoked by the appointing authority and the Government Servant shall continue under suspension even after release from the custody' was repelled by the Full Bench in the language recorded as under:

"In our opinion, under sub-rule [5] [a] suspension deemed to have been ordered shall continue to remain in force does not mean that the actual suspension shall also continue after release from custody. However, the deemed suspension shall remain in force for other purposes which may include all the consequences which flow from an order of suspension of a Government servant. From the combined reading of clause [a] and [b] of sub-rule [2] and sub-rule [5] [a] of Rule 49-A, the possible and reasonable conclusion is that deemed suspension shall be operative only for the period of custody and not beyond that. However, it shall remain in force for other purposes, which flow from the order of suspension. In our opinion, such a harmonious interpretation can be safely given to the provisions contained in sub-rule [5] [a] without dong any violence to the purpose and object and the legislative intent behind the aforesaid provisions."

8. It may usefully be observed that the two questions referred to the Full Bench did not warrant the decision rendered by the Full Bench on the scope and ambit of sub-rule [5] (a) of rule 49 A of the Civil Services (classification, Control and Appeal) Rules for the questions, which the Full Bench was called upon to answer, were these

(i) Whether sub-clause (a) of sub-rule (2) of Rule 49-A of the Civil Service (Classification, Control and Appeal) Rules, 1930 as applicable in Uttar Pradesh is violative of Articles 14 and 21 of the Constitution of India and null and void.

(ii) Whether the legal fiction envisaged under Rule 40-A, (2) (a) or (b) can come into play even in the absence of an order of suspension passed in writing?"

9. The express language employed in sub rule (8) of rule 4 of the Rules and in sub-rule (5) of rule 49 A of the rescinded Rules, spares no room for doubt that any suspension deemed to have been ordered or to have been continued "shall continue in force until it is modified or revoked by the Competent Authority". I am of the firm view that sub-rule (8) of rule 4 of the U.P. Government Servant (Discipline and Appeal) rules, 1999 leaves no room for doubt that any suspension ordered or deemed to have been ordered or have continued in force under this rule "shall continue to remain

in force until it is modified or revoked by the Competent Authority." The phraseology "shall be deemed to have been placed or as the case may be continued to be placed under suspension by an order of the authority competent to suspend" occurring in sub-rule (3) of rule 4, crystallises the effect that the deemed suspension may be continued by an order of the authority competent to suspend the Government Servant. Clause (b) of sub-rule (3) of rule 4, postnates that, "the aforesaid shall, after the release from the custody, inform in writing to the competent authority about his detention and may also make representation against the deemed suspension. The competent authority shall, after considering the representation in the light of the facts and circumstances of the case as well as the provisions contained in this rule, pass appropriate order continuing the deemed suspension from the date of release from custody or revoke or modify it."

10. The Full Bench though not called upon to decide whether 'deemed suspension' will automatically lapse it has been considered and answered the question. The Full Bench has not expatiated upon what are the 'other purposes' for which a 'deemed suspension' shall remain in force while 'actual suspension' will not. In my humble opinion, there seems serious incongruity in the observations in para 22 of the report. I would have referred the case to a larger Bench setting afoot the question for reconsideration as to whether, in view of **C.S. Saxena's** case (supra), a deemed suspension' would automatically lapse on the Government Servant being released from detention even in the face of an express stipulation to the contrary contained in sub-rule (8) of rule 4 of the Rules and in sub-rule (5) (a) of rule 49 A of the rescinded Rules but the present is not case of deemed suspension merely because it has been given into effect from the date of arrest. Here, specific order of suspension has been passed and although the competent authority may be oblivious of the fact that the petitioner was ordered to be released on bail the date the impugned order was passed, yet it can be very well be said to signify that the petitioner has been "continued to be placed under suspension by an order of authority competent to suspend within the meaning of clause (a) sub-rule (3) of Rule 4. The order does not suffer from the blemish of any illegality. The petitioner is, however, at liberty to make a representation as envisaged in clause (b) of sub-rule (3) of Rule 4, seeking revocation of the suspension order. In case, any representation is filed, the competent authority shall, after going into the tenability of the representation in the light of the facts and circumstances of the case, as well as the provisions embodied in the rules, pass appropriate order continuing the suspension from the date of release from custody or revoke or modify it.

11. As a result of foregoing discussion, the petition is dismissed subject to the above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 22.3.2001

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

Civil Misc. Writ Petition No. 10745 of 2001

Suryabhan Yadav ...Petitioner
Versus
The Vice-Chancellor ...Respondents

Counsel for the Petitioner:
Shri D.B. Yadava

Counsel for the Respondents:
Shri V.K. Upadhyaya
S.C.

Constitution of India-Article 226-High Court in exercise of its power under Article 226 can decide whether cogent reasons for condonation of shortage in attendance existed or not

(Held in para 7)

Once an application is made by a student to the Academic Council for condoning the shortage in attendance it is under a legal duty to pass appropriate orders within reasonable time to enable the student to appear in the examination and prepare for the examination. It appears reasonable that the Academic Council must take a decision atleast two weeks before commencement of the examination. But the academic council has not taken any decision on the application of the petitioner, which is pending before academic council from 23.2.2001. For the lapse on the part of the Academic Council of the University in not passing appropriate order on the application for condonation of shortage in attendance, the petitioner cannot be made to suffer. There were cogent reasons for shortage in attendance of the petitioner. Therefore, the shortage in attendance of the petitioner deserves to be condoned and he is entitled to appear in M.Com. (Previous) Examination scheduled to commence from 27.3.2001.

By the Court

1. A mention has been made by the learned counsel for the petitioner that the matter is extremely urgent. I am satisfied that the matter is urgent, therefore, the requirement of notice as per sub-rule (4) of Rule 1 of Chapter XXII of the Rules of the court is dispensed with.

2. Heard Sri D.B. Yadav learned counsel for the petitioner and Sri V.K. Upadhyaya learned counsel appearing for the respondents no. 1 to 3.

3. The petitioner was admitted in M.Com. (Previous) course of Banaras Hindu University on 2.8.2000. His father fell ill and was admitted in Nazareth Hospital, Allahabad on 7.8.2000 where he died on 13.8.2000. The medical certificate has been annexed as Annexure-2 to the writ petition. In paragraph 4 of the petition it has been stated that in the Entrance examination for admission to M.Com. course the petitioner secured 5th position which shows that he is a brilliant student. He could not attend his classes, as he was disturbed due to his father's death and the petitioner's family was facing financial problems. In paragraph 7 it has been stated that the petitioner had no means to stay at Varanasi, therefore, he could not attend the classes of M.Com. (Previous). However, he deposited examination fee on 9.11.2000/ Thereafter it appears that he missed some more classes due to financial trouble. His attendance felt short. As per the Ordinance of the university candidate is required to have 75% attendance for

appearing in examination of the university.

4. Sri V.K. Upadhyaya the learned counsel for the respondents has produced instructions received from university by fax that the petitioner's attendance is only about 24%. As per Ordinance of the university the academic council can condone the shortage in attendance on cogent reasons. The petitioner applied on 23.2.2001 to the Vice Chancellor/Chairman, academic Council, Banaras Hindu University attaching the death certificate of his father and clearly stating therein that his life became so complicated because of family problems, economical problems and other different problems that he could not succeed in attending regular classes and his attendance fell short. He prayed that his father was simple farmer and his financial condition is very weak, therefore, shortage in his attendance be condoned.

5. Sri V.K. Upadhyaya learned counsel for the respondents has placed reliance on a division bench decision in Banaras Hindu University and another versus Shashwat Vikram Gupta, Special Appeal No. 423 of 1996 decided on 24.5.1996 and urged that the power to condone shortage in attendance vested in the academic Council. He vehemently argued that this court cannot in exercise of jurisdiction under Article 226 take upon itself the power of Academic Council. It can direct the Academic Council to examine the matter and pass appropriate orders. The Division bench decision was given in different circumstances. The counsel appearing for the university made a statement before the court that the Academic Council would take decision on the application of the petitioner, but since no application had earlier been filed by the petitioner, there was no question for considering the delay in shortage of attendance of the petitioner by the Academic Council. The division bench, therefore, directed the Academic Council to take a decision in the matter of the students with regard to shortage in attendance and the petitioners were permitted to make representation to the Vice-Chancellor and if the Academic Council condoned the deficiency then the university would hold special examination for them, In the present case the petitioner has made an application to the academic council on 23.2.2001, but no decision has been taken by the academic council nor the instructions produced by Sri V.K. Upadhyaya show that any decision has been taken by the Academic Council on the application of the petitioner. Sri Upadhyaya has produced instructions obtained from the university by fax in which it has been stated that attendance of petitioner was only 24%. Twice shortage in attendance was displayed on the notice board and once it was communicated on 8.1.2001 to the petitioner but the instructions of the university does not disclose that any decision has been taken by the Academic Council on the application of the petitioner for condoning the shortage in attendance as cogent reason existed due to which the petitioner's attendance was short.

6. I am conscious of the fact that in matters of discipline it is the decision of the academic council that should be respected. But where the rules provide that the shortage in attendance can be condoned by the Vice-Chancellor/academic Council for cogent reasons then it casts a duty on the authority to exercise the power reasonably

in order to promote the purpose of the rule. When the petitioner came to know that his attendance was short, he made representation but no order appears to have been passed on it. The authorities failed to discharge their duty. There are two courses open to this court, one to direct the Academic Council to decide it, or the other, to examine itself whether from the documents filed by the petitioner cogent reasons are made out. The latter course is an exception, to be resorted where if the court fails to take action the entire purpose would be frustrated. Since the examinations are going to start from 27.3.2001, I am of the opinion that this court in exercise of its power under article 226 can decide whether cogent reasons for condonation of shortage in attendance existed or not.

7. Once an application is made by a student to the Academic council for condoning the shortage in attendance it is under a legal duty to pass appropriate orders within reasonable time to enable the student to appear in the examination and prepare for the examination. It appears reasonable that the academic Council must take a decision atleast two weeks before commencement of the examination. But the academic council has not taken any decision on the application of the petitioner, which is pending before academic council from 23.2.2001. The M.Com. (Previous)Examination is scheduled to commence from 27.3.2001. For the lapse on the part of the Academic Council of the university in not passing appropriate order on the application for condonation of shortage in attendance, the petitioner cannot be made to suffer. The petitioner's father fell ill and he died. There could be no greater misfortune in the life of a young man than the death of his father. This was aggravated by petitioner's financial difficulty. Poverty in our country is curse. The petitioner is a son of a poor farmer. He is a brilliant student who is interested in pursuing higher studies. But he has no means to arrange living at Varanasi. This financial difficulty coupled with death of his father shattered the petitioner. He could not be regular. Cogent means pertinent. The shortage of attendance in the circumstances was for the reason beyond the control of the petitioner. I am, therefore, satisfied that there were cogent reasons for shortage in attendance of the petitioner. Therefore, the shortage in attendance of the petitioner deserves to be condoned and he is entitled to appear in M.Com. (Previous) Examination scheduled to commence from 27.3.2001. The university has already allotted roll number 00001085 and issued admit card of petitioner to respondent no. 2

8. This petition is finally disposed of with a direction to respondents to permit the petitioner to appear in M.Com. (Previous) Examination scheduled to commence from 27.3.2001. Any shortage in attendance of the petitioner shall stand condoned. The respondents no. 2 and 3 are directed to issue admit card to the petitioner on or before 24.3.2001 A certified copy of this order shall be produced by the petitioner before respondent no. 3.

9. Let a certified copy of this order be issued to learned counsel for the parties on payment usual charged within 24 hours.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 16.3.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE O. BHATT, J.

Civil Misc. Writ Petition No. 460 of 2000

Dr. H.S. Rai and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Umesh Narain Sharma

Counsel for the Respondents:
Shri Pushpendra Singh
S.C.

Constitution of India-Article 226 it is settled that an act of the Court should not injure to any party. It is accepted that no party should suffer on account of the delay in the decision by the court. The principle of Actus curiae neminem gravabit applied.

(Held in Para 14)

On the facts of the case we are satisfied that the posts which were merged were not posts for which the petitioners applied i.e the post of District Live stock Officer and other equivalent posts re-designated as Chief Veterinary Officer rather lower posts mentioned in para 7 of the rejoinder affidavit were merged. Hence the stand of the State Government is wholly misconceived. The G.O. dated 19.1.87 does not come in the way of the petitioner's appointments.

By the Court

1. Heard Sri Umesh Narain Sharma learned counsel for the petitioners, learned Standing Counsel for the State Govt. and Shri Pushpendra Singh for the U.P. Public Service Commission.

2. The petitioners are all working as Veterinary Officers in various Veterinary Hospitals in U.P. and they are in the service of the State Govt. It may be mentioned that the post of Veterinary Officer was initially known as Pashu Chikitsak and thereafter it was designated as Pashudhan Vikas Adhikari (Life Stock Development Officer) vide Government order dated 27.11.78 and thereafter re-designated as Pashu Chikitsa Adhikari (Veterinary Officer) vide G.O. dated 29.4.81.

3. The petitioners applied for appointment as Zila Pashudhan Adhikari (District Live Stock Officer)/Cattle Development Officer/ Poultry Development Officer/ Gaushala Development Officer and other equivalent posts in U.P. Veterinary Service Class II. It may be mentioned that 37 such posts were advertised vide advertisement dated 30.4.77 copy of which is Annexure RA 1 to the rejoinder affidavit

4. It may be mentioned that in the channel of promotion the post above the post of Veterinary officer is post of District Live Stock Officer and other equivalent posts re-designated as Chief Veterinary Officer vide G.O dated 29.4.91 copy of which is Annexure RA 3 to the rejoinder affidavit. The above post that of District Live Stock Officer is the post of Deputy Director and above that is the post of Joint Director, and then Additional Director, and finally the post of Director vide para 8 of the Rejoinder affidavit.

5. The petitioners applied for the post of District Live Stock Officer and

other equivalent posts mentioned in the advertisement copy of which is Annexure RA 1. They were interviewed between 18 to 25 July 1987 but the result could not be declared since it appears that Writ Petition No. 6854 of 1986 U.P. Veterinary Association and another Versus State of U.P. and another was filed in this court in which the following interim order was passed on 23.7.87:

"As prayed, the respondents are granted three weeks time to file a counter affidavit. Rejoinder affidavit may be filed within three days thereafter.

List for admission in the week commencing 24th August 1987 it is made clear that if considered necessary the entire petition may be disposed of on merits on that date.

We are informed that the interviews for the post are already going on and they are likely to come to an end on 29th July, 1987. We are further informed that after the recommendation is made by the Commission it takes some time before the orders as issued by the Govt. Therefore, no one shall be prejudiced if the appointment orders are not issued till the petition is disposed of. Therefore, we direct that although the selection may go on and the entire process may be completed but the appointment letters may not be issued till further orders of this court."

6. A perusal of the above order shows that this court permitted the selection process to go on and to be completed but the appointment letters could not be issued till further orders of the Court.

7. Subsequently it appears that another writ Petition No 1151 of 1999 was file d before the Lucknow Bench of this Court in which the following interim order was passed on 26.7.99.

"Notice on behalf of respondent no. 1 has been accepted by the learned standing counsel and on behalf of respondent no. 2 by Dr. R.K. Srivastava. He prays and is granted three weeks time to seek instruction or to file counter affidavit. Petitioner shall have thereafter a week's time to file rejoinder affidavit. List immediately on expiry of four weeks. In the meantime, respondents are directed to declare the result of the selection for the post of District Livestock Officer held between 19th to 25th July, 1987 within a period of two weeks from the date a certified copy of this order is communicated to the respondent no. 2 or to show cause within the same period."

8. In pursuance of the aforesaid interim order dated 26.7.99 the U.P. Public Service Commission declared the result vide notice dated 28.9.99 copy of which is Annexure 1 to the petition. The petitioners name are mentioned in the list of selected candidates. For instance petitioner no. 1 Dr. H.S. Rai is at Serial No. 6 of select list, Petitioner no. 2 Dr. P. Sinha is at Serial no. 1 and so on.

9. However, despite the declaration of the result by the U.P. Public Service Commission, appointment letters were not issued to the petitioners although Writ Petition No. 6854 of 1986 had been dismissed by the Court on 13.11.97.

10. The petitioners have alleged that although over 13 years have elapsed since the selection yet they have not been given

appointment although Writ Petition No. 6854 of 1986 had been dismissed. The petitioners sent several representation s to the State Govt. as well as to the Director, Animal Husbandry for redressal of their grievance but to no avail. A true copy of one such representation dated 10.12..99 is annexure 3 to this writ petition. Hence this writ petition.

11. A counter affidavit and supplementary counter affidavit has been filed by the State Govt.. In paras 4 and 6 of the main counter affidavit it has been alleged that although vacancies for the various posts mentioned in the advertisement dated 30.4.77 had been advertised and the interviews held in July, 1987 but subsequently by G.O. dated 19.11.87 the different cadres were merged in one and common cadre known as **"Adhinasth Pashu Chikitsa Seva (Raj Patrit) Ke vibhinn Samvargo Ka Uttar Pradesh pashu Chikitsa seva Shreni-2 Me Sambilian."**

12. Consequently it is alleged that in the absence of different cadres it was not possible to promote or appoint the petitioners despite the selection by the U.P. Public Service commission. True copy of G.O. Dated 19.11.87 is annexure CAL1A similar stand has been taken in the supplementary counter affidavit.

13. In the rejoinder affidavit it had been pointed out in para 7 that the posts which were merged by G.O. 19.11.87 were certain posts of subordinate Veterinary Service (Gazetted) into the U.P. Veterinary Service Class II. These posts which were merged were subordinate to the post of District Livestock Officer. The posts which were merged, are mentioned in para 7 of the rejoinder affidavit. Moreover G.O. 19.11.87 was to operate prospectively and not retrospectively. True copy of G.O. 19.11.87 is Annexure RA-2. A similar stand has been taken in para 9 of the rejoinder affidavit.

14. On the facts of the case we are satisfied that the post which were merged were not posts for which the petitioners applied i.e. the post of District Livestock Officer and other equivalent posts re-designated as Chief Veterinary Officer. Rather lower posts mentioned in para 7 of the rejoinder affidavit were merged. Hence the stand of the State Govt. is wholly misconceived. The post of District Livestock Officer/Chief Veterinary Officer still exists and has not been merged with any other post. The post of District Livestock Officer/ Chief Veterinary officer is a higher post and only the senior most officer of Veterinary Service Class II can be appointed as a District Livestock Officer/Chief Veterinary Officer as is evident from the G.O. 4.5.88, a copy of which is Annexure RA-5. Hence the G.O. dated 19.11.87 does not come in the way of the petitioner's appointments.

15. Apart from that we are also of the opinion that the petitioner should not suffer because of the interim order of this Court dated 23.7.87 passed in Writ Petition No. 6854 of 1986 which was ultimately dismissed on 13.11.97. Had the interim order dated 23.7.87 not been passed by this Hon'ble Court, the petitioners would have been given appointment a long time back, but their appointments were held up for long period for no, fault of their. It is settled law that an act of the court should not

injure to any party "Actus curiae neminem gravabit."

16. The above Latin maxims has been quoted with the approval by the supreme Court in Jang Singh versus Brij lal and others AIR 1966 SC 1631.

17. In H.M.T. Ltd. Vs Labour Court 1994(2) SCC 38 it was observed by the Supreme Court "It is now accepted that no party should suffer on account of the delay in the decision by the court."

18. The principle of Actus curiae neminem gravibit has been applied by the Supreme Court in several other decisions also e.g. in Jagat Jeet Bhargava Vs. Juhi Lal AIR 1961 S.C. 832.A.R. Antulay Vs. R.S. Nayak 1988(2) SCC 603; Johri Singh Vs. Sukh Pal Singh 1989 (4) SCC 40-3, Suresh Chand Vs. Gulam Chisti 1990(1) SCC 593, Mithilesh Kumari and another Vs. Prem Behari Khare, 1989(2) SCC 95 and Raj Kumar Dey and others Vs. Tarapada Dey 1987 (4) SCC 398, etc.

19. In view of the above discussion we allow this writ petition and direct that the petitioners should be given appointments as per recommendation of the Commission forthwith. As regards their prayer for retrospective appointments petitioners may make a representation to the State Govt. which will be considered and decided expeditiously in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 27 FEBRUARY, 2001

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

Civil Misc. Writ Petition No. 124 of 2001

M/s J.H.V. Sugar Corporation Limited ...Petitioner

Versus

Chief Controlling Revenue Authority, U.P., Allahabad and others...Respondents

Counsel for the Petitioner:
Shri Tarun Varma
Shri G.N. Verma

Counsel for the Respondents:
S.C.
Sri Bharatji Agarwal
Sri Surya Prakash Keserwani

Indian Stamps Act-Chapter IV- there can be no doubt about the fact that an order passed by the Collector under Section 47-A of the Act, as applicable to the State of U.P. is subject to revision under section 56(1) of the Act before the Chief Controlling Revenue Authority. (Held in paras 16 and 17).

There is yet another aspect of the matter. The impugned order dated 22.12.2000 and other orders passed by the Chief Controlling Revenue Authority are purely of interlocutory nature and since no final orders have yet been passed in the pending revision application, it would be highly inappropriate to intervene in the matter by exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

By the Court

1. The crucial question which arises for determination in the present writ petition is whether a revision application

at the instance of State of U.P. against an order passed by the Collector of the district under the provisions of Chapter IV of the Indian Stamps Act (Act no.2 of 1899) (hereinafter referred to as 'the Act') is maintainable before the Chief Controlling Revenue Authority exercising the powers under Section 56(1) of the Act. This moot point has cropped up in the following circumstances.

2. The petitioner M/s J.H.V. Sugar Corporation Ltd. having its registered office at Calcutta purchased a sugar mill from M/s Oswal Foods Ltd. Sugar Division, Jami Kalan through its director-Mukesh Jain. The sale deed was executed in favour of the petitioner on 24.3.99. This sale deed covered the open land admeasuring 12617.12 sq. meters of village Jamui Kalan and 16303.0204 sq. meters of residential and constructed portion of village Gadaura. The valuation for the purposes of payment of stamp duty of the entire property sold in favour of the petitioner was arrived at by the Collector Maharajganj at Rs7,71,35,775. Stamp duty of Rs.61,70,862 was found payable on the deed of transfer. The Collector by order dated 11.9.2000 (Annexure 1 to the writ petition) found that there was deficiency in the payment of the stamp duty to the extent of Rs.9,03,377 as the petitioner had only paid stamp duty amounting to Rs.52,67,685. This determination was made by the District Magistrate on a reference dated 1.5.99 (Annexure S.C.A.-1) having been made by the Sub Registrar Nichlaul under section 47-A(1) read with Sections 33 and 47-A(4) of the Act. Dissatisfied with and aggrieved by the order passed by the Collector, Maharajganj, the State of U.P. has filed a revision application (Revision No.90 of 2000-2001) before the Chief Controlling Revenue Authority-respondent no. 1 under the provisions of Section 56(1) of the Act. The stand taken by the State is that the valuation of the property purchased by the petitioner for the purpose of payment of stamp duty comes to Rs.87,19,30,847.50. The petitioner took certain pleas with regard to the summoning or filing of the original sale deeds and also faintly suggested that the revision was not maintainable as the order passed by the Collector was final and pursuant to which the deficiency in the stamp duty has been made good. The Chief Controlling Revenue Authority by order dated 22.12.2000 observed that the various applications had been moved by the petitioner with a view to gain time and consequently fixed 3.1.2001 for hearing of the revision application on merits so that the petitioner may have reasonable opportunity of canvassing its point of view. Without waiting for the final outcome of the revision application, the petitioner has rushed to this court to invoke its extraordinary jurisdiction under Article 226 of the Constitution of India taking the plea that the revision application pending before the Chief Controlling Revenue Authority was not legally maintainable and consequently the entire exercise is futile. A feeble suggestion has also come to be made that the order passed by the Collector, who is one of the functionaries of the State of U.P. could not be challenged by the State itself by filing a revision.

3. A short counter affidavit has been filed on behalf of the State.

4. Heard Sri G.N. Verma, learned Senior Advocate assisted by Sri Tarun Verma, learned counsel for the petitioner and Sri Bharatji Agarwal, learned Senior

Advocate assisted by Sri Surya Prakash Keserwani for the State of U.P. and other respondents.

5. At the threshold, a note of caution may be sounded that since the revision application is pending before the Chief Controlling Revenue Authority-respondent no. 1, this court would refrain from making any observation touching the merits of the case, lest it may be prejudicial to either of the parties. This decision is, therefore, being confined only with regard to the entertainability and maintainability of the revision application under Section 56(1) of the Act against the order dated 11.9.2000 (Annexure 1 to the writ petition) passed by the Collector Maharajganj.

6. Sri G.N. Verma, learned Senior Advocate appearing on behalf of the petitioner made a reference to the provisions of Sections 33, 38 and 40 of the Act, They run as follows:-

"33. Examination and impounding of instruments (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose, every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in (India) when such instrument was executed or first executed.

Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Sections 125 to 128 and Sections 145 to 148 of the Code of Criminal Procedure, 1973.

(b) in the case of a Judge of High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purpose of this Section the State Government may in cases of doubt, determine what offices shall be deemed to be public offices, and who shall be deemed to be persons in charge of public offices.

(4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf, call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions.

(5) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty under Section 40 on the copy of the instrument:

Provided that no action under sub-section 4 or sub-section (5) shall be taken after a period of four years from the date of execution of the instrument.

38. Instruments impounded, how dealt with:- (1) When the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other Case, the person so impounding an instrument shall send it in original to the Collector.

40. Collector's power to stamp instruments impounded—(1) When the Collector impounds any instrument under Section 33, or receives any instrument sent to him under Section 38, sub-section (2), not being a receipt or a bill of exchange or promissory note, he shall adopt the following procedure—

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same, together with a penalty of five rupees or, if he thinks fit an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.

Provided that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

(2) **Every certificate under clause (a) of sub-section (1) shall for the purposes of this Act, be conclusive evidence of the matters stated therein.**

(3) Where an instrument has been sent to the Collector under Section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this Section return in to the impounding officers."

7. On the strength of the above provisions contained in Chapter IV of the Act, it was urged that the order passed by the Collector Maharajganj was final and conclusive and beyond the pale of challenge. To fortify his submission, Sri Varma placed reliance on a celebrated decision of a Full Bench of this Court in a stamp reference by the Board of Revenue reported in 1971 I.L.R., Volume XL-128. In that case, it was held that if a Collector has taken action under Section 40, sub-

section (1) (b) of the Indian Stamp Act, 1899, and having received the deficient duty and the penalty imposed, has certified under Sub-section (1) (a) that the instrument before him is duly 'stamped' the effect of sub-section (2) is that the jurisdiction of the Chief Controlling Revenue Authority to refer to the High Court, under section 57 of the Act, the question whether such instrument is in fact sufficiently 'stamped' or not is ousted. I have perused the decision, aforesaid. There can be no quarrel with the proposition of law that under Sub-section (2) of Section 40, the Certificate is for the purpose of the Act conclusive evidence of the matter stated therein. If a case before the Collector has been fully decided, there does not appear to be room for any further disposal in accordance with the provisions of sub-section (2) of Section 59. As regards Section 42(1) of the Act, Sri G.N. Varma placed reliance on the decision of a Division Bench of Rajasthan High Court in **Senamal Vs. State of Rajasthan and others**—AIR 1957 Rajasthan-211 wherein it was held that as soon as certificate under Section 42(1) has been issued, the matter is concluded so far as the Sub Registrar, who made the reference, is concerned. He has thereafter to register the instrument. It is true that the word 'may' appears before the words 'be registered'. But it is unthinkable that the intention was that after the Collector had come to a decision under Section 42(1), the Sub-Registrar should question that decision by refusing to register the document. The word 'may' in this context has the same force as 'shall'. It was further observed that there is no provision any where in the Act for cancellation of his order by the Collector once it has been passed under Section 40 (1) (a) or (b) of the Act. I have waded through this decision and find that there is a specific clarificatory observation that if the executive authorities are dissatisfied with the order of Collector, their remedy is by way of revision application to the Chief Controlling Revenue Authority under Section 56(1) of the Act.

8. A reference was also made to the decision of a Full Bench of Hyderabad High Court in **Jai Narayan and others Vs. Yasin Khan and others**- A.I.R. 1955 Hyderabad- 17. In that case, a Division Bench of the High Court of Andhra Pradesh not only impounded an insufficiently stamped document produced before it in appeal, but assessed the amount of penalty and sent it to the Collector for realising the amount. The argument before the Full Bench was that the High Court could only impound the document and determine its nature but could not assess the penalty. The Full Bench found sufficient force in that argument. It was held that the judgement relating to the assessment of penalty was not warranted by the provisions of the Act. It was observed that it is clear from Sections 33,35,38 and 40 that it is the Collector alone who has the power to assess the penalty, though it is true that the court or any other officer having the authority by law may impound the document but after impounding the same, the Court or the officer has to send the original document to the Collector under Section 38 clause '2) and it is only then that the Collector can adopt the procedure laid down in section 40. Again a reference was made to a Full Bench decision of Andhra Pradesh High Court in **Manganti Suryanarayana V. The Board of Revenue, Government of Andhra Pradesh**- AIR 1976 A.P. – 150 in which the majority view was that the power or

authority of the Chief Controlling Revenue Authority to refund the excess payment of stamp duty is circumscribed in the statute itself. Hence, the Board of Revenue is not empowered to order refund under Section 45 in every Case where excess payment of stamp duty or penalty has been paid by a party. The Board must be satisfied that stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40 in order to invoke its power to grant refund of the excess amount, otherwise not. The Legislature did not intend a case for voluntary or mistaken payment of stamp duty to fall under sub-section (2) to Section 45. The Chief Controlling Revenue Authority, which is the Board of Revenue, in the State of Andhra Pradesh, it was further observed, was not, therefore, competent to direct refund of the excess stamp duty paid voluntarily or under a mistaken impression of law by the party at the time of registration of the document; nor had the Board of Revenue inherent jurisdiction to order refund of the excess stamp duty. The Board of Revenue is only the Chief Controlling revenue authority which is an administrative tribunal empowered to act and function as a quasi judicial authority in the exercise of its powers under Section 56 of the Act, but not a Court having inherent jurisdiction. The powers of the Board to refund any excess stamp duty are circumscribed by the very statute. The Board cannot travel beyond the limitations provided under the Act. The two other decisions referred to by Sri Varma are **Jaidaval Shanti Kumar and another V. Gajadhar and others**- AIR 1956 Rajasthan-155 and **Chaturbhuidas and another Vs. The State of Madhya Pradesh and others**- A.I.R. 1975 M.P.-209. In both these decisions, power of the Board to make reference to High Court under Section 57 has come to be canvassed. A passing reference was made by Sri Varma to the decision of the Bombay High Court in **Usuf Dadabhai Vs. Chand Mahomed**- A.I.R. 1925 Bombay-51 in which it was held that the Chief Controlling Revenue Authority cannot refer an abstract question when there is no pending case before it. It can refer a case only when under Section 57 there is a case pending before it which is to be disposed of by it on receipt of High Court's judgement. The last three decisions referred to by Sri Varma relate to a reference which is required to be made by Chief Controlling Revenue Authority to the High Court under Section 57 of the Act. Reference to these decisions is unnecessary and wide off the mark.

9. A complete answer to the submissions made by Sri Varma is furnished by the various decisions relied upon by Sri Bharatji Agarwal with reference to the provisions of Section 56, contained in Chapter VI of the Act, which reads as follows:-

"56. Control of, and statement of case to, Chief Controlling Revenue Authority:- (1) The powers exercisable by a Collector under Chapter IV and Chapter V and under clause (a) of the first proviso to Section 26 shall in all cases be subject to the control of the Chief Controlling Revenue Authority.

(2) If any Collector, acting under Section 31, Section 40 or Section 41, feels doubts as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the Case, and refer it, with his own opinion thereon, for

the decision of the Chief Controlling Revenue Authority.

(3) Such authority shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision."

10. There is no dispute about the fact that powers of the Collector which he exercises under the provisions contained in Chapter IV and V and under clause (a) of the first proviso to Section 26 are subject to the ultimate control of the Chief Controlling Revenue Authority as envisaged under Sub-section (1) of Section 56. This provision came to be canvassed for interpretation before the apex court as well as this court. As mentioned above, the Collector, Maharajganj has passed the impugned order which has been assailed in the revision application by the State on a reference having been made under Section 47-A of the Act. For the sake of clarity, it would be worthwhile to quote the provisions of Section 47-A as made applicable to the State of U.P. by U.P. Act No. 11 of 1992 w.e.f. 1.11.1991:-

"47-A Instruments of conveyance etc., if under-valued, how to be dealt with-

(1) If the market value of any property which is the subject of any instrument on which duty is chargeable on the market value of the property as set forth in such instrument is less than even the minimum value determined in accordance with any rules made under this Act the registering Officer appointed under the Indian Registration Act, 1908, shall refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(2) Without prejudice to the provisions of sub-section (1), if such registering officer while registering any instrument on which duty is chargeable on the market value of the property has reason to believe that the market value of the property which is the subject of such instrument, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(3) On receipt of a reference under sub-section (1) of sub-section (2) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of the instrument and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.

(4) The Collector may, suo motu, or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or any officer authorised by the Board of Revenue in that behalf Inspector of Stamps, Uttar Pradesh, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property not already referred to him under sub-section (1) or sub-section (2), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject of such

instrument and duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty payable thereon in accordance with the procedure provided for in sub-section (3). The difference, if any, in the amount of duty, shall be payable by the person liable to pay the duty."

11. The question as to what stamp duty is chargeable on a particular instrument has to be decided in accordance with the procedure prescribed under section 47-A of the Act. The order passed under Section 47-A is amenable to revisional jurisdiction conferred on the Chief Controlling Revenue Authority under Section 56(1) of the Act. This aspect of the matter came to be considered by the apex court in **Trudeshwar Dayal and another Vs. Maheshwar Dayal and others-** A.I.R. 1990 S.C.-485 in which the scope of the revisional jurisdiction under Section 56 of the Act was laid down. In that case, the appellants Trudeshwar Dayal and another moved the Chief Controlling Revenue Authority under Section 56 of the Act. The Chief Controlling Revenue Authority, in exercise of its revisional power set aside the impugned order of the Collector, inter alia, on the ground of lack of jurisdiction. The decision of the Chief Controlling Revenue Authority was challenged before this court by filing a Writ Petition. The matter was remanded to the Collector to decide the case afresh in the light of the observations made by this court. This Court, in fact, had doubted the power of Chief Controlling Revenue Authority to entertain appellants' application under Section 56 of the Act. Against the order of remand passed by this court (A.I.R. 1989 Allahabad-206), Trudeshwar Dayal and another filed an appeal. It was urged before Hon'ble the Supreme Court that there cannot be any doubt about the power of Chief Controlling Revenue Authority to correct an erroneous order of the Collector. Emphasis was laid on the language of Section 56 suggesting its wide application. The apex court was in agreement with the learned counsel for the appellants and observed thus:-

".....The learned counsel was also right in arguing that the Authority is not only vested with jurisdiction but has the duty to quash an order passed by the Collector purporting to be under Chapter IV and V of the Act by exercising power beyond his jurisdiction. To hold otherwise will lead to an absurd situation where a subordinate authority makes an order beyond its jurisdiction which will have to be suffered on account of its unavailability before a higher authority. This Court in **Janardhan Reddy V. State of Hyderabad**, 1951 S.C.R. 344: (A.I.R. 1951 S.C.-217) after referring to a number of decisions observed that it is well settled that if a Court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction i.e., an appeal would lie to the Court to which it would lie if its order was with jurisdiction. We, therefore, agree with the appellants that the Chief Controlling Revenue Authority had full power to interfere with the Collector's order, provided it was found to be erroneous. Their difficulty, however, is that we do not find any defect in the Collector directing to take steps for the realization of the stamp duty."

12. From this decision of the apex court, if follows that the power exercised by the Collector under Section 47-A of the Act as applicable in Uttar Pradesh is subject to revision. An erroneous order or an order beyond jurisdiction passed by the Collector can always be corrected by the revisional authority, i.e., Chief Controlling Revenue Authority under Section 56(1) of the Act. The ratio of the decision in **Trudeshwar Dayal and another** (supra) is that under section 56 the Chief Controlling Revenue Authority has full powers to interfere with the Collector's order, provided it is found to be erroneous. On the strength of the above decision of the apex court, a Division Bench of this court has observed in **Jai Bhagwan Das and another Vs. State of U.P. and others**- 1991 R.D.-425 (H.C.) that for conferring revisional jurisdiction in sub-section (1) of Section 56, the key word is 'control'. Since any action taken under Chapter IV is subject to or conditional upon the control of the Chief Controlling Revenue Authority, any power exercised by the Collector under Chapter IV shall be subject to the revisional or supervisory jurisdiction of the Chief Controlling Revenue Authority. In another decision- **M/s Orai Oil Chemicals Pvt. Ltd. and another Vs. State of U.P. and others** A.I.R. 1997 Allahabad- 92, it was contended before this court that Section 56 of the Act does not confer power of revision on Chief Controlling Revenue Authority and that no revision is maintainable when the Collector exercised power under Section 47-A having held that the document is correctly stamped. This contention did not find favour with the court, which observed as follows:-

"Under the Stamp Act, the High Court is also given power to examine the chargeability of duty of any instrument under Section 60 while by reason of Section 57 the Chief Controlling Revenue Authority may also make a reference to the High Court. The Court has been given judicial power by virtue of Section 61 of the said Act. Thus we see that the Chief Controlling Revenue Authority is not powerless to examine or revise the decision of the Collector. Though on a different reason, I affirm the view of the Chief Controlling Revenue Authority with regard to the maintainability of the case before him ….."

13. The expression 'control' encompasses within its ambit the supervisory jurisdiction vested in the Chief Controlling Revenue Authority. The said authority cannot shut its eyes when the facts are brought before it that by certain machination, manipulations or otherwise, evasion of revenue has taken place thereby causing substantial loss to the State. As has been held in **Jagdish Narain V. Chief Controlling Revenue Authority and others-** A.I.R. 1994 Allahabad- 371, the sole object of the Act is to increase revenue and its provisions must be construed as having in view only the protection of revenue. Although the provisions contained in the Act impose pecuniary burdens and the Act is a fiscal enactment, yet considering the implication involved therein, its provisions must be given a construction which prevents undue hardship to the subject. It was further observed that this fact cannot be lost sight of that in a taxing statute, there is no room for any intendment or prescription or balancing of equities yet it has to be kept in mind that in the proceedings under Section 47-A of

the Act, Stamp Authorities who are only concerned with the collection of fiscal duty stand authorised and in fact called upon to re-determine the correct market value of the subject matter of the 'instruments' referred to therein in which the market value appears to have been incorrectly set forth. The entire exercise to be undertaken under the aforesaid provision appears to be with the objective to neutralise the effect of under-valuation of the property with a view to evading stamp duty.

14. The submission made by Sri Varma, learned Senior Advocate on behalf of the petitioner that the order passed by the Collector is conclusive and final in view of the provisions of sub-section (2) of Section 40 of the Act does not go too far. What sub-section (2) of Section 40 envisages is that every certificate issued under clause (a) of sub-section (1) shall, for the purposes of the Act, be conclusive evidence of the matter stated therein. The conclusiveness provided by the said provision to the certificate issued by the Collector has no relevance or bearing on the determination of the market value of the property for purposes of computing the stamp duty. From the scheme of the Sections, contained in Chapter IV of the Act, it would be apparent that the question as to what duty is chargeable on the instrument has to be decided in accordance with the procedure prescribed under Section 47-A of the Act (as applicable to the State of Uttar Pradesh). The re-determination of the correctness of the market value of the property which was the subject matter of the sale deed or an instrument in respect of the vacant land or the plant and machineries as well as residential constructions executed in favour of the petitioner under Section 47-A of the Act is subject to the direct control of the Chief Controlling Revenue Authority by virtue of the provisions of Section 56(1) of the Act. It cannot be pleaded, canvassed, argued or determined that the order of the Collector passed under Section 47-A of the Act enjoys total immunity even though it may be erroneous or may be the outcome of some extraneous circumstances. I have no hesitation in recording the finding that the order passed by the Collector under Section 47-A of the Act, as applicable to the State of U.P. is subject to the revision under section 56(1) of the Act.

15. A short and swift reference to another submission raised on behalf of the petitioner about the maintainability of the revision application may also be made. It is stated that the State of U.P. cannot challenge the order passed by its subordinate functionary. True it is that the District Magistrate is an officer subordinate to the State Government. He works directly under the control of the State Government with a hierarchy of a number of other officers over him. This fact, however, cannot be ignored that the Collector acts in different capacities. While exercising the powers under Section 47-A of the Act, he acts as quasi judicial authority as has been held in **Jagdish Narain's case (supra)**; **M/s Orai Oil Chemicals Pvt. Ltd. and another's** case (supra); and **Ama Stores represented by its Partner M.T.M. Abubacker Vs. Collector of Madras and another-** A.I.R. 1970 Madras- 148. The State of U.P. is the party to the proceedings under Section 47-A of the Act before the Collector. He (the Collector) records his finding with regard to the determination of the market value

of the property which is the subject matter of the instrument and the question of stamp duty payable thereon after taking into consideration the rival contentions of the parties including the State of U.P.. The State of U.P. has a right to lead evidence before the Collector and after determination and adjudication, according to the parameters laid down under Section 47-A of the Act, the Collector records his reasons and arrives at a conclusion. The Collector acts as a quasi judicial authority. The State of U.P. may be an aggrieved party on account of the erroneous exercise of the jurisdiction by the Collector or for variety of other circumstances. The State is interested in getting the revenue by recovering the stamp duty as provided by law. If the Collector has failed in the discharge of his duty faithfully or has acted on certain extraneous circumstances and, in any case, his findings are, per se, erroneous resulting in loss of revenue to the State and confers undue advantage on the beneficiaries under the instrument, the State certainly has a right to challenge his order before the authority which is vested with the power to exercise control over the Collector.

16. There is yet another aspect of the matter. The impugned order dated 22.12.2000 and other orders passed by the Chief Controlling Revenue Authority are purely of interlocutory nature and since no final orders have yet been passed in the pending revision application, it would be highly inappropriate to intervene in the matter by exercising extraordinary jurisdiction under Article 226 of the Constitution of India.

17. In the conspectus of above facts, there can be no doubt about the fact that an order passed by the Collector under Section 47-A of the Act, as applicable to the State of U.P. is subject to revision under Section 56(1) of the Act before the Chief Controlling Revenue Authority. The controversy raised by the petitioner about the maintainability of the revision application has been pressed into service with a view to procrastinate and delay its disposal. The controversy about the maintainability of the revision application cannot be sustained. The Writ Petition being without any merits or substance is liable to be dismissed.

18. In the result, the writ petition fails and is dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 26.4.2001

BEFORE
THE HON'BLE S. HARKAULI, J.

Civil Misc. Contempt Petition No. 1227 of 1998

Panna Lal ...Applicant
Versus
Alok Tandon, The District Magistrate, Allahabad ...Opposite Party

Counsel for the Applicant:
Sri Irshad Ali
Sri S.K. Pathak
Sri Bhagwat Prasad
Sri S.C. Kesharwani
Sri R.N. Bhakt

Counsel for the Respondents:
S.C.

Contempt of Courts Act- section 12- the question of validity of the transfer cancellation order cannot be examined in

contempt jurisdiction of this Court. It can be examined in a writ petition where alone the cancellation order, if found illegal, can be quashed and consequent mandamus can be issued. (Held in para 4)

In civil contempt jurisdiction it is only to be seen whether the order of this Court dated 20.1.1998 has been complied with by passing of order by the Collector of Allahabad relating to the entitlement of salary of the petitioner. Since the Collector has passed an order although slightly beyond the time fixed by the judgment dated 20.1.1998, and prima facie it cannot be said that the Collector while passing that order has in any manner tried to circumvent the Judgment of this Court. No action is called for in this contempt proceedings. This contempt petition is accordingly dismissed.

By the Court

1. Heard learned counsel for the petitioner and the learned Standing Counsel representing the opposite party. The petitioner is a lekhpal. He was posted at Bhognipur in Kanpur Dehat. By order dated 24.08.1996 passed by the Board of Revenue he was transferred from Bhognipur to Allahabad and he joined at Allahabad on 1.1.1997. The petitioner filed Civil Misc. Writ Petition No. 2110 of 1998 alleging that although he has joined on 1.1.1997 at Allahabad pursuant to his transfer, but he had not been paid his salary for the period from 1.1.1997 onward. The aforesaid writ petition was finally disposed of by judgment dated 20.1.1998 at the stage of fresh itself without granting any time to file counter affidavit. The relevant part of the judgment reads as follows:-

"The writ petition is finally disposed of with the direction that the District Magistrate, Allahabad shall himself look into the matter and pass appropriate order for the release of the salary of the petitioner from the date the petitioner joined at Allahabad. Appropriate order shall be passed by the District Magistrate Allahabad, respondent no. 2 within a period of one month from the date a certified copy of this order is produced before him. In case the District Magistrate comes to the conclusion that the petitioner is (not?) entitled to salary he shall record reasons thereafter (therefor?)."

2. A copy of the judgment dated 20.1.1998 is filed as Annexure 6 to the contempt petition. Pursuant to the said judgment, the Collector Allahabad passed an order dated 15.7.1998, a copy of which has been appended as Annexure C.A. 3 to the Counter Affidavit of the Collector Sri Alok Tandon. In the first paragraph it has been stated by the Collector Allahabad that Board of Revenue by its order dated 21.11.1997 has cancelled the transfer order of the petitioner dated 24.8.1996. Accordingly he has held that after cancellation of the transfer, the petitioner was not entitled to payment of salary for the subsequent period. Learned Counsel representing the petitioner has submitted that once the petitioner has joined pursuant to the transfer order, the same could not have been cancelled and the only option available to the Board of Revenue was to pass fresh order of transfer of petitioner. He has also submitted that the ground of cancellation as appears from the record is that the post at Allahabad is stated to be reserved for S.C./S.T. candidates. According to the learned counsel it may be open to reserve certain posts out of the total posts in the

cadre, or certain vacancies out of the total vacancies proposed to be filled in a particular selection, but in a cadre consisting of inter district transferable employees, reservation of particular post in a particular district can not be done.

3. Having heard learned counsel for the petitioner as well as learned Standing Counsel, I am of the opinion that the question of validity of the transfer cancellation order cannot be examined in contempt jurisdiction of this Court. It can be examined in a writ petition where alone the cancellation order, if found illegal, can be quashed and consequent mandamus can be issued.

4. In civil contempt jurisdiction it is only to be seen whether the order of this Court dated 20.1.1998 has been complied with by passing of order by the Collector of Allahabad relating to the entitlement of salary of the petitioner. Since the Collector has passed an order although slightly beyond the time fixed by the judgement dated 20.1.1998, and prima facie it cannot be said that the Collector while passing that order has in any manner tried to circumvent the Judgment of this Court (as the transfer cancellation is not by him but by the Board of Revenue), I am of the opinion that no action is called for in this contempt proceedings. This contempt petition is accordingly dismissed. The notices issued to the opposite party are hereby discharged. There will be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.4.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE O. BHATT, J.

Habeas Corpus Petition No. 8387 of 2001

Mukesh Kumar Gupta and another
...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Shri A.D. Giri
Shri Vijay Prakash
Shri A. Samad

Counsel for the Respondents/ Opposite parties:
A.G.A.
Shri Sanjay Kumar Singh
Shri S.N. Srivastava

Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974-section 3- the detention order- since the petitioner has been suspended on 5.10.2000, obviously thereafter he could not continue the said activity because he was doing those activities by virtue of his office, and since he is now no longer functioning in that office, there was no justification for passing the impugned detention order on 16.2.2001. (Held in para 4).

We are of the view that the impugned detention order is arbitrary and illegal. Hence we quash the impugned detention order dated 16.2.2001.

By the Court

1. Heard Sri A.D. Giri, learned Senior Advocate, Sri Vijay Prakash and Sri A. Samad, learned counsels for the

petitioners and Sri Sanjay Kumar Singh for the respondents.

2. The petitioner no. 1 has challenged the detention order dated 16.2.2001 Annexure 1 to the writ petition passed under Section 3 of the Conservation of Foreign Exchange & Prevention of Smuggling Activities Act, 1974 as amended. A counter affidavit has been filed by the respondent and by means of an amendment application the petitioner has placed on record the grounds of detention.

3. Several arguments have been advanced by the learned counsel for the petitioner but in our opinion the very first ground is sufficient to allow this petition. Learned counsel for the petitioner submitted that the allegation against the petitioner no. 1 who was Superintendent in Custom and Central Excise Department was that by misusing his office he was abetting smuggling activities. The petitioner no. 1 was suspended on 5.10.2000 while the detention order is dated 16.2.2001. In our opinion when the petitioner no. 1 was suspended on 5.10.2000 obviously he could not continue to do the alleged activity of abetting smuggling because he was doing those activities by virtue of his office as Superintendent, Custom and Central Excise. Learned counsel for the petitioner has rightly submitted that since the petitioner has been suspended on 5.10.2000 obviously thereafter he could not continue the said activity because he was doing those activities by virtue of his office, and since he is now no longer functioning in that office there was no justification for passing the impugned detention order on 16.2.2001.

4. We are in the agreement with this submission of the learned counsel for the petitioner and hence we are of the view that the impugned detention order is arbitrary and illegal. Hence we quash the impugned detention order dated 16.2.2001. However, in case the petitioner no. 1 is reinstated it will be open to the authorities to take appropriate action in accordance with law.

5. The petition is allowed. The petitioner no. 1 shall be released forthwith unless he is required in some other preventive detention or criminal case. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD APRIL 18, 2001

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

Civil Misc. Writ Petition No. 35289 of 2000

Rajendra Kumar Nigam ...Petitioner
Versus
District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Shri N.B. Nigam

Counsel for the Respondents:
S.C.

U.P. Urban Buildings (Regulation of Rent, Eviction and Letting) Act, 1972 (U.P. Act No. XIII of 1972)- Section 21 and 22- Any person who is aggrieved by an order passed under section 21 of the Act is legally entitled to maintain an appeal under section 22 of the Act, even though he may not have been a party in the release proceeding. (Held in para 8).

The appeal filed by the respondent no. 3 cannot be said to be incompetent as he is obviously aggrieved by the order passed under Section 21 of the Act. The land/lord, instead of contesting the appeal, has unnecessarily rushed to this Court for quashing the proceedings in the appeal. The petition lacks merits and is devoid of substance.

By the Court

1. The dispute relates to premises no. 115/95 Ashok Nagar Kanpur in which one late Arjun Lal was a tenant. Rajendra Kumar Nigam, the present petitioner who is landlord of the said premises, filed an application under Section 21(1)(a) of the U.P. Urban Buildings (Regulation of Rent, Eviction and Letting) Act, 1972 (Act no. XIII of 1972) (hereinafter referred to as 'the Act') which was registered as P.A. case no. 18 of 1996. The said release petition was allowed by the Prescribed Authority by order dated 11.3.1999. Late Arjun Lal or his legal heirs did not file any appeal under Section 22 of the Act and thus, the order of release dated 11.3.1999 became final.

2. The landlord moved an application under Section 23 of the Act for implementation/ execution of the order of release. In spite of the best efforts of the Prescribed Authority, the landlord could not be put in physical possession of the released accommodation on account of the obstruction/resistance put in by one Braj Behari Misra – (now respondent no. 3). It is maintained that Braj Behari Misra—respondent no. 3 was backed by one Sri Bhoodhar Misra, a member of the Legislative Assembly from Kanpur and, therefore, the police help was also not made available to translate the release order into action.

3. Braj Behari Misra—respondent no. 3 moved an application on 15.5.2000 before the Prescribed Authority to recall the order dated 11.3.1999. The application was rejected by the Prescribed Authority on 16.5.2000 with the observation that he was an unauthorized occupant. Thereafter, Braj Behari Misra – respondent no. 3 filed Rent Appeal No. 47 of 2000 under Section 22 of the Act asserting himself to be the tenant of the released accommodation. This appeal has been admitted by learned District Judge, Kanpur Nagar on 23.5.2000 and the operation of the original order of release dated 11.3.1999 has been stayed. It is in these circumstances that the landlord has invoked the extraordinary jurisdiction of this court under Article 226 of the Constitution of India to quash the order of the District Judge admitting the appeal and staying the order of release on the ground that an appeal at the instance of an unauthorized occupant against whom any order of release has been passed is not maintainable under Section 22 of the Act.

4. Counter and rejoinder affidavits have been exchanged. Heard Sri N.B. Nigam, learned counsel for the petitioner as well as Sri S.M. Dayal, appearing on behalf of the respondent no. 3.

5. The moot point for consideration and determination in the present writ petition is that whether Braj Behari Misra – respondent no. 3 who was not a party to the release petition and against whom the order of release is being enforced is entitled to maintain the appeal under Section 22 of the Act or not. Sri N.B. Nigam, learned counsel for the petitioner pointed out that the respondent no. 3 has been adjudged as an unauthorized occupant in proceedings under Section 23

of the Act and since the order passed under Section 23 is not subject to appeal under Section 22 of the Act, the appeal before learned District Judge is incompetent and, therefore, the interim order of stay passed by him in an appeal, which is not maintainable is vitiated. Sri Dayal has repelled the above submission and urged that an appeal under Section 22 may be filed by a person who is aggrieved by an order passed under Section 21 of the Act.

6. Section 22 of the Act, which requires interpretation, runs as follows:

"Any person aggrieved by an order under Section 21 or Section 24 may, within 30 days from the date of order, prefer an appeal against it to the District Judge, and in other respects, the provisions of Section 10 shall mutatis mutandis apply in relation to such appeal."

7. Braj Behari Misra- respondent no. 3 claims himself to be the tenant of the accommodation, in respect of which an order of release has been passed and it is alleged that his possession dates back prior to the year 1976. It was also pointed out that late Arjun Lal was not in occupation as a tenant of the accommodation which has throughout been in the possession of the respondent no. 3 as a tenant. The order of release passed under Section 21 of the Act is executable against the tenant as well as any other person who was let into possession by the tenant to frustrate the order of release. In the present case, it has to be seen whether Braj Behari Misra- respondent no. 3 was, in fact, the tenant of the accommodation which has been released treating late Arjun Lal as the tenant. The respondent no. 3 was not a party to the release petition. The application to recall the order of release moved by the respondent no. 3 before the Prescribed Authority failed. Braj Behari Misra- respondent no. 3 who claims himself to be the tenant in his own and independent right and not through late Arjun Lal against whom the release petition was filed, is undoubtedly an aggrieved person within the meaning of Section 22 of the Act. Any person who is aggrieved by an order passed under Section 21 of the Act is legally entitled to maintain an appeal under Section 22 of the Act, even though he may not have been a party in the release proceeding. This point came to be considered in different context in **Mohd. Arif Vs. IInd Additional District Judge, Kanpur Nagar**-1991 (2) A.R.C.-86. In that case, Mohd. Arif- the petitioner made an application for impleading him as a party on the ground that he was also a co-tenant in the accommodation in dispute in respect of which an application for release under Section 21(1)(a) of the Act was moved. The Prescribed Authority rejected the application. Mohd. Arif who claims himself to be the co-tenant, approached this Court by filing a writ petition. Though the writ petition was dismissed, it was observed:

"……In case, an order of release is ultimately passed in respect of the accommodation, in which Mohammad Arif claims to be also a co-tenant and in case he feels aggrieved by the final order, he may have a right to file an appeal under Section 22…… A reading of the above provision would made it clear that any person aggrieved by an order under Section 21 (1)(a), has a right of filing an appeal under Section 22. Section 22 of the

aforesaid Act does not state that any party aggrieved by an order under Section 21 of the aforesaid Act is only entitled to file an appeal. The word 'any person aggrieved' is significant. It means that a person, who is affected or is aggrieved by an order passed under Section 21 of the aforesaid Act shall have a right to file an appeal although he may not be a party to the proceedings."

8. The appeal filed by the respondent no. 3 cannot be said to be incompetent as he is obviously aggrieved by the order passed under Section 21 of the Act. The landlord, instead of contesting the appeal, has unnecessarily rushed to this Court for quashing the proceedings in the appeal. The petition lacks merits and is devoid of substance.

9. It is accordingly dismissed. The parties shall bear their own costs. On the production of a certified copy of this order, the appellate court shall decide Appeal No. 47 of 2000 filed by Braj Behari Misra- respondent no. 3 under Section 22 of the Act positively within 30 days after hearing the concerned parties. Sri Dayal, learned counsel for the respondent no. 3 states that the respondent no. 3 shall not, in any manner, delay the disposal of the appeal and extend due cooperation in getting the appeal decided within the time specified.

10. It is also made clear that the appellate authority shall not be influenced, in any manner, by any observation made by this Court in this judgement and shall decide the appeal according to law taking his own independent view.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED, THE ALLAHABAD: 27.2.2001

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

Civil Misc. Writ Petition No. 17750 Of 1992

Micro Abrasives (India) Limited ...Petitioner

Versus

Dhanvir Singh & another ...Respondents

Counsel for the Petitioner:
Shri R.K. Shukla
Shjri S.K. Gupta

Counsel for the Respondents:
Shri Ashok Khare
Shri S.D. Shukla
Shri Atul Mehara

U.P. industrial Disputes Act, 1947, section 6-N, a probationer cannot be terminated or discharge from the service without complying the provisions of the said section.

(Held in para 12)

That respondent had worked for 240 days and his termination of service without complying with mandatory provision of section 6-N rendered the discharge or termination invalid. The apex court in Vikramaditya Pandey v. Industrial Tribunal, Lucknow and another JT 2001 SC 608 has held that, "Ordinarily, once the termination of service of an employee is held to be wrongful or illegal the normal relief of reinstatement with full back wages shall be available to the employee, it is open to the employer to specifically plead and establish that there were special circumstances which warranted either non-reinstatement or non-payment of back wages. 'No foundation has been laid down in this petition or before the

labour court mentioning any special circumstances which may disentitle the respondent from being awarded back wages. Since the respondent was retrenched without payment of any retrenchment compensation, in violation of section 6-N he was entitled for reinstatement with full back wages.

By the Court

1. The questions that arise for consideration in this petition are whether an appointment of a probationer contrary to model standing orders is invalid appointment, if so, its effect; whether clause (bb) of Section 2 (oo) of the Industrial Disputes Act, 1947 (Central Act) is applicable in State of Uttar Pradesh; whether a probationer can be terminated or discharged from the service without complying the provisions of the Section 6-N of the U.P. Industrial Disputes Act, 1947 (U.P. Act); whether termination or discharge of a probationer after expiry of maximum probationary period amounts to retrenchment; whether the workman is entitled for reinstatement and back wages?

2. The petitioner appointed Dhanvir Singh the respondent no. 1 on 1.1.1987 as an Office Assistant on probation for a period of six moths. The appointment letter mentioned that if the work of the respondent is found satisfactory, he would be absorbed in the factory and if it is not found satisfactory, then his service could be terminated even earlier than six months. It further provided that the probationary period could be extended by another six months. The probationary period of the petitioner was extended by another six months w.e.f. 1.7.1987 by order passed on 26.6.1987. The workers of the petitioner's concern went on strike from 10.12.1987 till 16.2.1988. The respondent joined the strike and did not attend his duties during this period. The works manager of the petitioner's company passed an order on 15.3.1988 that as the work of the respondent was not satisfactory during the probationary period, he was discharged from the service w.e.f. 16.3.1988. The respondent raised industrial dispute. The State Government exercising powers under Section 4-K of the U.P. Industrial Disputes Act, 1947 (in brief the U.P. Act) made a reference to the Labour Court U.P., Rampur the respondent no. 2. It was registered as Adjudication case No. 50 of 1991. The respondent no. 2 by its award dated 31.10.1991, published on 24.3.1992 accepted the claim of respondent and held that the termination of respondent from the service was illegal, the respondent was entitled for reinstatement with all benefits of service which he would have received had he been on work. The petitioner challenged the award dated 31.10.1991 by means of this writ petition. This court on 19.5.1992 passed an interim order and stayed the operation of the award to the extent that it granted back wages to the respondent. It directed that the respondent would be paid future wages from the month of June 1992 and it shall be open to the petitioner to take or not to take work from the respondent.

3. I have heard Sri Shashi Kant Gupta the learned counsel for the petitioner and Sri Ashok Khare the learned senior counsel assisted by Sri S.D. Shukla for the respondent no. 1 and Sri Atul Mehra brief holder State of U.P. appearing for the respondent no. 2.

4. Sri Shashi Kant Gupta the learned counsel for the petitioner has urged that

clause (bb) has been added in Section 2 (oo) of the Industrial Disputes Act 1947 (in brief Central Act) by amending Act No. 49 of 1984, w.e.f. 18.8.1994. Under clause (bb) a probationer can be discharged form the service. He placed reliance on the decisions of the apex court in M. Venugopal v. The Divisional Manager, Life Insurance Corporation of India, Andhra Pradesh and another AIR 1994 SC 1343, and State of Rajasthan v. Rameshwar Lal Gahlot 1999 (77) FLR 38. He also relied on Division Bench decision of this court in Smt. Pushpa Agarwal v. Regional Inspectors of Girls Schools, Ist Region Meerut and another 1995 (70) FLR 20 and the decision of Karnataka High Court in C.M. Jitendra Kumar v. the Management Bharat Earth Movers Ltd. and another 1985 LIC 1833. He further urged that respondent was appointed on probation and his probationary period was extended and he had been discharged from the service by order dated 15.3.1988 w.e.f. 16.3.1988. The termination of service for unsatisfactory work could constitute motive and not foundation, therefore, no right accrued to the respondent to continue in service of the petitioner. He placed reliance on the decisions of the apex court in Krishnadevaraya Education Trust and another v L.A. Balakrishna JT 2001 (1) SC 617, Chandra Prakash Shahi v. State of U.P. and others(2000) 5 SCC 152, Oswal Pressure Die Casting Industry, Faridabad v. Presiding Officer and another (1998) 3 SCC 225, High Court of Judicature at Patna v.Pandey Madan Mohan Prasad Sinha and others (1997) 10 SCC 409, Kunwar Arun Kumar v. U.P. Hill Electronics Corporation Ltd. and others (1997) 2 SCC 191, K.V. Krishnamani v. Lalit Kala Academy AIR 1996 SC 2444, Municipal Corporation, Raipur v. Ashok Kumar Misra, AIR 1991SC 1402, State of U.P. and another v. K.K. Shukla (1991) SCC 691, State of Gujrat v. Sharad Chand Manohar neva AIR 1988 SC 338 and (Shri) Dhanjibhai Ramjibhai v. State of Gujrat (1985) 1 SCJ 86. The learned counsel further urged that no finding has been recorded by the labour court that the respondent had worked for the period 240 days nor any violation of standing orders has been alleged before the labour court, therefore, the award of the labour court is liable to be set aside. The respondent is not entitled for reinstatement and back wages.

5. On the other hand Sri Ashok Khare the learned counsel for the respondent has urged that clause (bb) of Section (oo) of the Central Act is not applicable to the State of Uttar Pradesh. The workmen working in the State of U.P. and their terms of employment are governed by the U.P. Act and the provisions of clause (bb) of the Central Act cannot be read in U.P. Act. He placed reliance on a Division Bench decision of this court in **Jai Kishun and others v. U.P. Co-operative Bank Ltd., Lucknow and others** (1989) 2 UPLBEC 144 and a single judge decision of this court in **Mohamad Husain v. Labour Court at Varanasi and another** 1994 LIC 2403. He urged that since clause (bb) of Section (oo) of the Central Act is not applicable and the terms of employment would be governed by U.P. Act and since there is no provision in U.P. Act similar to clause (bb) of the Central Act, therefore, the law laid down by the Constitution Bench of the apex court in **Punjab land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer Labour Court, Chandigarh and other** (1990) 3 SCC

682 would be applicable to the facts of this case and termination of respondent without complying the mandatory provision of Section 6-N of U.P. Act would render the termination or discharge illegal. The learned counsel further urged that Model Standing Orders was applicable to the petitioner's concern. It provides that a workman could be appointed on probation for a period of three months. The petitioner had appointed the respondent on a probation period of six months which was contrary to the model standing orders, therefore, the appointment of the respondent cannot be treated to be on probation. An invalid appointment is not covered in the exceptions provided under Section 6-N of the U.P. Act or clause (bb) of section 2 (oo) of the Central Act. Since respondent had worked for 240 days continuously in a calendar year he became regular employee of petitioner and his service could not be terminated without payment of retrenchment compensation. He placed reliance on the two Division Bench decisions of Madhya Pradesh High in Rajesh Kumar and others v. State of Madhya Pradesh and others 1994 (2) LLJ 320 and Suresh Chandra Mathe v. Jiwaji University, Gwalior and others 1994 (2) LLJ 462. He further relied on the single judge decisions of the Punjab and Haryana High Court in Gidderbaha Co-operative Marketing-cum-Processing Society Ltd. v. Presiding Officer Labour Court and another 1996 (!) LLJ 644 and another decision of Bombay High Court in Alexander Yesudas Maikel v. Perfect Oil Seals and IRP and others 1996 (1) LLJ 533. He further urged that the respondent did not join the strike nor he was absent from 10.12.1987 to 16.2.1988. He urged that from the award it is clear that the respondent continuously worked from 1.1.1987 to 16.3.1988 and completed more than 240 days, therefore, the petitioner could not discharge or terminate the respondent from service without complying with the provision of Section 6-N of the U.P. Act. The learned counsel for the State of U.P. appearing for respondent no. 2 supported the award.

6. The question is whether an appointment of a probationer contrary to model standing orders is invalid appointment, if so, its effect? In its award the labour court has recorded a finding that the respondent was appointed for period of six months as office assistant on probation. The model standing orders provided in U.P. Industrial Employment (Standing Orders) Rules 1946 (as applicable in 1988) are applicable to petitioner's factory. Standing order 3 (b) lays down that, "A permanent workman is a workman who has been engaged on a permanent basis and includes any person who has satisfactorily completed a probationary period of three months in the same or another occupation in the industrial establishment." Standing order 3 (c) lays down that, "A probationer is a workman who is provisionally employed to fill a permanent vacancy and has not completed three months in that occupation." Under the model standing orders the petitioner could not appoint the respondent on probation for more than three months. The appointment of respondent on probation for six months was contrary to the provisions of model standing orders. The appointment of respondent on probation could be for three months only. Even if the appointment was on probation of six months and was an invalid appointment its effect in law would be that the respondent could be treated on probation

for period of three months only because period of six months mentioned in the appointment letter was invalid and inconsistent with the standing order, therefore, the discharge of respondent would be invalid. (See, The Indian Tobacco Company Ltd. v. The industrial court and others 1990 (60) FLR 403). The model standing orders do not provide for any extension of probationary period. The respondent after three months became permanent or regular workman as provided by standing order 3 (b). In any case the petitioner cannot be permitted to take advantage of his own mistake and claim that since respondent's appointment was for six month it was contrary to the model standing orders and invalid. The longer period of probation mentioned in the appointment order did not make the appointment invalid but rendered the period beyond three months surplus age. That has to be ignored. The right of the respondent has to be decided treating him as a valid appointee on probation for three months. The termination of service of a workman for any reason whatsoever except excluded by section 6-N amounts to retrenchment. The High Courts of Madhya Pradesh, Punjab and Haryana and Bombay in Rajesh Kumar (supra), Suresh Chandra Mathe (supra) and Gidderbaha Cooperative Marketing –cum Processing Society Ltd. (supra) and A.Y. Miakel (supra) have held that services of the probationer cannot be terminated without complying the mandatory provisions of retrenchment, therefore, since the petitioner had terminated the services of the respondent without complying with the provisions of Section 6-N of the U.P. Act, the termination or discharge was illegal and the award of the labour court does not suffer from any infirmity.

7. The next question in this case is whether clause (bb) of Section 2 (oo) of the Industrial Disputes act, 1947 (Central Act) is applicable in Uttar Pradesh? The condition of the service of workmen in Uttar Pradesh is governed by the provisions contained in U.P. Act. The question whether definition of the work "retrenchment" as defined in section 2 (s) of the U.P. Act or amended definition under clause (bb) of section 2 (oo) of Central Act would apply in State of U.P. came up for consideration before the Division Bench of this court in **Jai Kishun** (supra). The Division Bench examined both the definitions of retrenchment contained in U.P. Act and Central Act and held that the provisions of U.P. Act would prevail over the Central Act in the matters relating to rights and liabilities of employer and workmen in a case of retrenchment and in matters of retrenchment Section 6-N of the U.P. Act would be applicable. The observation of the Division Bench in paragraphs 25 and 26 is extracted below:-

"25. From a perusal of the two provisions quoted above, it is clear that an inconsistency exists in regard to the applicability of the provisions contained in Chapter V-A of the Central Act and the provisions contained under Sections 6-J to 6-q of the U.P. Industrial Disputes Act. In this connection, we find that the Industrial Disputes Act, 1947 came into force on April 1, 1947. The U.P. Industrial Dispute Act came into force on February 1, 1948 after receiving the assent of the Governor General of India under section 76 of the Government of India Act, 1935. Section 6-R has been added to the U.P. Industrial Disputes Act in the year 1957 by U.P. Act No. 1 of 1957. The President had accorded assent to U.P. Act No. 1 of 1957

on December 29, 1956. It was published in the Gazette of Uttar Pradesh dated January 2, 1957. So far Section 25-J of the Central Act is concerned, it was existing since prior to passing of U.P. Act No. 1 of 1957. Section 25-J of the Central Act was also amended by Act No. 36 of 1964 with effect from 19.12.1964 but by this amendment only proviso to sub-section (1) of Section 25-J was added. The other provisions which are material namely, sub-section (1) and sub-section (2) of Section 25-J remained the same as existing from before. From the above facts, it is clear that addition of Section 6-R to the U.P. Act was made by an amendment in the year 1957 i.e. subsequent to the existing provision contained under Section 25-J of the Central. Article 254 of the Constitution is attracted in cases where there exists conflict between the two provisions of the Statutes, on passed by the Parliament and the other, by the State Legislature. In such cases, it is the State law which is to prevail provided it has received the assent of the President and has been passed subsequent to the act made by the Parliament. This position is clear from clause (2) of Article 254 of the Constitution. As observed earlier, inconsistency exists between the two provisions namely, Section 25-J of the Central Act and Section 6-R of the U.P. Act. Both cannot operate simultaneously and one will have to give way to the other. Provisions contained under Section 6-R of the U.P. Act being a subsequent law, having been passed after receiving assent of the President shall override and provisions contained under Section 25-J of the Central Act as it was already existing since prior to 1957. The subject matter of legislation is undisputedly in the concurrent list. Therefore, we hold that in view of Article 254 (2) of the Constitution, provisions of Section 6-R of the U.P. Act will prevail over the provisions of Section 25-J of the Central Act, i.e. to say, in the State of Uttar Pradesh, in the matters relating to rights and liabilities of employers and workmen, in a case of retrenchment, Section 6-N of the U.P. Act will be applicable.

26. Once we have come to the conclusion that the provisions of the U.P. Act will be applicable in the State of Uttar Pradesh in the matters relating to retrenchment, there remains no difficulty in holding that the definition of the work 'retrenchment' as given under the U.P. Act will be applicable. It is well settled that the word which has been defined in a statute has to be given the same meaning whenever occasion arises while applying the provisions of the statute concerned. The definition provided in a statute is not to be applied while interpreting the provisions of a different Act. The result would, therefore, be that the petitions in hand would be covered by the decisions of the Hon'ble Supreme court referred to in the earlier part of this judgment holding that cessation of employment brought about without complying with the provisions of Section 25-J of the Industrial Disputes Act, as then stood, would be illegal and void. The decisions of the Hon'ble Supreme Court are based on unamended definition of the word 'retrenchment' as defined under Section 2 (oo) of the Industrial Disputes Act, which was the same as it is under the U.P. Act."

8. Thus, it is clear that provision of clause (bb) of Section (oo) of the Central Act is not applicable in State of U.P. Act. Therefore, the law laid down by the apex court in M. Venugopal (supra) and

Rameshwar Lal Gahlot (supra) wherein amended sub-clause (bb) inserted in 1984 in Section (oo) has been considered would not apply to the facts of this case. The decision of Karnataka High court in C.M. Jitendra Kumar (supra) is also not applicable and it had not been accepted by the same High court in S.N. Vasudevan and others v. Management of Bharat Fritz Werner Pvt. Ltd. and others 2000 (86) FLR 986. A Division Bench of this court in Smt. Pushpa Agarwal (supra) has held that if amendment in Central Act has been made after the law was enacted by the State, it will prevail over the State Act. It further held that clause (bb) of section 2 (oo) of the Central Act will be applicable to every case wherever the question of validity of termination of service is raised on the ground of noncompliance of Section 6-N of the U.P. Act. This Division Bench has not taken notice of earlier Division Bench in Jai Kishun (Supra). Section 6-R has been added in U.P. Act by U.P. Act no. 1 of 1957 after receiving the assent of the President on 29.12.1956. It was published in U.P. Gazette on 2.1.1957. Prior to coming into force of section 6-R in 1957 there was supremacy of the Central Act in matters of retrenchment by virtue of sub-section 2 of Section 25-J of the Central act but once the section 6-R received the assent of the President it held the field. Further clause (bb) applies to termination of service of a workman as a result of non-renewal of contract of employment. It would not apply to termination for unsatisfactory performance during probation. It has already been held that the respondent had completed his probationary period of three months, he became a regular workman whose service could not be terminated. Proviso to Article 254 (2) carves out an exception by providing that the Parliament can enact a law on same matter subsequently and in that case latter Central Law would prevail. But the expression “same matter” is significant. Clause (bb) added to section 2 (oo) of Central act is not on same matter, as is covered by section 6-R of the U.P. Act, therefore, in matters of retrenchment the U.P. Act holds the field even now.

9. In Uptron India Ltd. v. Shammi Bhan and another (1998) 6S.C.C. 538 the apex court was not concerned with the question whether in view of section 6-R of the U.P. Act the amendment made in 1984 in section 2 (oo) of the Central Act by which clause (bb) was added would apply to State of Uttar Pradesh in view of Article 254 (2) of the Constitution.

` 10. The next question is whether a probationer can be terminated or discharged from the service without complying the provisions of the Section 6-N of the U.P. Act? If the employer terminates the services of a workman who had been in continuous service for one year, unless it falls within one of the exceptions mentioned in clauses (a) to (c) of section 6-N, it amounts to retrenchment. The Constitution Bench of the apex court in Punjab Development and Reclamation Corporation Ltd. Chandigarh (supra) considered unamended Section 2 (oo) of the Central Act and held that "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section." None of the clauses (a) to (c) apply to the discharge of respondent for the petitioner's case is that the respondent was terminated under any clauses (a) to (c) of Section 6-N. From the records of this case, it is clear that the

respondent had worked for a period of 240 days. The claim made by respondent in paragraph 2 of the written statement that he had worked for 240 days had not been specifically denied before the labour court by the petitioner in the rejoinder statement. The labour court had recorded a finding of fact that no warning letter or charge-sheet with regard to strike was given by petitioner to the respondent. It further recorded the finding that the respondent had worked from 11.1.1987 to 16.3.1988 for a period of more than one year. Therefore, the claim of the respondent that he worked for a period of 240 days had not been specifically disputed by the petitioner before the labour court nor any evidence was led to disprove the claim, therefore, it is clear that the respondent worked for more than 240 days. Even if it is assumed that the respondent was on strike from 10.12.1987 he completed 240 days in a calendar year. The respondent has worked for the period 240 days, therefore, he could not be retrenched from the service without complying with the mandatory provision of Section 6-N of the U.P. Act.

11. The next question is whether termination or discharge of a probationer after expiry of maximum probationary period amounts to retrenchment? The terms of the appointment letter, Annexure-1 to the writ petition, clearly demonstrate that the respondent was appointed on 1.1.1987 on probation for a period of six months, which could be extended further for another period of six months. The petitioner claimed that they have extended the probationary period of the respondent w.e.f. 1.7.1987, for a period of six months. The extended probation period of six months came to an end on 31.12.1987. The respondent continued in service even after the expiry of maximum probationary period. The petitioner terminated his service on 15.3.1988 w.e.f. 16.3.1988, after the maximum probationary period of one year, as per the terms of appointment letter had expired which was not permissible. After expiry of maximum probation period the respondent became regular employee of the petitioner. He could not be discharged or terminated from the service treating him to be a probationer, without complying with the provisions of Section 6-N of the U.P. Act. The apex court in State of Punjab v. Dharam Singh AIR 1968 SC 1210, Om Prakash Maurya V. U.P. Co-operative Sugar Factories Federation, Lucknow AIR 1986 SC 1844 and M.K. Agarwal v. Gurgaon Gramin Bank AIR 1988 SC 286 has laid down that after expiry of maximum probationary period the employee could not be treated on probation but shall be deemed to have been confirmed. Even though these decisions were not concerned with the Industrial Disputes Act but the general principle laid down in these decisions cannot be ignored. The decisions relied upon by the learned counsel for the petitioner in Krishnadevarya Education Trust (supra), C.P. Shahi (supra), Oswal Pressure Die Casting Industry (supra), Pandey Madan Mohan Prasad Sinha (supra) Kunwaar Arun Kumar (supra), K.V. Krishnamani (supra), Ashok Kumar Misra (supra), K.K. Shukla (supra), (Shri) Dhanji Bhai Ramjibhai (supra) and Sharad Chandra Manohar Neva (supra) are of no help to the petitioner.

12. The next question is whether the workman is entitled for reinstatement and back wages? I have held that respondent had worked for 240 days and his

termination of service without complying with mandatory provision of section 6-N rendered the discharge or termination invalid. The apex court in Vikramaditya Pandey v. Industrial Tribunal, Lucknow and another JT 2001 (1) SC 608 has held that, "Ordinarily, once the termination of service of an employee is held to be wrongful or illegal the normal relief of reinstatement with full back wages shall be available to the employee; it is open to the employer to specifically plead and establish that there wear special circumstances which warranted either non-reinstatement or non-payment of back wages." No foundation has been laid down in this petition or before the labour court mentioning any special circumstances which may disentitle the respondent from being awarded back wages. Since the respondent was retrenched without payment of any retrenchment compensation, in violation of section 6-N he was entitled for reinstatement with full back wages.

13. For the reasons aforesaid, I do not find any merit in this petition. The writ petition fails and is dismissed.

14. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: MAY 3, .2001

BEFORE
THE HON'BLE YATINDRA SINGH, J.

Civil Misc. Writ Petition No. 13171 of 2001

Kesh Dutt Pandey ...Petitioner
Versus
Senior Regional Manager and others ...Respondents

Counsel for the Petitioner:
Shri Somesh Khare

Counsel for the Respondents:
S.C.
Shri Satya Prakash

The food Corporation of India Staff Regulations, 1971- sections 67 and 68- an appeal lies against the order of dismissal under regulation 68 (ii)- regulation 67 (ii) is restricted to interlocutory orders or orders step in aid of final disposal of disciplinary proceedings (except in a case of a suspension order): leaving the scope of final order imposing penalty to regulation 68 (ii).

(Held in Para No. 15)

The intention of regulation 67 is to bar appeal at interlocutory stage so that disciplinary proceedings may not prolong. If this is the purpose of regulation 67 and some meaning is to be given to regulation 68, then regulation 67 (ii) is restricted to interlocutory orders or orders step in aid of final disposal of disciplinary proceedings (except in a case of a suspension order): leaving the scope of final order imposing penalty to regulation 68 (ii). If these provisions are so read then the order dismissing the petitioner is appealable under Regulation 68 (ii) of the Regulation. The appellate authority can

go into factual position, it is more efficacious than a writ petition.

By the Court

1. This writ petition involves with the interpretation of regulation 67 and 68 of the Food Corporation of India Staff Regulations, 1971 (the Regulations). The question is whether an appeal lies against the order of dismissal under regulation 68 (ii) or is it barred under regulation 67 (ii)?

The Facts

2. The petitioner was an employee of the Food Corporation of India (the FCI). He was charge-sheeted on 30.3.2000 for misappropriating of rice stocks during November 1991, thus casing a financial loss to the FCI. An inquiry officer was appointed who submitted his report. The inquiry report was served upon the petitioner. He was dismissed from service on 8.2.2001 after considering his explanation. Hence the writ petition.

The Parties Submission

3. I have heard Sri Somesh Khare, counsel for the petitioner and Sri Satya Prakash, counsel for the F.C.I. The respondents have raised preliminary objection that.

- An appeal lies against the order dated 8.2.2001 dismissing the petitioner from service under Regulation 68 (ii) of the Regulation:
- The appellate authority can go in question of facts and is more efficacious than the writ jurisdiction.
- The petitioner may be relegated to the alternative remedy.

4. The petitioner submits that in view of Regulation 67 (ii) no appeal lies under Regulation 68 (ii) and as such writ petition can not be dismissed on the ground of the alternative remedy. He submits that no appeal lies because of following reasons.

- Regulation 67[1] starts with the words 'Notwithstanding anything contained in these regulations' and it prevails over any other provision in the Regulations.

Regulation 68[2] begins with the words 'Subject to provision of Regulation 67' and it is subordinate to Regulation 67.

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[1] **67 Appeals:**
Orders against which no appeal lies----
Notwithstanding anything contained in these regulations, no appeal shall he against:
(i) any order made by the Board:
(ii) any order of an interlocutory nature or of the nature of a step-in-aid or the final disposal of a disciplinary proceeding, other than an order of the final disposal of a disciplinary proceeding, other than an order of suspension.
(iii) any order passed by an inquiring authority in the course of an inquiry under Regulation 58.

[2] **68. Orders against which appeals lie:**
Subject to the provisions of Regulation 67, an employee of the Corporation may prefer an appeal against all or any of following orders, namely:
(i) an order of suspension made or deemed to have been made under Regulation 66;
(ii) an order imposing any of the penalties specified in Regulation 54 whether

Regulation 67 (ii) says that no appeal shall lie against the final disposal of any disciplinary proceedings.

- The order dismissing the petitioner from service is final disposal of disciplinary proceeding.

5. The petitioner has cited two decisions[3]. The first one is a division bench decision of this Court that explains.

'When the words are clear and unambiguous, then there is no room for intendment and the words should be given their plain and clear meaning, as they appear to be'.

The other one is a decision of the Apex court that says.

'In cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision'.

6. There is no dispute with the above propositions. There is no doubt that regulation 67 prevails over regulation 68. But the question is what is the correct interpretation of the Regulation 67 (ii)? Does it bar an appeal against the order imposing penalty.

7. The relevant part of regulation 67 is as follows:

67. Not withstanding anything contained in these regulation, no appeal shall lie against:

---

made by the disciplinary authority or by any appellate or reviewing authority,

(iii) an order enhancing any penalty, imposed under Regulation 54;

(iv) an order which----

(a) denies or varies to his disadvantage his pay, allowance, and other retirement benefits as regulated by regulations or by agreement; or

(b) reducing or withholding the terminal benefits or denying the maximum terminal benefits admissible to him under the regulations;

(c) determining the subsistence and other allowances be paid to him for the period of suspension or for the period during which he is deemed to be under suspension or for any portion thereof;

(d) determining his pay and allowances---

(i) for the period of suspension, or

(ii) for the period from the date of his dismissal, removal, or compulsory retirement from service, or from the date of his reduction to a lower grade, post, time scale or stage in a time-scale of pay, to the date of his reinstatement or restoration to his grade or post or

(e) determining whether or not the period from the date of his suspension or from the date of his dismissal, removal, compulsory retirement or reduction to a lower grade, post, time-scale of pay or stage in a time-scale of pay to the date of his reinstatement or restoration to his grade or post shall be treated as a period spend on duty for any purpose.

Explanation; In this regulation.

(i) the expression 'employee of the Corporation' includes a person who has ceased to be in the service of the Corporation;

(ii) the expression 'terminal benefits' includes gratuity and any other retirement benefit.

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[3] M.P. Tandon and others vs. Chief Justice High Court Allahabad and others, 1984 UPLBEC 1407, and J.K. Cotton Spinning and Weaving Mills Co. Ltd. vs. State of UP, AIR 1961SC 1170.

(ii) any order of an interlocutory nature or of the nature of a step-in-aid or the final disposal of a disciplinary proceeding, other than an order of suspension;

8. The petitioner lays emphasis on the word 'or' between the clause 'of the nature of a step-in-aid and the clause ' the final disposal of the disciplinary proceedings'. According to him this shows clause final disposal of disciplinary proceeding is independent of the earlier clauses and the appeal against final disposal of disciplinary proceeding is barred. According to him regulation 67 (ii) should be broken into three different clauses and no appeal lies against any order.

(i) of Interlocutory nature, or

(ii) of the nature of step-in-aid, or

(iii) the final disposal of disciplinary proceedings (other than order of suspension).

9. The petitioner submits that :

- the petitioner has been dismissed from service;
- it is final disposal of disciplinary proceedings; and
- no appeal lies.

10. The respondents submit that:

- This interpretation is literal and arises out of use of words 'or' after the words 'step-in-aid' in regulation 67 (ii).

- It renders regulation 67 (ii) awkward.

In case this Interpretation is accepted then regulation 68 (ii) will become redundant.

This sub-regulation is as follows:

68. Subject to the provisions of Regulation 67, an employee of the Corporation may prefer an appeal against all or any of the following orders, namely:

(ii) an order imposing any of the penalties specified in Regulation 54 whether made by the disciplinary authority or by any appellate or reviewing authority.

Decision

11. It is said that while interpreting a provision, intention or purpose behind it may be seen. Justice Franfurther once observed. 'There is no surer way to misread a document than to read it literally.' On the other occasion, Justice Holmes said ‘The meaning of the sentence is to be felt rather than proved’. So should be the case here.

12. It is settled law that while interpreting different provisions harmonious construction is to be adopted and no provision should be interpreted in such a way so as to render any other provision redundant. The Apex Court in JKCSW Mills vs. State of UP[4] observed.

'In the interpretations of the Statutes the courts always presume that the legislature inserted every part there for a purpose and legislative intent in is that every part of the statue should have effect.'

[4] AIR 1961 SC 1170 (Paragraph 7)

In case interpretation suggested by the petitioner is accepted, it would make part of regulation 68 redundant.

13. The Apex Court in Maharashtra SFC vs. Jaycee Drugs and Pharma[5] said,

'It is a settled rule of interpretation of statutes that if the language and the words used are plain and unambiguous, full effect must be given to them as they stand and in the garb of finding out the intention of legislature no words should be added there to or subtracted therefrom. Likewise it is again a settled rule of interpretation that statutory provisions should be construed in a manner which sub serves the purpose of the enactment and does not defeat it and that no part thereof is rendered surplus or otiose'

Regulation 67 (ii) and 68 (ii) have to be interpreted in light of these principles.

14. Regulation 68 (ii) shows that appeal will lie against the order imposing penalty. The order finally deciding the disciplinary proceeding dismissing the petitioner imposes penalty under regulation 54. In case petitioner's submission is accepted then this clause will become redundant.

15. The disciplinary proceedings should end quickly. The intention of regulation 67 is to bar appeal at interlocutory stage so that disciplinary proceedings may not prolong. If this is the purpose of regulation 67 and some meaning is to be given to regulation 68, then regulation 67 (ii) is restricted to interlocutory orders or orders step in aid of final disposal of disciplinary proceedings (except in a case of a suspension order): leaving the scope of final order imposing penalty to regulation 68 (ii). If these provisions are so read then the order dismissing the petitioner is appealable under Regulation 68 (ii) of the Regulation. The appellate authority can go into factual position: it is more efficacious than a writ petition. The writ petition is dismissed on the ground of alternative remedy.

16. I am deciding the writ petition on the ground of alternative remedy. Some time has already been spent, in view of this, in case any appeal is filed the appellate authority may decide the same on merits at an early date.

The Word 'Or' is Misplaced'

17. I have interpreted regulation 67 (ii) according to its purpose so that regulation 68 (ii) may not become redundant. But use of the word 'or' in regulation 68 (ii) after the words 'step-in-aid' is odd. Central Civil Services (Classification, Control and Appeal) Rules, 1965 contains similar provisions. Rules 22 and 23 are similar to regulations 67 and 68. The word 'or' was initially there in Rule 22 between the words 'step-in-aid' and the words 'the final disposal of disciplinary proceedings'. This was amended by Central Civil Services (Classification, Control and Appeal) Amendment Rules, 1996. Now in place of word 'or' the word 'of' has been substituted. This has clarified the meaning. The FCI may also remove this ambiguity.

[5] 1991 (2) SCC637 Paragraph 16. Same principles were applied in Shadi Singh Vs Rakha 1992 (3) SCC 55

CONCLUSION

My conclusions are as follows:

(i) Regulation 67(ii) does not bar filing of an appeal against final disposal imposing penalty under regulation 54.

(ii) An appeal lies against the final order imposing penalty under Regulation 68 (ii)

(iii) The order dated 8.2.2001 imposes penalty and the petitioner can file appeal against the same.

(iv) The writ petition is dismissed on the ground of alternative remedy. In case appeal is filed it may be decided on merits, at an early date.

With these observations the writ petition is disposed off.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.5.2001

BEFORE
THE HON'BLE S. HARKAULI, J.

Civil Misc. Contempt petition no. 3961 of 2000

Smt. Shakuntala Goswami ...Petitioner
Versus
Smt. Saroj Chaudhary and others
...Opposite parties

Counsels for the Petitioner:
Mr. P.K. Goshwami
Mr. T.P.Singh

Counsel for the Respondent:
S.C.

Contempt of Courts Act- Section 12- when the court is exercising contempt jurisdiction, the alleged non-compliance of the orders of Court cannot be viewed in theoretical terms. The Court must examine as to whether it was legally possible for the opposite parties to comply with the order because otherwise non compliance cannot be said to be 'wilful'. (Held in para 15)

In the circumstances I am of the opinion that no further action is called for in this contempt petition. The contempt petition is, accordingly, dismissed. Notices issued herein are discharged.

By the Court

1. I have heard Sri T.P. Singh, senior advocate, who appeared for the petitioner before lunch and who desired that this case should be finally disposed of today itself. After lunch Sri T.P. Singh did not appear and Sri P.K. Goswami advocate representing the petitioner stated that he would argue the case. I have heard him also at great length. The relevant facts appearing from the available record are as follows.

2. The petitioner was a teacher in the Government Girls Intermediate College, Phaphamau, District Allahabad. She was transferred by order dated 18.7.2000 to the Government Girls Higher Secondary School, Tharwai, District Pratapgarh. She filed a writ petition being Writ Petition No. 31852 of 2000 in which this Court passed the following interim order.

"As an interim measure, it is provided that in case the impugned order dated 18.7.2000 (Annexure 3 to the petition) has not already been given effect to in accordance with law, the operation thereof shall remain stayed till further

orders by this Court. It is also provided that pendency in the matter will not preclude the authorities for (from) reconsidering the matter in the event of representation being filed on behalf of the petitioner.

Dated. 27.2.2000"

3. Before the above order was passed one Smt. Suman Rani Yadav, who had been posted by transfer in place of the petitioner, had joined her new posting.

4. The case of the petitioner was that she had not handed over charge of her previous posting at Phaphamau, Allahabad and, therefore, it could not be said that transfer order had been given effect to in accordance with law. When the matter came up again before the Court another order dated 11.10.2000 was passed. The relevant part of which is as follows :

" From the material on record it is clear that on the date the order was passed charge was not taken from the petitioner. The same was evident from the letter written by the Principal dated 17.8.2000 filed as Annexure R. 15 to the rejoinder affidavit.

In view of above noted facts, the order dated 27.7.2000 is hereby confirmed. It is further directed that petitioner shall be permitted to continue to hold post of Assistant Teacher at Government Girls College, Phaphamau, Allahabad.

5. At this point it may be relevant to refer to the said letter of the principal dated 17.8.2000 which has been referred in and is the basis of the above interim order dated 11.10.2000. A copy of it is filed as Annexure 3 to this contempt petition. The letter has been written by the Principal of the College at Tharwai saying that charge has not been handed over by the petitioner, Smt.Shakuntala Goshwami and, therefore, she should be required to hand over the charge so that her Last Pay Certificate (LPC) and Service Book can be forwarded by the Phaphamau College to the Tharwai college.

6. The letter would indicate that the petitioner was not available for her duty at the college at Phaphamau and had left without handing over charge. Prima facie such conduct on part of any employee would border on misconduct. However no final opinion can be expressed on this point as the circumstances in which the petitioner left the Phaphamau college without handing over charge are not on record in this contempt petition.

7. It is well settled that no party can be permitted to take advantage of his own wrong. Thus in absence of good explanation of the aforesaid unusual conduct, the petitioner does not appear to be entitled to take advantage of the words 'in accordance with law' used in the interim order dated 27.7.2000, therefore, in this contempt petition the Court passed a detailed order dated 22.2.2001 which is reproduced below:

"The petitioner was transferred and in her place one Smt. Suman Rani Yadav was posted as result of transfer.

The case of the respondents is that Smt. Suman Rani Yadav joined in place of the petitioner on 21.7.2000. On the other hand the case of the petitioner is that although Smt.Suman Rani Yadav has joined as alleged by respondents on

21.7.2000, the petitioner was not releaved from that post of Assistant Teacher in accordance with law, as the procedure for handing over of charge was not complied with.

On 27.7.2000 an interim order was passed that transfer order of the petitioner dated 18.7.2000 would remain stayed if it had not been given effect to **'in accordance with law'.**

The contention of the petitioner is that because the petitioner was not relieved 'in accordance with law', therefore, transfer order should be deemed to be stayed. Further , after exchange of affidavits on 11.10.2000 this Court passed an interim order in the following words:

"From the material on record, it is clear that on the date the order was passed (i.e. 27.7.2000) charge was not taken from the petitioner. The same was evident from the letter written by Principal dated 17.8.2000 filed as Annexure R.A 15 to the rejoinder affidavit",

In view of this it has been submitted by learned counsel for the petitioner that finding recorded in the interim order indicates that stay order dated 27.7.2000 would continue to be operative as the petitioner had not been relieved.

The further submission on the part of the petitioner is based upon the direction issued on 11.10.2000 which says that it is further directed that the petitioner shall be permitted to continue to hold the post of Assistant Teacher at Government Girls Inter College, Phaphamau, Allahabad.

It has been stated on behalf of the petitioner that despite clear cut direction the petitioner is not being permitted to continue on the post of Assistant Teacher at Phaphamau, Allahabad. The defence in the counter affidavit is that the instruction has been sought from the higher authority, Joint Director, by the Principal of the college as to what should be done in the matter.

Whether this defence set up in the counter affidavit by Principal is sufficient or not has to be examined in the light of the facts that it is a Government College, that it is not possible for the Principal to make payment to two persons on the same post, that this Court has not directed even in the interim. order dated 11.10.2000 as to what should be done about the person who has already joined on the post of the petitioner and that the Principal does not have the power to transfer or send away Smt. Suman Rani Yadav to accommodate the petitioner. This power lies only with higher authorities. Having regard to these facts I am of the opinion that the Joint Director of Education to whom matter has been referred should be required to submit a reply to this contempt petition as to why he has not issued necessary instructions or clarification sought by the petitioner (principal) to enable compliance of the order of this Court.

In the circumstances issue notice to the opposite party nos. 2 and 3 to file their reply to this contempt petition as well as the facts pointed out above in this order. Notices will be made returnable within a month. Steps will be taken within three days. Copy of this order will be sent along with notice. Personal appearance will not be necessary."

8. Pursuant to the above order dated 22.2.2001, an order has been passed by

the Joint Director of Education on 29.3.2001 transferring the petitioner back to the Government Girls Inter College, Phaphamau, Allahabad from Tharwai and transferring Smt. Suman Rani Yadav from Phaphamau to Katra.

9. When the Court is exercising contempt jurisdiction, the alleged non-compliance of the orders of Court cannot be viewed in theoretical terms. The Court must examine as to whether it was legally possible for the opposite parties to comply with the order because otherwise non compliance cannot be said to be 'wilful'. It has already been observed in the detailed order dated 22.2.2001 (quoted above) that it was legally not permissible for the Principal without necessary clarification or direction from the higher authorities either to make payment, from Government funds, to two persons, i.e. the petitioner, as well as Smt. Suman Rani Yadav on the same post, nor it was possible for the Principal to transfer Smt. Suman Rani Yadav who had already joined. The necessary clarification or direction from the higher authorities was sought by the Principal. In the normal course of things the authorities in government require a reasonable amount of time to consider the various aspects of the matter and to pass appropriate orders. It would be unpractical to expect the authorities to act immediately in such matters, as there are number of factors which have to be considered and taken into account and which may not have been placed before the Court when the order was passed. Therefore, a slight amount of delay by authorities in complying with the order should not be viewed in a very rigid manner by punishing the officers.

10. In this case there has been substantial compliance of this Court's order although there was some delay in compliance. Learned counsel representing the petitioner has raised the grievance that petitioner should not have been treated to be continued at Phaphamau because of the stay order and she should have been paid salary for the entire period from Phaphamau. This grievance apart being hyper technical also does not take into consideration the fact that two persons cannot be paid salary on one post. Smt. Suman Rani Yadav must have been paid her salary on the post at Phaphamau. It is not possible to make second payment of salary of the same post again to the petitioner and, therefore, I am unable to accept the argument of the petitioner.

11. The petitioner has also submitted in this contempt petition a mandamus should be issued to the respondents to make payment of salary to the petitioner. He has relied upon a decision of the Supreme Court in the case of **Vidhya Dhar Sharma Vs. G,.B. Patnaik** reported in JT 2001 SC 405 (paragraph 6). This decision contains a direction given by the Supreme Court and the decision does not deal with the question whether the High Court can issue such direction in exercise of its Contempt Jurisdiction. The other decision relied upon by the petitioner is the case of **Mohd. Idris Vs. Rustam Jahangir** reported in AIR 1984 SC 1826 (paragraph 4) which approves that it is open to the High Court in exercise of Contempt Jurisdiction to issue direction to close the branch, i.e. to remedy the contempt.

12. However, in view of the fact that the writ petition of the petitioner is already pending where at the final hearing

it is open to the petitioner to obtain necessary directions. Findings recorded while passing of the interim order are not final and binding at the final hearing. In the pending writ petition it will be required to be adjudicated finally where the transfer order dated 18.7.2000 had been given effect to prior to passing of the interim order dated 27.7.2000. It would also require to be examined as to what would be meaning and effect (in the facts of this case) of the words 'in accordance with law' as used in the interim order dated 27.7.2000, and whether the petitioner, who prima facie walked away in violation of law without handing over charge, can be permitted in the equity (writ) jurisdiction to say that she was not relieved 'in accordance with law'.

13. Because the prima facie findings recorded for passing interim orders are neither res-judicata nor necessarily binding at the stage of final hearing, it may be possible that at the final hearing of the writ petition the Writ Bench may take a different view than the one taken in the interim order dated 11.10.2000, or the view I may take in this contempt petition if I go into these questions, therefore, I am not inclined to adjudicate upon the same questions which are sub-judice in the pending writ petition, and thereby risk the embarrassment of a contradictory finding on the same issues between the same parties by two different Benches.

14. Under these circumstances, I am not inclined to issue any direction by recording my final finding on the aforesaid questions involved in this matter. The observations made above are only, prima facie, observations for deciding this contempt petition, and should not be interpreted to mean final findings at the time of final adjudication of the writ petition.

15. In the circumstances I am of the opinion that no further action is called for in this contempt petition. The contempt petition is, accordingly, dismissed. Notices issued herein are discharged.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 26.4.2001

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

Special Appeal No. 467 of 2001

Smt. Meera Tewari ...Petitioner
Versus
The Chief Medical Officer and others ...Respondents

Counsel for the Appellant:
Mr. A.N. Tripathi

Counsel for the Respondents:
Mr. Ranvijai Singh
S.C.

U.P. Government Servant (Discipline & Appeal) Rules, 1999 -sub-rule 1 of Rule 4-A government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the enquiry. The impugned order of suspension does not refer to any contemplated inquiry or the fact that any inquiry is pending.

(Held in para 4)

The order of suspension is against the provisions of Rule 4 of the U.P. Government Servant (discipline and appeal) rules, 1999 and the same cannot be sustained. The learned Single Judge

has directed the inquiry to be completed within three months. It was not within the scope of the learned Single Judge to direct any inquiry to be made on his own. We are of the view that since the order of suspension is contrary to Rule 4 of the said Rules, the same should be quashed and set aside.

By the Court

1. Heard Sri A.N. Tripathi, learned Advocate for the appellant and Sri Ranvijai Singh, learned Standing Counsel for the respondents.

2. This Special Appeal is directed against the order dated 4.4.2001 passed by the learned Single Judge dismissing the writ petition. The challenge in the writ petition was against the order of suspension. The contention of the appellant is that the learned Single Judge did not properly appreciate the question that suspension is not permissible unless enquiry is contemplated or enquiry is pending. Learned counsel for the appellant referred to us Sub-rule (1) of Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 which is set out herein below:

"4. **Suspension** (1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority.

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty.

Provided further that concerned Head of the Department by the Governor by an order in this behalf may place a Government Servant or class of Government Servants belonging to Group 'A' and 'B' posts under suspension under this rule.

Provided also that in the case of any Government Servant or class of Government Servant belonging to Group 'C' and 'D' posts, the Appointing Authority may delegate its power under this rule to the next lower authority.

3. From the said rule it appears that a Government Servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the enquiry. The impugned order of suspension does not refer to any contemplated inquiry or the fact that any inquiry is pending.

4. In that view of the matter, we are of the view that the order of suspension is against the provisions of Rule 4 of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 and the same cannot be sustained. The learned Single Judge has directed the inquiry to be completed within three months. It was not within the scope of the learned Single Judge to direct any inquiry to be made on his own. We are of the view that since the order of suspension is contrary to Rule 4 of the said Rules, the same should be quashed and set aside.

5. The Special Appeal is allowed and the order of suspension is hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 8.5.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 17360 of 2001

Bala Prasad Agnihotri ...Petitioner
Versus
U.P. State Public Services Tribunal and others ...Respondents

Counsel for the Petitioner:
Mr. Hariom Tiwari
Mr. C.B. Yadav,
Mr. Yogesh Agarwal

Counsel for the Respondent:
S.C.

Constitution of India- Article 226- only those amount can be recovered as arrears of land revenue for which there is a statutory provision (Held in para 4)

The petitioner challenged the termination order before the U.P. Public Service Tribunal but his claim petition was dismissed on 28.3.2001. Hence this petition.

By the Court

1. Heard learned counsel for the parties.

2. The petitioner has challenged the impugned order dated 28.3.2001 (Annexure-9) to the petition) as well as the order of termination of his service dated 10.2.1982 (Annexure-2 to the petition) by which certain sums were ordered to be recovered from the petitioner as arrears of land revenue.

3. The petitioner was an Assistant Agriculture Inspector having been appointed in the year 1958. He was placed under suspension on 30.3.1974 and an FIR under section 409 as well as 477 A IPC was also filed against him. He was convicted in the criminal case by the learned CJM and in the departmental enquiry he was dismissed from service with further direction to refund the amount of loss caused to the Government. True copy of the judgement in the Criminal Case has been annexed as Annexure-1 to the petition. True copy of the termination order dated 10.2.82 is Annexure-2 to the petition. The appeal against the conviction in the criminal case was also dismissed on 31.10.84.

4. The petitioner challenged the termination order before the U.P. Public Service Tribunal but his claim Petition was dismissed on 28.3.2001. Hence this petition.

5. Admittedly the petitioner was given opportunity of hearing. Serious allegations have been made against the petitioner as is evident from a perusal of the impugned termination order dated 10.2.82. He has alleged to have caused a loss of Rs. 2,68,298.50 due to fictitious entries which 'he had made.

6. The findings in the enquiry that the petitioner has defalcated Government money are findings of fact and we cannot interfere with the same in writ jurisdiction. We, therefore, uphold the termination order.

7. Learned counsel for the petitioner then submitted that recovery cannot be made as arrears of land revenue. This submission appears to be correct. Only

those amount can be recovered as arrears of land revenue for which there is statutory provision vide **Ram Bilas Tibriwal Versus Chairman, Municipal Board** 1998 (2) A.W. 1468 and **Anupam Sari Centre Versus Collector**, 1999 (1) AWC 237. However no such statutory provision has been shown to us. Hence we direct that the amount in question cannot be recovered as arrears of land revenue, and the orders dated 8.3.88 (Copy of which are Annexure- 3 and 4 to the petition) are quashed.

8. The petition is disposed off accordingly.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD APRIL 27, 2001

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

Civil Misc. Writ Petition No. 16451 of 1999

M/s Jaswant Sugar Mills Ltd. Maliyana ...Petitioner

Versus

Commissioner, Meerut Division, Meerut and others ...Respondents

Counsels for the Petitioner:
Sri P.K. Jain
Sri G.N. Verma

Counsels for the Respondents:
S.C.
Sri S.K. Tyagi
Sri Y.K. Sinha
Sri R. Asthana

U.P. Public Money's (Recovery of Dues) Act 1972 (Act No. 23 of 1972)-S-3-Recovery Proceeding- arrears of salary wages and gratuity- No Recovery certificate issued by Competent Authority- such amount can not be recovered as arrears of land revenue.

Held- Para 14 and 16

The money in question, admittedly, does not fall in any one of the categories of money provided under Section 3 of the Act. According to the letter of Shri Narendra Singh Tyagi, dated 20.8.1991 (Annexure-1 to the Writ petition), the money in question was alleged to be the arrears of amount of salary, wages and gratuity of the workmen working in the petitioner mill, which does not come in any one of the categories of the money provided under Section 3 of the Act, referred to above. Therefore, the said amount was not recoverable as arrears of land revenue. Further, admittedly, in the present case, no recovery certificate or a certificate as provided under sub-section (2) of Section 3, referred to above, was issued by any competent authority.

Thus, it is settled view of this Court that in the absence of recovery certificate issued by a competent authority, no recovery proceedings can be initiated by the Collector. As stated above, Mr. Narendra Singh Tyagi has no right to make an application to the Collector for recovery of the amount in question as neither the said money was public money within the meaning of the term used under the aforesaid Act nor there was any recovery certificate issued by a competent authority in respect thereof.

Case law discussed
1988 (33) ALR-316
1998 ALJ-156
1991 (18) ALR-94

By the Court

1. By means of this petition filed under Article 226 of the Constitution of India, petitioner prays for issuance of a writ, order or direction in the nature of certiorari quashing the sale proclamation

dated 28.03.1992, order dated 30.05.1992 passed by the Sub Divisional Magistrate, Meerut confirming the sale of the properties owned by the petitioner and the order dated 05.04.1999 passed by the Commissioner, Meerut Division, Meerut dismissing the objections filed by the petitioner under Rule 285-I of the Rules framed under the U.P. Zamindari Abolition and Land Reforms Act, for short hereinafter referred to as "the Rules" and "the Act".

2. The relevant facts of the case giving rise to the present petition, in brief, are that it was on an application made by Shri Narendra Singh Tyagi, Secretary, Chini Mill Majdoor Hitkari Samiti, Meerut, Z.A. Form No. 74 for recovery of an amount of Rs. 75,99,445/- towards the salary, wages and gratuity of the workmen working in the said factory was issued by the Collector, Meerut. On the basis of the said Form dated 28.03.1992, sale proclamation fixing 28.04.1992 for auction of the property specified in the Form for recovery of aforesaid amount, was issued. The petitioner as soon as came to know about the aforesaid proceedings, filed objection against the sale before the Collector. Prayer for stay of further proceedings was also made. As no action was taken and no order was passed on the objection of the petitioner by the Collector, the petitioner filed Writ Petition No. Nil of 1992 challenging the validity of recovery proceeding contending that no amount was outstanding against the petitioner in respect of salary, wages, gratuity etc. and that no recovery certificate was issued by any competent authority. The said writ petition was disposed of finally with the direction that until disposal of the representation, the recovery proceedings shall remain in abeyance and were to be subject to the order passed on the representation. The order dated 20.04.1992 is quoted below:-

"Heard learned counsel for the petitioner, the petitioner by means of this writ petition has sought for quashing the recovery proceeding in pursuance of the citation dated 28.03.92, annexure-2 of writ petition. The ground of attack in this case is that the recovery proceedings has been initiated without giving opportunity to the petitioner or even the total amount due which the petitioner is liable to pay and he even made a representation before the District Magistrate, respondent no. 1 which is annexure- 3 to the petition and the said representation has yet not been disposed of by respondent no. 1.

Having heard learned counsel for the petitioner, the learned Standing Counsel and on the facts and circumstances of this case, we dispose it of today at the stage of admission finally in accordance with the Rules of the Court. Since only relief which the petitioner seeks is that he was not aware of the total dues for which the recovery has been sought and for which he has also made representation. In view of this, we direct respondent no. 1 to dispose of the petitioner's representation, annexure-3 of the petition within two weeks from the date of the certified copy of this order is produced before it. The petitioner is also directed to file certified copy of this order with another copy of the said representation annexure-3 of petition within two weeks from today.

Until disposal of the said representation, the recovery proceedings shall be kept in abeyance and shall be

subject to the order passed in the said representation.

With the aforesaid observations, the present writ petition is disposed of finally.

Certified copy of this order be issued to the counsel for the petitioner on payment of usual charges today."

3. The aforesaid order passed by this Court was communicated to the Collector as well as the officer conducting the auction sale, before the auction sale could take place but he deliberately violating and flouting the order passed by this Court held the auction on 28.04.1992 and the property in dispute worth more than Rs. Five crores was sold only for an amount of Rs. 93,01,000/- without following the procedure prescribed for the same. The petitioner filed an application before the Commissioner, respondent no.1, and prayed for quashing the auction proceedings under Rule 285-I of the Rules framed under the Act. The Commissioner by his order dated 19.05.1992 entertained the objection and stayed the auction proceedings and confirmation of sale till disposal of the case. The order dated 19.5.1992 is quoted below:-

"विद्वान अधिवक्ता को सुना। वाद के निस्तारण तक नीलाम की कार्यवाही एवं पुष्टि स्थगित की जाती है।"

4. The information of the said stay order was communicated to the Sub Divisional Magistrate and the Tehsildar on 21.05.1992; but as they had refused to receive the same, the copies of the order were sent to them by registered post which was received by the Sub Divisional Magistrate on 22.05.1992. The Sub Divisional Magistrate acting in utter disregard of the order passed by the Commissioner, confirmed the auction sale on 30.05.1992. It has also been stated that immediately thereafter, i.e., 02.06.1992, the possession over the property in dispute was delivered to the auction purchaser, respondent no.6. By order dated 18.02.1993, after hearing the counsel for the parties, the Additional Commissioner (Judicial), while dealing with the objection of the petitioner, held that auction of the properties of the petitioner and confirmation of the same, were bad in law and were liable to be set aside as there was no recovery certificate issued by any competent authority and further in view of order dated 20.04.1992 passed by the High Court and order dated 19.05.1992 passed by the Commissioner, neither auction could be held nor it could be confirmed. Having recorded the said findings, he referred the matter to the Board of Revenue. However, the Board of Revenue did not accept the reference and turned down the same on the ground that the Additional Commissioner (Judicial) has no jurisdiction to dispose of the objection filed under Rule 285-I of the Rules and directed the Commissioner to dispose of the objection. Challenging the validity of the order passed by the Board of Revenue, the petitioner again filed writ petition No. 45726 of 1993, which was partly allowed by this Court by judgment and order dated 21.10.1997 and the matter was sent back to the respondent no. 1 for decision afresh in the light of the observations and directions made by this Court. The operative portion of the said order is quoted below:-

"In the result this writ petition succeeds in part. The impugned order passed by the Board of Revenue shall stand modified requiring the

Commissioner, the respondent no. 3 to consider and finally disposed of the objections filed by the petitioner under rule 285-I of the U.P. Zamindari Abolition and Land Reforms Act as well as the revision filed against the order confirming the sale in question dated 30.5.92 in accordance with law within a period not later than three months from the date of the production of a certified copy of this order.

There shall however, be no order as to costs."

5. Thereafter, the Board of Revenue sought comments from the Collector on the representation of the petitioner. In compliance of the order passed by the Board of Revenue, the Collector submitted his comments. The matter was thereafter sent to the Collector by the Board of Revenue. The Collector by his order dated 18.12.1995, removed the receiver, who was continuing since before, holding that no amount was outstanding against the petitioner nor any recovery certificate was pending disposal. The receiver was also directed to prepare inventory and a Chartered Accountant was appointed to audit the accounts from 1984 to 1995. The petitioner filed a representation before the Board of Revenue as the petitioner wanted the audit of accounts from 1977 to 1984. As no action was taken on the representation filed by the petitioner, the petitioner again had to approach this Court and to file writ petition No. 10220 of 1996. This Court entertained the petition and on 8.4.1996 issued direction to the Chairman of the Board of Revenue to decide petitioner's representation and communicate the order to the petitioner by 30.06.1996. In compliance of the order passed by this Court, the Board of Revenue issued a direction to the Collector to submit a report. The Collector, thereafter, submitted his report to the effect that from 03.01.1977 to 24.10.1990, amount of Rs. 1,16,10,101.53 was outstanding against the petitioner. After going through the material on the record, the Chairman, Board of Revenue found that the attachment of compensation of the petitioner's land was illegal inasmuch as the statement of provisional deductions was rejected by the Prescribed Authority and the order dated 20.02.1992 of the Collector was illegal. The Chairman directed the Collector to pay the balance amount after adjusting Rs.1,62,02,402.20, which was due under the demand notice if there was no recovery certificate in respect of the said amount against the petitioner. Since the amount outstanding was Rs.1.76 crores and the Chairman directed deduction of Rs. 1.62 crores, the petitioner once again filed writ petition No. 31378 of 1996. This Court on 17.07.1997 granted interim order directing the payment of Rs. 4,33,94,783.40 after deducting Rs. 1,62,02,402.20, within two months with the remarks that this payment shall be subject to final decision.

6. It was on 21.10.1997 that writ petition No. 45726 of 1993 was partly allowed by this Court and the Commissioner was directed to dispose of the objection as well as the revision filed against confirmation of auction sale within three months. Since the orders passed by the Board of Revenue as well as by this Court were not complied with, the petitioner was obliged to file contempt petition No. 2611 of 1997 for non compliance of the order dated 17.07.1997, referred to above, on which notices were

issued to the respondents to show cause as to why action under the Contempt of Courts Act be not taken against them. The petitioner on 28.01.1998 also filed an application before the Commissioner in Case No. 15/91-92 of 1992 to determine whether there was any recovery certificate or notice of demand issued before the auction dated 28.04.1992. Thereafter, arguments were heard by the Commissioner and order/judgment was reserved. The Writ Petition No. 9716 of 1992 was disposed of with the direction to decide the application dated 28.01.1998 of the petitioner. The Commissioner rejected the objection of the petitioner and approved the auction dated 28.04.1992 and confirmation of sale dated 30.05.1992. The Commissioner found that were public dues against the petitioner for recovery of which, auction was held and auction of the properties owned by the petitioner was legal and valid. Hence, the present petition.

7. On behalf of respondents no. 1 to 7, three counter affidavits- one by respondents no. 1 to 3; second by respondents no. 4 and 5 and third by respondents no. 6 and 7, were filed. In brief, stand taken by the contesting respondents is that the auction and confirmation of sale were valid and legal, orders were passed after considering the entire material on the record and after hearing the petitioner. It was stated that actually auction was held on 27.03.1992 but since the highest bid was under priced, the auction was cancelled on 28.03.1992 by the respondent no. 3. It has also been contended that there was outstanding dues against the petitioner and as such the property in question was validly auctioned on 28.04.1992 and that the sale was rightly confirmed on 20.05.1992 in accordance with law. It has also been urged that the stay order dated 19.05.1992 passed by the Commissioner was not served upon the respondents no. 2 and 3 before auction was held. Although, the order of the High Court dated 20.04.1992 was served on 28.04.1992 upon respondents No. 2 and 3, after the completion of auction proceedings. Respondents no. 4 to 7 also asserted that the order of High Court was served upon them after 1.10 p.m. on 28.04.1992 and the order of the Commissioner dated 19.05.1992 was served on 03.06.1992.

8. The facts stated in the aforesaid counter affidavits were controverted and denied by the petitioner by filing the rejoinder affidavits and it was asserted that the entire proceedings were null and void. In the rejoinder affidavit filed in reply to the counter affidavit filed by respondents no. 6 and 7, it has been specifically asserted by the petitioner that the stay order passed by the Commissioner was served upon the respondent no. 3 and the Tehsildar on 21.05.1992 and the same was also sent by the registered post with A/D to respondent no. 3 and the Tehsildar on 22.05.1992. The copies of the registered letter and the registration receipts dated 22.05.1992 have been filed as Annexures R.A.2 and R.A. 3 to the rejoinder affidavit.

9. Learned counsel for the petitioner vehemently urged that in the present case, no recovery certificate was issued by the competent authority, therefore, the Collector, Meerut had no jurisdiction to proceed to recover the amount in question as arrears of land revenue and to issue Z.A. Form No. 74. The jurisdiction of the Collector in recovery matters starts after the receipt of the recovery certificate

issued by the competent authority and not before. In the present case, it was urged that no recovery certificate was at all issued by any competent authority. It was also urged that Shri Narendra Singh Tyagi had no right to make an application dated 20.08.1991 for initiation of recovery proceedings inasmuch as the amount in question could not be recovered as arrears of land revenue. Learned counsel for the petitioner also urged that the Collector, Meerut had no jurisdiction to proceed further to auction the properties owned by the petitioner without deciding the objection filed by the petitioner before him and to issue Form No. 74. Similarly, it was also urged that the Auction Officer also had no jurisdiction to hold auction and deprive the petitioner of its properties. It was also submitted that the respondents have deliberately acted illegally and in violation of the order passed by this Court on 20.04.1992 whereby the Collector was directed to decide the objection before proceeding further. Learned counsel for the petitioner also pointed out several irregularities in conduct of sale on account of which, the sale proceedings were liable to be set aside. It was also contended that without deciding objection under Rule 285-I, neither sale could be held nor the same could be confirmed. Lastly, it was urged that no amount was outstanding against the petitioner as the amount in question was already recovered/adjusted from the money received by the Collector from the sale of Putha-farm, which was owned by the petitioner. Therefore, there was no question of recovering the said amount again.

10. On the other hand, learned counsel appearing on behalf of the respondents as well as the learned standing counsel submitted reply of arguments made by learned counsel for the petitioner that the auction proceedings were conducted and concluded by the respondents in accordance with law and did not suffer from any illegality or infirmity. It was urged that since inspite of demand being made by Shri Narendra Singh Tyagi to pay the amount in question, no payment was made, he, therefore, had no option but to approach the Collector for recovery of the said amount. It was also urged that the Collector, Meerut on the application filed by Shri Narendra Singh Tyagi rightly issued Z.A. Form No. 74 even though no recovery certificate was issued by the competent authority. Learned counsel urged that the impugned orders did not suffer from any illegality or infirmity. This writ petition was, therefore, liable to be dismissed.

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

12. The questions, which arise for consideration by this Court are as to whether the amount in question could be recovered as arrears of land revenue; as to whether the amount in question could be recovered in absence of any recovery certificate issued by competent authority; as to whether without deciding the objection filed by the petitioner under Rule 285-I, the Collector and the Auction Officer had the jurisdiction to proceed further to hold the auction sale and confirm the sale; as to whether the authorities below have failed to comply with the orders passed by the Hon'ble Court dated 20.04.1992 and as to whether the auction sale in question was bad in

law and was liable to be set aside for several irregularities committed by the authorities below in conducting the sale.

13. The U.P. Public Moneys (Recovery of Dues) Act, 1972 (U.P. Act No. XXIII of 1972), provides for the recovery of dues payable to the State Government or to the Uttar Pradesh Financial Corporation or any other corporation notified by the State Government in that behalf or to any other nationalised or scheduled bank or to government company and to validate certain acts done and proceedings taken in the past and to provide for matters connected therewith. Section 3 of the said Act provides for recovery of certain dues as arrears of land revenue, which reads as under:-

"3. Recovery of certain dues as arrears of land revenue:- (1) Where any person is party—

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him by the State Government or the Corporation, by way of financial assistance; or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government or the Corporation shall be recoverable as arrears of land revenue; and such person --

(i) makes any default in repayment of the loan or advance or any instalment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any installment thereof; or

(iii) otherwise fails to comply with the terms of the agreement,- then, in the case of State Government, such officer as may be authorised in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company, the Managing Director or where there is no Managing Director then the Chairman of the Corporation, by whatever name called thereof, and in the case of a banking company, the local agent thereof, by whatever name called may send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

(2). The Collector on receiving the certificate shall proceed to recover the amount stated therein as an arrear of land revenue.

(3). No suit for the recovery of any sum due as aforesaid, shall lie in the civil court against any person referred to in sub-section (1).

(4). In the case of any agreement referred to in sub-section (1) between any person referred to in that section and the State Government or the Corporation, no arbitration proceedings shall lie at the

instance of either party either for recovery of any sum claimed to be due under the said sub-section or for disputing the correctness of such claim.

Provided that whenever proceedings are taken against any person for the recovery of any such sum he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken may make a reference under or otherwise enforce an arbitration agreement in respect of the amount so paid, and the provisions of Section 183 of the Uttar Pradesh Land revenue Act, 1901, or Section 287-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as the case may be, shall mutatis mutandis apply in relation to such reference or enforcement as they apply in relation to any suit in the civil court.

(5). Save as otherwise expressly provided in the proviso to sub-section (4) of this Section or in Section 183 of the U.P. Land Revenue Act, 1901, or Section 287-A of the U.P. Zamindari Abolition and Land Reforms Act, 1950 every certificate sent to the Collector under sub-section (1) shall be final and shall not be called in question in any original suit, application (including any application under the Arbitration Act, 1940) or in any reference to arbitration and no injunction shall be granted by any Court or other authority in respect of any action taken or intended to be taken in pursuance of any power conferred by or under this Act."

14. The aforesaid statutory provision clearly provides the dues of money which can be recovered as arrears of land revenue. The money in question, admittedly, does not fall in any one of the categories of money provided under Section 3 of the Act. According to the letter of Shri Narendra Singh Tyagi, dated 20.08.1991 (Annexure-1 to the writ petition), the money in question was alleged to be the arrears of amount of salary, wages and gratuity of the workmen working in the petitioner mill, which does not come in any one of the categories of the money provided under Section 3 of the Act, referred to above. Therefore, the said amount was not recoverable as arrears of land revenue. Further, admittedly in the present case no recovery certificate or a certificate as provided under sub-section (2) of Section 3, referred to above, was issued by any competent authority. The Collector, Meerut, therefore, merely on the basis of a letter written by Shri Narendra Singh Tyagi, who had no jurisdiction to approach the Collector, could not proceed to recover the amount in question as arrears of land revenue. The Collector, apparently, acted illegally and in excess of his jurisdiction in issuing Z.A. Form No.74 and to ask the Tehsildar concerned to recover the amount in question and to pay the same to the complainant or to the workmen of the company. This Court vide order dated16.03.1999 directed the respondent no.1 to produce the recovery certificate, if any, issued by the competent authority for recovery of the month in question. This Court also by order dated 20.04.1992 directed the respondent no.1 to decide the objection filed by the petitioner before proceeding further to recover the money in question. The respondent no.1 acting wholly illegally in excess of his jurisdiction and in disregard of the orders passed by this Court, proceeded to auction the property in

dispute owned by the petitioner. Therefore, the entire recovery proceedings conducted by the authorities below are null and void. A reference in this regard may be made to the decision in the case of M/s Rewa Gases Private Limited Vs. State of U.P. and others, reported in 1998 (33) A.L.R. 316, wherein it was ruled by a Division Bench of this Court as under:-

"9. Both the remaining arguments have, however, enough force. As already noted above, none of the petitioners took any advantage of entering into any transaction under the provisions of any State-sponsored Scheme. Likewise, at no point of time, the petitioners seem to have approached M/s U.P. Carbide and Chemicals Ltd. for according any financial assistance or loan under any State-sponsored Scheme. Obviously, the transactions of the petitioners were simple mercantile transactions. It appears that M/s U.P. Carbide and Chemicals Ltd. had supplied some goods/ materials to each of petitioners and price thereof has not been paid by any of the petitioners to the aforesaid supplier. Consequently, in view of the provisions noted above, M/s U.P. Carbide and Chemicals Ltd., on facts of these cases cannot invoke any of the clauses (a), (b), (c) and (d) of Section 3 of the Recovery Act against any of the petitioners for recovery of the money which it claims to be due against them under ordinary business transaction."

15. Similar view was taken in M/s Veer Traders, Saharanpur Vs. Auto Traders Limited, Pratapgarh and others, reported in 1998 A.L.J. 156 wherein it was ruled as under:-

"It will, therefore, be seen that the Collector gets jurisdiction to recover the amount stated in the recovery certificate as arrears of land revenue only if there is a valid recovery certificate, i.e., as recovery certificate signed by a person competent in the case of a Corporation the certificate has to be signed only by the Managing Director or if there is no Managing Director then the Chairman of the Corporation by whatever name he is called. No other officer of the company is authorised to sign the recovery certificate such as is contemplated under Section 3 of the Act."

16. Thus, it is settled view of this Court that in the absence of recovery certificate issued by a competent authority, no recovery proceedings can be initiated by the Collector. As stated above, Mr. Narendra Singh Tyagi has no right to make an application to the Collector for recovery of the amount in question as neither the said money was public money within the meaning of the term used under the aforesaid Act nor there was any recovery certificate issued by a competent authority in respect thereof. The respondents have, thus, acted wholly illegally and in excess of their jurisdiction in putting the properties of the petitioner to public auction and to confirm the sale. It may be noted that even after the specific directions of this Court, contesting respondents failed to produce any valid recovery certificate in respect of the amount in question. Thus, the whole recovery proceedings are non est and on the basis of the same, petitioner cannot be deprived of its properties.

17. Learned counsel for the petitioner is also right in his submission that without deciding the objection filed

by the petitioner, the respondent no.1 had no jurisdiction to auction the properties in question. It is not disputed that on receipt of Z.A. Form No. 74, petitioner filed an objection on 12.04.1992 before the respondent no. 1, which was not decided and auction was held by the respondents. Not only the objection filed by the petitioner was ignored by the contesting respondents but also the direction issued by this Court in Civil Misc. Writ Petition No. Nil of 1992, vide order dated 20.04.1992, which was served upon the contesting respondents well within the time, to decide the objection before proceeding further with the auction proceedings. A reference in this regard may also be made to the decisions of this Court in the case reported in 1996 (1) Current Civil Cases 190 and Smt. Prabha Devi V. Bhoop Singh and another, reported in 1991 (18) A.L.R. 94. Not only the auction was held in violation of the orders passed by this Court but the auction sale was also confirmed without deciding the objection filed by the petitioner under Rule 285-I of the Rules framed under the Act, therefore, the auction sale held by the respondents was illegal and invalid.

18. Learned counsel for the petitioner also pointed out several irregularities and mistakes committed by the authorities concerned in publishing and conducting the sale of the property in dispute. It was stated that before the sale in question, no citation or notice of demand was ever issued by the petitioner as required under Section 280 read with Rule 242 of the Rules framed under the Act. Before putting the properties to sale, the alleged defaulter is to be provided an opportunity to pay the amount in question by issuing a citation or notice of demand. In the instant case, authorities below have acted illegally ignoring the view taken by this Court in the cases of Jalal Uddin v. State of U.P. and others, reported in 1985 AWC 163; Smt. Chandrawati and another v. U.P. State Electricity Board, Lucknow and others, reported in 1986 A.L.J.1451; Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh, reported in JT 1993 (5) S.C. 313; Lal Chand v. VIII Additional District Judge and others, reported in JT 1997(3) S.C.367 as well as in Smt. Shanti Devi v. State of U.P. and others, reported in 1979 R.D.203.

19. According to learned counsel for the petitioner, the sale proclamation served upon the petitioner was also illegal as in the same, no amount, which was allegedly due on account of wages and gratuity etc. against the petitioner was mentioned in the sale proclamation or under any other Act. Many other irregularities, as stated above, were pointed out by learned counsel for the petitioner upon which, the sale in question was liable to be set aside. After holding that the money in question could not be recovered as arrears of land revenue and the authorities below had no jurisdiction to proceed to recover the amount in question as arrears of land revenue in the absence of the recovery certificate, it is not necessary to deal with several other arguments made by learned counsel for the petitioner. This petition is, therefore, liable to be allowed and the impugned orders are liable to be quashed. It is, however, observed that if actually some amount of wages, salary or gratuity is outstanding against the petitioner, the contesting respondents can recover the same by taking recourse to the proceedings under the Payment of Wages

Act as well as under the U.P. Industrial Disputes Act.

20. For the facts and reasons stated above, this petition succeeds and is hereby allowed. The order dated 05.04.1999 (Annexure-23), order dated 30.05.1992 (Annexure-7), sale proclamation dated 28.03.1992 (Annexure-2) are hereby quashed and the respondents are directed to restore back status quo ante as on before the auction sale dated 28.4.1992 was held, within a period of two weeks from the date a certified copy of this order is communicated to the competent authority.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.4.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No.13370 of 2001

Mahesh Chauhan ...Petitioner
Versus
Anil and others ...Respondents

Counsels for the Petitioner:
Sri P.P. Srivastava
Sri Ranjan Srivastava

Counsel for the Respondent:
S.C.

Constitution of India- Article 226- order dated 3.3.2001 whereby the respondent No.2 decided issue No. 7 holding that the election petition is maintainable and permitting the election petitioner to append a fresh verification of the election petition-challenged- the court has power to permit the election petitioner to remove the defect in verification of permit the petitioner to make verification. (Held in para 11).

The mere fact that the affidavit was prepared before the election petition was drafted, does not itself make the election petition defective.

By the Court

1. This writ petition is directed against the order dated 3.3.2001 whereby the respondent No. 2 decided issue No.7 holding that the election petition is maintainable and permitting the election petitioner to append a fresh verification of the election petition.

2. Briefly, stated the facts, are that the election from Ward No. 6, Gautam Budh Nagar for the membership of Zila Panchayat was held on 29.6.2000. The petitioner was declared elected by margin of 18 votes as against respondent No.1. Respondent No. 1 filed Election Petition on 7.7.2000 in the court of District Judge, Gautam Budh Nagar. The petitioner filed an application (29C) to dismiss the election petition on the ground that it was not maintainable. It was alleged that the election petition under the provisions of U.P. Zila Panchayat (Settlement of Disputes relating Membership) Rules, 1994 (in short the Rules) can only be presented in person by the election petitioner, whereas the election petition was presented by one Sri R.K. Singh, Advocate. It was further averred that the affidavit of Anil, the election petitioner, respondent No.1 was sworn on 3.7.2000 at Delhi much before the presentation of the election petition. The District Judge rejected the application on 18.8.2000 on the finding that on the date of the presentation of the election petition, the election petitioner was present in person along with his counsel Sri R.K. Singh, Advocate. The petitioner filed Writ Petition No. 40750 of 2000 in this Court.

The writ petition was dismissed. It was, however, observed that if the petitioner raises a plea about the maintainability of the election petition in the written statement an issue on the point shall be framed and it shall be decided by the learned District Judge or the transferee court as a preliminary issue.

3. The District Judge, respondent No.2 decided the preliminary issue holding that the election petition filed by respondent No.1 was maintainable and permitted the election petitioner, respondent No.1 to append a fresh verification to the election petition. The petitioner has challenged this order in the present writ petition.

4. I have heard Sri P.P. Srivastava, learned Senior Advocate for the petitioner who urged that the election petition should have been presented by respondent No.1 in person as provided under Rule 4(3) of the Rules but as it was not done, the election petition was not maintainable.

5. The petitioner had raised this point in Writ Petition No. 40750 of 2000. This Court did not accept this contention because the District Judge in his order dated 18.8.2000 had recorded a finding that the respondent No.1 was present along with his counsel when the election petition was presented. This Court observed as follows:-

"At this stage, suffice it to say that the learned District Judge, has accepted the contention of the election petitioner that he was present at the time of filing of the election petition. Substantial compliance of Rule 4 of the Rules governing the representation of the election petition has been held to have been made. With regard to the other defects as pointed out by the learned counsel for the petitioner the matter may be trashed out after framing of the preliminary issue."

6. As this question was decided by this Court, this matter is no longer open to urge that the election petition was not maintainable as the petitioner did not present it in person before the District Judge. It has already been found that the petitioner was present along with his counsel when the election petition was presented before the District Judge.

7. The next submission of the learned counsel for the petitioner is that the election petition was not verified by respondent no.1 and it was liable to be rejected. The election petition was filed alongwith an affidavit. The District Judge has permitted respondent No.1 to verify the pleadings and the pleadings had been verified.

8. This Court in Surendra Nath and another Vs. Mahendra Pratap Singh, AIR 1986 Alld. 290 it was contended that the verification in the election petition was defective, as the verification was not done at the foot of the plaint as required under law but at some other page. The Court held that it was immaterial whether the verification is made in continuation of the proceeding paragraph or on a separate page after the plaint ended. In All India Reporter Ltd. Vs. Ramchandra Dhondo Datar, AIR 1961 Bom.292, the Court held that plaint is to be verified by the plaintiff or one of the plaintiffs or by some person but not by any other person but the omission to verify a pleading is a mere irregularity and that a pleading which is not verified as required under Order 6

Rule 15, C.P.C. may be verified at any later stage of the suit, even after the expiry of the period of limitation. In Bhikaji Keshao Joshi and another Vs. Brijlal Nandlal Biyani and others, AIR 1955 SC 610 it was held that in absence of enumeration of various paragraphs in the verification clause cannot be considered as a defect so as to reject the election petition. In Provabati Kunwar Vs. Kaiser Kunwar and others AIR 1959 Cal. 642, it was held that a suit cannot and ought not to fail because of imperfect verification and the court should give leave to rectify it at any time.

9. Learned counsel for the petitioner relied upon the decision in Dr. (Smt.) Shipra etc. etc. Vs. Shanti Lal Khoiwal etc. etc. Judgment Today 1996 (4) SC 67 it was held that the verification by a Notary or any other prescribed authority is a vital act which assures that the election petitioner had affirmed before the notary etc. that the statement containing imputation of corrupt practices was duly and solemnly verified to be correct statement to the best of his knowledge or information as specified in the election petition and the affidavit filed in support thereof. In this case the Apex Court did not lay down that the Court cannot permit verification of the election petition. In Mr. V. Narayanaswamy Vs. Mr. C.P. Thirunavukkarasu JT 2000 (1) SC 194 the Apex Court upheld the order of Madras High Court whereby the application of the respondent under Order 6 Rule 16 and Order 7 Rule 11, C.P.C. was allowed and the election petition was dismissed. In this case it was found that there were no material facts in the election petition and the election petitioner was afforded opportunity to make the correction and give the material facts in the election petition but as he failed to do so it was held that the High court has power to permit to make amendment for furnishing material particulars and to require amendment of the verification. It was observed as under:

"High Court has undoubtedly the power to permit amendment of the petition for supply of better material particulars and also to require amendment of the verification and filing of the required affidavit but there is no duty cast on the High Court to direct suo moto the furnishing of better particulars and requiring amendment of petition for the purpose of verification and filing of proper affidavit. In a matter of this kind them primary responsibility for furnishing full particulars of the alleged corrupt practices and to file a petition in full compliance with the provisions of law is on the petitioner. (See in this connection Constitution Bench decision in Bhikaji Keshao Joshi and Anr. Vs. Brijalal Nandlal Biyani and ors. (AIR 1955 SC 610= (1955) 2 SCR 428 (444)."

10. These cases do not hold that the Court has no power to permit the election petitioner to remove the defect in verification or permit the petitioner to make verification.

11. The last submission of the learned counsel for the petitioner is that the election petitioner had got sworn the affidavit on 3.7.2000 while the election petition was presented on 7.7.2000 and, therefore, the contents of the election petition cannot be taken as duly sworn on affidavit. The mere fact that the affidavit was prepared before the election petition was drafted, does not itself make the election petition defective.

I do not find any merit in the writ petition and it is, accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 27.4.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE O. BHATT, J.

Civil Misc. Writ Petition No. 23291 of 1997

Sunil Kumar Pathak ...Petitioner
Versus
Chairman, Indian Oil Corporation and others ...Respondents

Counsel for the Petitioner:
Sri Lalji Sinha
Sri Ravi Kant

Counsel for the Respondents:
Sri V.R. Agrawal

Indian Oil Corporation Ltd. (Conduct, Discipline and Appeal) Rules 1980- rule 8- Provisions of abandoned the service- on overstaying beyond the period sanctioned the leave- held- arbitrary violative of Article 14 of the constitution without conducting the Disciplinary proceeding without affording any opportunity of hearing- order held illegal.

Held- Para 16

In our opinion the facts of the case are squarely covered by the decision of the Supreme Court in D.K. Yadav Vs. J.M.A. Industry Ltd. 1993 (3) SCC 249. In view of the said decision clause 8 of the Rules is clearly violative of Article 14 of the Constitution and the petitioner should have been given opportunity of hearing in an enquiry after charge sheeting him. Since that was not done the impugned order dated 20.5.1997 Annexure 1 to the petition is clearly illegal and is hereby quashed.

Case law discussed.
1993 (3) SCC-249

By the Court

1. This writ petition has been filed against the impugned order dated 20.5.1997 Annexure 1 to the writ petition by which the petitioner was deemed to have abandoned his job and his name has been struck off from the rolls of the respondent corporation.

2. Heard learned counsel for the parties. We have also perused the counter and rejoinder affidavits. It is alleged in paragraph 1 of the petition that the petitioner joined the service of Indian Oil Corporation as Accounts Officer on Probation after having qualified in written and interview test held on 15.1.1990. The petitioner was thereafter confirmed on the post of Accounts Officer in July 1990. He was promoted as Senior Accounts Officer in 1994.

3. In paragraph 5 of the writ petition it is alleged that the petitioner proceeded on earned leave to Bombay from 11.9.1995 to 22.9.1995 with prior permission of the concerned authority. However, the petitioner for unavoidable reasons could not join his duty and applied for extension of leave from 23.9.1995 to 6.10.1995. It is alleged that the petitioner joined duty on 13.10.1995 and applied for extension of leave from 7.10.1995 to 27.10.1995. This application was allowed and the petitioner worked till 6.11.1995 and received salary.

4. In paragraph 6 of the petition it is alleged that the petitioner again fell ill as he was suffering from Hepatitis. He sent

an application for leave from 7.11.1995 and resumed duty on 27.12.1995 when he was declared fit by the doctor. In paragraph 7 it is alleged that on 27.12.1995 a letter was issued by the Chief Finance Manager for producing the original papers with regard to the petitioner's treatment and for his medical examination at Indian Oil Corporation hospital. In paragraph 8 of the petition it is alleged that the petitioner presented himself for medical examination on 1.1.1996 before the Chief Medical Officer of the Corporation Hospital at Mathura and on 2.1.1996 the Pathological test was carried out. The petitioner submitted original papers of his treatment as demanded by the Chief Finance Manager and Dr. S.P. Singh attested the same and gave fitness certificate.

5. In paragraph 9 of the petition it is alleged that on 6.1.1996 an application was made by the petitioner to the Senior Finance Manager for leave in order to escort the petitioner's father to Baroda for treatment. His application was rejected and a warning was issued to him to join duty by 29.1.1996 otherwise his service will be terminated. In paragraph 10 of the petition it is alleged that the petitioner submitted his joining report on 29.1.1996 and requested for allocation of work. He also submitted his reply on 31.1.1996 to the letter dated 19.1.1996 and stated the reasons for his absence. It is alleged that the petitioner's medical bill was sanctioned by the Chief Finance Manager. In paragraph 11 it is alleged that the petitioner actually worked on 6.2.1996 and signed the entry register and applied for provident fund loan.

6. In paragraph 12 it is alleged that the petitioner sent a registered letter on 9.2.1996 to the Chief Finance Manager on the ground of his illness as he was suffering from lumbago and sciatica. He also sent applications on various dates for extension of leave, as he was not in a position to join duty. In paragraph 13 it is alleged that on 16.8.1996 the petitioner submitted the joining report with medical bills and fitness certificate but on account of sickness the petitioner was again unable to attend the office from 18.8.1996 to 20.5.1997 and applied for leave to the Chief Finance Manager

7. In paragraph 15 of the petition it is alleged that on 20.5.1997 the petitioner submitted fitness certificate from the Chief Medical Superintendent and joined duty on 21.5.1997. He was advised by the Senior Finance Manager to report to the Chief Human Research Manager for allocation of duty but no duty was allocated to him. It is alleged that the petitioner was present in the office till 10.6.1997 when a registered letter appears to have been sent to his residence and was returned with the postal endorsement that the petitioner was on duty in the office.

8. In paragraph 17 of the petition it is alleged that the petitioner was surprised to read in the newspaper '**Dainik Jagaran**' dated 11.6.1997 that he had lost his lien for abandoning his job vide Annexure 1 to the writ petition.

9. It is alleged in paragraph 20 of the writ petition that no opportunity of hearing was given to the petitioner before terminating his service.

10. In the counter affidavit of the Corporation it is alleged in paragraph 6 that the petitioner was sanctioned leave from 11.9.1995 to 22.9.1995 and he

applied for extension of the leave upto 6.10.1995 which was also sanctioned but the petitioner did not report for duty after the extended sanction of leave upto 6.10.,1995 i.e. he was absent from 7,.10.1995 onwards. Hence the Corporation wrote to the petitioner vide letter dated 19.10.1995 pointing out that he is remaining absent unauthorisedly and he ought to report on duty latest by 31.10.1995. On 31.10.1995 the petitioner reported for duty and submitted application for sanction of leave from 7.10.1995 to 27.10.1995. The petitioner remained on duty for about a week till 6.11.1995 and thereafter again remained absent unauthorisedly. In paragraph 7 of the counter affidavit it is alleged that the petitioner started remaining absent unauthorisedly without information from 7.11.1995 onwards and on 20.12.1995 i.e. after a month and half. The corporation wrote to the petitioner advising him to report for duty positively by 26.12,.1995 and submit his explanation. True copy of the letter dated 20.12.1995 is Annexure C.A. 1 to the counter affidavit. On 26.12.1995 a leave application was received by the Corporation from the petitioner seeking leave from 8.11.1995 to 22.12.1995 on the ground that the petitioner was not physically well. This application was not supported by any medical certificate. True copy of the application is Annexure C.A. 2 to the counter affidavit. The Corporation did not sanction this leave and wrote to the petitioner asking him to produce medical certificate and report to the Chief Medical Officer of the Corporation at Mathura for medical examination. True copy of the said letter is Annexure C.A. 3.

11. In paragraph 8 of the counter affidavit it is alleged that the petitioner was examined by the Chief Medical Officer of the Corporation on 1.1.1996 who found him fit. True copy of the certificate is Annexure C.A. 4 . In paragraph 9 of the counter affidavit it is stated that the application for leave of the petitioner for the period 8.1.1996 to 7.2.1996 was examined by the Corporation and having regard to his long absences in the past and requirement of exigencies of work it was not considered possible to sanction him further leave and he was informed by the letter dated 19.1.1996 that his application for leave cannot be sanctioned and he was advised to join duty by 29.1.1996. He was reminded that he had not submitted the medical certificate. He was also advised that if he fails to join the duty by 29.1.1996 it will be presumed that he was not interested in continuing his service. His attention was drawn to clause 8 of the relevant rules of the Corporation. True copy of the letter is Annexure C.A. 5 to the counter affidavit.

12. In paragraph 10 of the counter affidavit it is stated that it is incorrect that the petitioner joined duty on 29.1.1996. However, it is correct that his letter dated 31.1.1996 was received by the Corporation in which he made various unfounded and unbecoming allegations against his senior officers. True copy of the petitioner's letter is Annexure C.A.6 to the counter affidavit. It is further alleged that the petitioner had been applying for leave on false grounds. He had alleged in his application dated 6.1.1996 that he had to take his ailing father to Baroda for treatment but this was absolutely false because he was all along in Mathura. It is also alleged that he was gainfully employed in his private business of selling rice at Mathura. In paragraph 11 it

is stated that the petitioner came to the establishment on 6.2.1996 and he did not perform his duty. He came only to record his presence and for personal work. In paragraph 12 it is stated that the Corporation did not receive the petitioner's application for leave as claimed by the petitioner. However, his application dated 14.5.1996 was received in the office.

13. In paragraph 17 of the counter affidavit it is stated that the petitioner's name was removed from the roll of the Corporation by letter dated 20.5.1997 which was sent by registered post and when it was received back undelivered it was published in the newspaper. True copy of the order passed by the Executive Director dated 20.5.1997 which was sent by registered post and when it was received back undelivered it was published in the newspaper. True copy of the order passed by the Executive Director dated 20.5.1997 is Annexure C.A. 7.

A rejoinder affidavit has been filed and we have perused the same. We have also perused the supplementary affidavit and its reply.

14. The respondents are relying on clause 8 of the Indian Oil Corporation Ltd.(Conduct, Discipline and Appeal) Rules 1980 which states that if an employee overstayed leave beyond the period of leave originally granted or subsequently extended or is otherwise absent beyond 21 days continuously without prior permission or intimation he shall be treated to have voluntarily abandoned the Corporations service.

15. In our opinion the facts of the case are squarely covered by the decision of the Supreme Court in D.K. Yadav vs. J.M.A. Industry Ltd. 1993 (3) SCC 249. In view of the said decision clause 8 of the Rules is clearly violative of Article 14 of the Constitution and the petitioner should have been given opportunity of hearing in an enquiry after charge sheeting him. Since that was not done the impugned order dated 20.5.1997 Annexure 1 to the petition is clearly illegal and is hereby quashed.

16. The petition is allowed. The petitioner will be reinstated with continuity of service but in the circumstances of the case without back wages. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD:18.4.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE O. BHATT, J.

Civil Misc. Writ Petition No.40670 of 2000

Mahavir Prasad Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Babulkar

Counsel for the Respondents:
S.C.

Constitution of India, 226, Article 14- Service Law Disciplinary Proceeding- initiated before retirement- almost eight years expired-enquiry held violative of Article 14 of the constitution of India- direction to release the arrears of salary alongwith 12% interest.

Held- Para 3

In the present case the petitioner retired on 31.7.1993 and hence almost eight years have expired but the enquiry has not been completed. In the circumstances continuance of the enquiry is wholly arbitrary and anything which is arbitrary is violative of Article 14 of the Constitution as held by the Supreme Court in Maneka Gandhi Vs. Union of India- AIR 1978 SC 597.

Case law Relied on:

AIR 1978 SC-597

By the Court

1. In this case learned Standing Counsel was granted six weeks time to file counter affidavit by order dated 12.9.2000. Thereafter on 6.2.2000 he was granted three weeks and no more time to file counter affidavit but as yet no counter affidavit has been filed. Hence we treat the allegations in the writ petition to be correct.

2. The petitioner retired as D.I.O.S. on 31.7.1993. On 10.6.1993 he was served with a charge sheet and thereafter in 1994 he was served with a supplementary charge sheet but it is deeply regrettable that enquiry has not yet been completed and the petitioner is only getting provisional pension. In our opinion the enquiry cannot be kept pending for so many years.

3. Learned counsel for the petitioner relies on the rules dated 2.11.1995 made under Article 309 of the Constitution vide Annexure-8. In Clause 17 of the same it is mentioned that if enquiry commences before the retirement then it must be completed within six months after the retirement. In the present case the petitioner retired on 31.7.1993 and hence almost eight years have expired but the enquiry has not been completed. In the circumstances continuance of the enquiry is wholly arbitrary, and anything which is arbitrary is violative of Article 14 of the Constitution as held by the Supreme Court in Maneka Gandi Vs. Union of India A.I.R. 1978 S.C. 597. Hence we quash both the charge sheet and supplementary charge sheet and direct that the petitioner shall be given final pension including all benefits and arrears and interest from the date when it was due at the rate 12% within two months of production of a certified copy of this order in accordance with law. The petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED, THE ALLAHABAD : 2.5.2001

BEFORE
THE HON'BLE M. KATJU, J
THE HON'BLE R.B. MISRA, J

Civil Misc. Writ Petition No. 25986 of 1995

Pravina Solanki, Constable C.P. 849 ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner :
Sri S.K. Lakhtakia

Counsel for the Respondents :
S.C.

Constitution of India- Article 226. There are no allegations against the petitioner that her conduct in any way affected her official functions. There is also no allegation that she was on duty at the relevant time-unless an employee does some act which interferes with his/her official function, ordinarily whatever he / she does in his/ her private life cannot

be regarded as misconduct. The position may have been different if the petitioner was doing the aforesaid acts while on duty, but in the present case she was at her residence late in the night and there is no allegation that she was on duty at that time.

(Held in para 5 & 6)

We cannot help observing that if the petitioner had been a male employee perhaps the authorities would have done nothing about it, but since she was a female, she has been proceeded against. Thus this is case which smacks of sexual discrimination. In view of the above the writ petition is allowed. The impugned orders are quashed.

By the Court

1. This writ petition has been filed against the impugned order dated 2.8.99 Annexure 8 to the petition dismissing the petitioner from service and the appellate order dated 30.11.89 passed by the D.I.G., Agra and the revisional order dated 24.3.91 passed by the D.G.P., U.P. as well the judgement dated 1.6.95, Annexure 10 to the writ petition passed by the U.P. Public Service Tribunal.

2. We have heard learned counsel for the parties. The petitioner was lady constable in the U.P. Police. After due selection in 1982 she was appointed and in 1986 she was posted at Firozabad, district Agra. In para 2 of the petition it is alleged that her work and conduct was good and she was awarded good entries. In para 3 it is alleged that in 1983 in the All India Police Meet the petitioner was awarded First Prize in the Dance Competion and she won other prizes.

3. In para 4 it is alleged that when the petitioner was posted at Firozabad her younger sister Anjali developed some serious medical trouble hence her mother took a room on rent in Agra and brought Km. Anjali for treatment at Agra and both started living there together. The petitioner often visited them. Various facts have been alleged in the petition but it would not be necessary to go into the same. All that is necessary to mention is that the petitioner has alleged that due to some enmity the Dy. S.P. the respondent no.5 raided her residence on 30.12.87 at about 11.30 P.M. and arrested the petitioner and one Jagdish Saran Joshi, a guest of the petitioner's mother in order to defame the petitioner and get her removed from service. They were medically examined and the petitioner was suspended on 2.1.88 by order of the S.S.P., Agra. The petitioner was chargesheeted on 31.10.88 vide Annexure 6 to the petition. In this chargesheet it is alleged that on the night of 30/31.12.87 the petitioner was found at her residence under influence of liquor and sleeping with Jagdish Saran Joshi in the same bed. Bottles of liquor and some rifle, guns and cartridges were also recovered. On the basis of the said chargesheet an enquiry was held against the petitioner. True copy of the enquiry report dated 28.2.89 is Annexure 7 to the petition. Thereafter vide order dated 2.8.89 the petitioner was dismissed from service. Her appeal before the D.I.G. was also dismissed and the revision before D.G.P. vide Annexure 9 also filed. The petitioner then approached the U.P. Public Services Tribunal but her petition was dismissed vide Annexure 10 to the writ petition. Hence this writ petition.

4. There are no allegations against the petitioner that her conduct in any way affected her official functions. There is

also no allegation that she was on duty at the relevant time. In our opinion unless an employee does some act which interferes with his/her official function the ordinarily whatever he/she does in his /her private life cannot be regarded as misconduct. In the case of Rabindra Nath Ghosh 1985(1) SLR 598 this was the view taken by the Calcutta High Court and this was also the view taken by a division bench of this Court in State of U.P. Versus B.N. Singh AIR 1989 Alld. 359. The position may have been different if the petitioner was doing the aforesaid acts while on duty, but in the present case she was at her residence late in the night, and there is no allegation that she was on duty at that time. As held by this Court in the case of State of U.P. Versus B.N. Singh (Supra), in order to bring a case of a government servant within the definition of personal immorality on the ground of habit of sex, it must be shown that this habit of the government servant has reduced his utility as a public servant so as to damage the government or official generally in public esteem. In Sukhdev Singh V. State of Punjab, 1983(2) SLR 645 the Punjab High Court held that a constable under influence of alcohol while not on duty cannot be held to be guilty of misconduct. In the present case the petitioner was not having sex in a public place but at her residence. Hence it cannot be said that she has committed any misconduct for which she can be departmentally proceeded against.

5. We cannot help observing that if the petitioner had been a male employee perhaps the authorities would have done nothing about it, but since she was a female she has been proceeded against. Thus this is a case which smacks of sexual discrimination.

6. In view of the above the writ petition is allowed. The impugned orders are quashed. The petitioner shall be reinstated in service within a month of production of certified copy of this order before the S.S.P., Agra. She will also get all back wages and other benefits treating her service not to have been terminated, with 12% interest from the date of termination to the date of reinstatement, and these will be paid to her within 2 months. She will also get continuity of service, increment, etc.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 26 APRIL 2001

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

Civil Misc. Writ Petition No. 8394 of 2001

Smt. Leelawanti ...Petitioner
Versus
Rent Control and Eviction Officer and others ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri Akhileshwar Singh

Counsel for the Respondents:
Sri Ravi Kant

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972- Section 12 (3) ' Deemed vacancy'- a son of the deceased tenant possessed his own residential house in the same eity - liable to be evicted- presumption ' Deemed vacancy' arose.

Held - Para 16

There can be no escape from the finding that Ashok Chabara was normally residing with his father in the tenanted house and that he has acquired other

houses from time to time on rent for his residence. Ashok Chabara being a member of the family, which expression has been defined under Section 3 (g) of the Act, acquired another residential building in the same city in a vacant stage for his occupation and consequently, the tenant (s) ceased to occupy the tenanted accommodation in view of the provision of sub- section (3) of Section 12 read with explanation (b).

Case law discussed;

(1995) 1 SCC - 537
1981 ARC - 305
1992 AWC - 190
2000 (1) ARC - 610
1989 (3) SCC - 77
1995 (1) SCC - 537
1979 (3) SCC - 745
1990 (4) SCC- 207
AIR 1986 SC -488
(1989) 1 SCC -441
AIR 1976 SC -1207
1985 (2) SCC -68
AIR 1976 SC -1766
AIR 1960 SC -195
2000 (1) ARC - 189
1983 (4) SEC - 3590
1980 (1) SCC -416
AIR 1950 SC -265
AIR 1965 SC- 1954
1952 AC -109
1951 (2) ALLER 587
AIR 1953 SC -2441
1953 SCR - 773
AIR 1961 SC -838
1987 (supply) SCC -350
1980 ACJ 194
1988 (1) ARC 108
1991 JRC - 426

By the Court

1. By means of this writ petition under Article 226 of the Constitution of India, the petitioner- Smt. Lilawanti has challenged the order dated 26.2.2001, Annexure 1 to the Petition, whereby a deemed vacancy has been declared by the Rent Control and Eviction Officer/VIth Additional City Magistrate, Kanpur Nagar in respect of house no. III- A/214 Ashok Nagar, P.S. Nazirabad, Kanpur Nagar.

2. Counter and rejoinder affidavits have been exchanged. Heard Sri W.H. Khan, learned counsel for the petitioner and Sri Ravi Kant, learned Senior Advocate appearing on behalf of the respondent no. 2.

3. It is indubitable fact that late Radha Kishan Chhabara was the original tenant in the premises aforesaid. He died on 16.10.1990 leaving behind him the present petitioner (widow) and three sons, namely Ashok Kumar Chhabara, Prem Chhabara and Rakesh Chabara. Whereabouts of Rakesh Chandra Chhabara are not known as he is missing for a considerable long time. The respondent no. 3 - Dharmendra Kumar moved an application for allotment of tenanted premises on the ground that a deemed vacancy has come into being in view of the provisions of sub -section (3) of Section 12 of the U.P. Urban Buildings (Regulation of letting, rent and eviction) Act, 1972 (Act no. XIII of 1972) hereinafter referred to as 'the Act') as Ashok Chabara son of the original tenant has acquired separate residential accommodation within the municipal limits of Kanpur Nagar. After obtaining the report of Rent Control Inspector and completing necessary formalities, the Rent Control and Eviction Officer, by the impugned order dated 26.2.2001 declared the tenanted accommodation as vacant. A finding of fact was recorded by the Rent Control and Eviction Officer that Ashok Chabara had acquired house no. D-41 Govind Nagar in the year 1985 and the third house no. 120/192-A, Lajpat Nagar in the year 1989, i.e. during the life time of his father late Radha Kishan Chabara

and consequently, a deemed vacancy under provisions of section 12 (3) of the Act has occurred.

4. The petitioner Smt. Lilawanti has challenged the order of vacancy on variety of grounds. It is asserted that Ashok Kumar Chabara has separated during the life time of his father and was not normally residing with him when he acquired a house on rent in Govind Nagar, then in Kaushalpuri and then in Lajpatnagar, that he did not inherit the tenancy rights on the death of his father and consequently, even if he took any house on rent at different places, no legal vacancy arose in respect of the accommodation of which Late Radha Kishore Chabara was the tenant and after his death, the (widow) and Prem Chabara (son) are the joint tenants.

5. Sri W.H. Khan, learned counsel for the petitioner urged that though Ashok Chabara is the son of the petitioner and was initially living in the tenanted house, he ceased to occupy the same during the life time of his father as he separated from the family and merely because a married son has gone to a rented house to settle himself in an independent capacity, a deemed vacancy under sub- section (3) of Section 12 would not arise. The thrust of the submission of Sri W.H. Khan was that since Ashok Chabara has ceased to be the member of the family of the tenant and has not been normally residing with him nor was wholly dependent on the tenant, the provisions of sub- section (3) of Section 12 of the Act shall not be attracted. In support of his contention, Sri Khan placed reliance on explanation (b) to the proviso to sub- section (3) of Section 12. He also placed reliance on certain observations of the apex court in **Harish Tandon vs. Addl. District Magistrate, Allahabad** - (1995) 1 SCC-537. Sri Ravi Kant has repelled the above submission and urged that there can be no escape from the fact that Ashok Chabara son of the tenant who was living in the tenanted house has acquired a separate house and on account of acquisition of another house for residential purpose by a family member of the tenant, a deemed vacancy has undoubtedly arisen.

6. The crucial point for determination in the present writ petition is whether on account of acquisition of a house by Ashok Chabara who is the son of the original tenant in a vacant state for residential purpose within the municipal limits of Kanpur Nagar would give rise to a deemed vacancy as contemplated under Section 12 (3) of the Act, which reads as follows :

"12. Deemed vacancy of building in certain cases - (1) A land lord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if -

(a)…….
(b)…….
(c) …….
(2)…….

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town are in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy'

Provided that if the tenant or any member of his family had built any such residential building before the date of

commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

Explanation - For the purposes of this sub- section -

(a) a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purposes as a tenant, allottee or licencee;
(b) the expression 'any member of family' in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant …"

7. The above provisions came to be interpreted by this court as well as apex court in a number of decisions. A full Bench of this Court in Smt. Rama Devi Shakya v. Addl. District Judge- 1981 ARC - 305, interpreting the provisions of Section 12 (3) and explanation (b) observed as follows:

"If a person is normally residing with the tenant, he shall be a member of the family, if he is wholly dependent on such tenant, then also he will be a member of the family, even though he may not be normally residing with the tenant.

If a person who has been normally residing with the tenant builds or otherwise acquires, in a vacant state, or gets vacated a residential building in the same city etc. the building under tenancy shall be deemed to have become vacant. Similarly, if a person who is wholly dependent on the tenant does the offending act, namely, acquires etc., another residential building, the same result will follow. It is not necessary that a person should both be normally residing with the tenant as well as be wholly dependent on such tenant before his acquiring another building will cause vacancy.

Explanation (b) to Section 12 (3) of the Act does not require that a member of the family who acquires another building should both have been normally residing with the tenant and should also be wholly dependent on him."

8. Later on, in another case- **Syed Mazahar Mustafa Jafri and another v. Rent Control and Eviction Officer, Allahabad and others** 1992 AWC - 190, it was held that a deemed vacancy of a tenanted accommodation occurs automatically on account of certain acts done by the tenant or a member of the family. In that case, in the life time of the original tenant, one of his sons had acquired a residential house in the same city in a vacant state and had got possession in the same. The Rent Control Inspector Inspected the house in dispute and submitted his report to the said effect. Thereafter notices were issued to the parties. The petitioners - sitting tenants filed objection challenging the report. The Rent Control and Eviction Officer held that the disputed house would be deemed to be vacant. The order of vacancy was challenged in the writ petition by the sitting tenants. It was observed that a plain reading of sub- section (3) of Section 12 of the Act shows that if the tenant or any member of his family builds or otherwise acquires in a vacant state a residential building in the same city or municipality in which the building under

tenancy is situate then the tenant shall be deemed to have ceased to occupy the building under his tenancy. Explanation (b), however, provides that the expression ' any member of the family' in relation to a tenant shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant. Therefore, if any member of the family of a tenant acquires a residential building in a vacant state in the same city or municipality, the building under the tenancy shall not be deemed to be vacant provided the member of the family of the tenant satisfies either of two conditions, namely (1) he has not been normally residing with the tenant, and (2) he is not wholly dependent on the tenant. If the 'member of the family' of the tenant satisfies only one of the conditions, namely, that he has not been normally residing with the tenant or that he is not wholly dependent on the tenant, in that event the provisions of sub-n section (3) will apply and the tenant shall be deemed to have ceased to occupy the building under his tenancy. It is, therefore, clear that if a member of the family of a tenant builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city or municipality in which the building under tenancy is situate, the tenant shall be deemed to have ceased to occupy the building under his tenancy unless he establishes that a member of his family, who has built or acquired in a vacant state or has got vacated, a residential building, was such a person who was neither normally residing with him nor was wholly dependent on him. The same point came to be considered by this court in **Sarswati Chadda (Smt.) Vs. Ist Additional District Judge, Allahabad and others** -2000 (1) ARC - 610. In that case, two sons of the tenant acquired property within the same city in a vacant state. The sons were found to be not wholly dependent on the tenant. The question that arose for determination before the court was whether sons had been normally residing with the tenant or not. It was held that the established position of law now is that either one of the ingredients is to be satisfied in order to attract the application under Section 12 (3) of the Act. It was further observed that relevant date on which the tenant shall be deemed to have ceased to occupy the accommodation would be the date on which the acquisition was made by the son.

9. Sub section (3) of Section 12 of the Act emphasizes acquisition of another building in a vacant state. Under it, the question of possession is the all important feature. If a building is acquired in a vacant state, it is obviously available for being occupied. The purport of Section 12 (3) of the Act is to frown upon the tenant having two buildings for his and his family members' occupation at the same time. Explanation (b) to sub section (3) of Section 12 of the Act, as said above, clearly specifies the circumstances in which a deemed vacancy would arise. If a person (a) wholly dependent on tenant and/or (b) normally residing with him, acquires another accommodation, the tenant shall be deemed to have ceased to occupy the building under tenancy i.e. a deemed vacancy would come into existence.

10. Sri W.H. Khan, learned counsel for the petitioner urged that the impact of the decision of the Full Bench in **Smt. Rama Devi Shakya's** case (supra) was considered by the apex court in **Mohd. Azeem V.. Additional District Judge** -

1989 (3) SCC - 77 and overruling it, it was observed that if the Full Bench decision was to be followed then in an expanding family, even if one child moved out it would result in the eviction of all the other members of the family. Reliance was also placed on paragraph 19 of the oft quoted decision of the apex court in **Harish Tandon Vs. Additional District Judge, Allahabad and others** 1995 (1) SCC -537 to point out the difficulties, which may arise on account of one of the family members of the tenant acquiring a separate accommodation. Para 19 of the Report runs as follows:

"19. So far as sub-section (3) of Section 12 is concerned, it says that in case of residential building, if the tenant or any member of his family builds or otherwise acquires, in vacant state or gets vacated a residential building in the same city, municipality, notified area or town area, in which the building under tenancy is situate, the tenant 'shall be deemed to have ceased to occupy the building under his tenancy'. It was submitted that if full effect is given to the deeming clause, then a house where the tenant was living with his four sons, one of his sons getting any accommodation in the same city or town, the tenant along, with his remaining three sons have to be evicted which shall lead to an absurd result. Although we are not concerned in the present case with the scope of sub-section (3) of Section 12, but in order to appreciate the submission made on behalf of the respondents, we may point out that sub -section (3) of Section 12, does not conceive that if one of the sons living with ;the tenant, who is not wholly dependent on such tenant acquires any other residential building in the same city or town, then even the original tenant shall be deemed to have ceased to occupy the building in question.

This is apparent from Explanation (b) to said sub- section (3) which says:

" the expression 'any member of family' in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant"

In view of the explanation any member of the family mentioned in sub-section (3) shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant. As such, if a son of the tenant who is not wholly dependent on such tenant, acquires or gets any residential building in the same city or town, there is no question of the tenant deeming to have ceased to occupy the building under sub-section (3) of Section 12."

11. According to Sri W.H. Khan, the effect of the decision of the Full Bench and the subsequent decision in **Syed Mazhar Mustafa Jafri and another** (supra) and host of other decisions of this court has been to a considerable extent whittled down by the decision of the apex court in **Mohd. Azeem** (supra) and **Harish Tandon** (supra). At the first flush the provisions of sub -section (3) of Section 12 of the Act appear to be quite strange, harsh and inequitable leading to absurd results. The old parents may be led to a serious trouble if a married son (not dependent) but who normally resided with parents, of necessity, for variety of reasons, such as paucity of accommodation, to maintain harmonious relations by living separately and to enjoy the family life independently without any

interference of the parents acquires an independent accommodation. In course of time, the family members go on multiplying it become well- nigh impossible to live in the original tenanted accommodation comfortable and conveniently. The bond of love and affection which existed between parents and the son on account of social fabric and the present prevailing environment breaks in course of time by introduction of daughter-in-laws. In these circumstances, if a son separates from his parents by taking another accommodation, in that event, the parents would automatically be deemed to have ceased to occupy the tenanted accommodation thereby rendering themselves liable to ejectment. According to Sri W.H. Khan, the deeming provision is clearly against the stark realities of life and should not receive judicial approval. The submission of Sri Khan, though quite attractive and plausible, does not stand the test of legal scrutiny. In **Harish Tandon's** case (supra), it has been observed in paragraph 26 that the judgement in **Mohd. Azeem's** case (supra) by which the Full Bench decision of this court was overruled, does not lay down the correct law. The effect of this observation is that the apex court has not approved its own earlier decision in **Mohd. Azeem's** case (supra) holds good. This aspect of the matter was considered in **Syed Mazahar Mustafa Jafri's** case (supra) by this court and after taking into consideration the various observations made in **Mohd.Azeem's** case (supra) and **Harish Tandon's** case (supra), it was held that the law laid down by the Full Bench of this court in **Smt. Rama Devi Shakya's** case (supra) still holds good.

12. Sri Ravi Kant pointed out that stray observations made in **Harish Tandon's** case (supra) in paragraph 19 of the Report are not in the nature of obiter dicta and, therefore, not binding on this court. In support of this submission, Sri Ravi Kant placed reliance on the decisions in **Dalvir Singh Vs. State of Panjab**, (1979) 3 SCC - 745, (para 22), **Krishna Kumar Vs. Union of India**, (1990) 4 SCC- 207, **Prakash Aml Chand Shah Vs. State of Gujarat and others** (AIR 1986 SC-468), **Ambica Quarry Works V. State of Gujarat** (1987) 1 SCC - 213, **Municipal Corporation Delhi V. Gurunam Kaur** (1989) 1 SCC - 101, **Union of India V. Dhaanwanti Devi and others** - (1996) 6 SCC -44, **A.D.M. V. Shiva Kant Shukla** (A.I.R. 1976 SC -1207), **Gasket Radiators Pvt. Ltd. Vs. Employee's State Insureance Corporation and another** - 1985 (2) SCC -68, **Amarnath Om Prakash Vs. State of Pubjab** (A.I.R. 1985 SC -218), and **Prakash Chandra V. State of U.P.** (A.I.R. 1960 SC -195) which have all been discussed in the decision of a Division Bench of this Court in **National Textile Corporation Vs. Swadeshi Cotton Mills Co. Ltd.**- 2000 (1) A.R.C. - 189 as well as other decisions of the apex court in **Sree Nivasa General Traders Vs. State of Andhra Pradesh and others** - 1983 (4) S.C.C. - 353, **Kewal Krishana Puri Vs. State of Pubjab** - 1980 (1) S.C.C. -416 discussed in the decision of this court in **Sarswati Chadda** (supra). The gamut of all the above decision is that when the observations of high judicial authority like the Supreme Court are being considered, the greatest possible care must be taken to relate the observations of a Judge to the precise issues before him and to confine such observations even though expressed in

broad terms in general compass of the question before him unless he makes it clear that he intended the remarks to have a wider ambit. The decisions of the courts should not be followed generally like statute irrespective of their particular fact situation. It was emphasized that in order to understand and appreciate the binding force of a decision, it is always necessary to see what were the facts of a case in which the decision was given and what was the point which had to be decided. The decision is an authority only for what it actually decides and not for what may logically follow from it. Every judgement must be read as applicable to the particular facts proved or assumed to be proved since generality of the expositions of whole law but governed or modified by the particular facts of the case in which such expressions are to be found. In **Harish Tandon's** case (supra), the apex court had to decide a matter with regard to it non- residential building to which deeming provision of Section 12 (2) of the Act was attracted. In that case, after the death of original tenant, his sons carried on business of deceased father in partnership in the tenanted building and one of them inducted his son-in-law as one of the partners. It was held that son-in-law not being a member of family within the definition of Section 3 (g) of the Act and by virtue of his induction as a partner, a deemed vacancy and as such induction amounted to sub-letting in view of deeming provision of Section 12 (2) and (4) as well as explanation (I) to Section 25 of the Act. The observations contained in paragraph 19 with regard to the operation of sub -section (3) of Section 12 of the Act concerning residential accommodation were not germane to the decision in **Harish Tandon's** case (supra). The observations relied upon by Sri W.H. Khan in **Harish Tandon's** case (supra), therefore, are of no help to him as they do not bind this court as a precedent.

13. It is well settled that the deeming provision is an admission of the non-existence of the fact deemed. It is quite possible that on account of deeming provision, serious hardship, as pointed out by Sri W.H. Khan, may occur but at the alter of hardship, the plain provisions of law which envisage a deemed contingency cannot be sacrificed. This point has been dealt with comparatively in greater details in **Syed Mazahar Mustafa Jafri's** case (supra) in which similar plea was taken that sub- section (3) of Section 12 read with explanation (b) would result in serious hardship if one of the family members of the tenant acquires a residential accommodation in a vacant state in the same city. Placing reliance on the decision of the apex court in **Commissioner of Agricultural Tax Vs. Keshav Chand-** A.I.R. - 1950 S.C. 265, as well as **Morvi Mercantile Bank Vs. Union of India**-A.I.R.- 1965 S.C.-1954 it was held that the question of hardship cannot be and should not be allowed to affect the true meaning of the words used in a statute, hardship or inconvenience cannot alter the meaning of the language employed by the legislature if such meaning is clear on the face of the statute or the rules. The argument of inconvenience and hardship was found to be a dangerous one and was only admissible in construction where the meaning of the statute is obscure. Where the meaning of the statute is clear and explicit, if any hardship or inconvenience is felt, it is for the legislature to take appropriate steps to amend law and not for the courts to legislate under the guise

of interpretation. Section 12 seeks to achieve the object that a tenant should not have more than one accommodation in the same city so as to protect the interest of others who are suffering on account of scarcity of accommodation. The Full Bench of this court was also not unaware of the hardship which may arise on account of strict interpretation of the deeming provision. In paragraph 30 in **Smt. Rama Devi Shakya's** case (supra), the Full Bench observed as follows:

" 30. The rigour of Section 12 (3) is considerably softened by proviso (b) to rule 10 (6) of the rules. This proviso reads:

" In the case of a residential building under the tenancy of a person who shall be deemed by virtue of Section 12 (3) to have ceased to occupy it by reason of his or any member of his family building or otherwise acquiring in a vacant state or getting vacated another residential building in the same local area, whether that other building is built or acquired or got vacated before or after the date of commencement of the Act, if the District Magistrate is satisfied that the two buildings are occupied by the tenant and a member of his family separately, and that they are separate in messing, the District Magistrate may re-allot the residential building deemed to be vacant under Section 14 (4) to the said tenant or the said member of his family as the case may be."

Even though the acquisition of another building by the tenant or a member of his family may bring about vacancy, yet, if the District Magistrate is satisfied that the two buildings are occupied separately and that there is separate messing he may re-allot the building under tenancy to him. It is open to the present petitioners to apply for re-allotment on the ground that they are living separately and have separate messing, even though the accommodation in their tenancy has fallen vacant under Section 12 (3)."

14. Be that as it may, the fact remains that a deeming provision has to be given full effect and the object and purpose of the provision cannot be frustrated on the ground of hardship and inconvenience. In paragraph 13 to 17, the apex court in **Harish Tandon's** case (supra) has dwelt over the matter of the role of a provision in a statute creating legal fiction. It was held placing reliance on **East End Dwelling Co. Ltd. V. Finsbury Borough Council** - 1952 A.C. - 109 : (1951) 2 All E.R. - 587 , **State of Bombay v. Pandurang Vinayak**- A.I.R. 1953 S.C. -244 : 1953 SCR -773; **Chief Inspector of Mines V. Karan Chand Thapar** - AIR 1961 SC 838 : (1962) 1 SCR-9 **J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India** - 1987 Supp. SCC -350 AIR 1988 SC -191; and **M. Venugopal V. Divisional Manager Life Insurance Corporation of India** -(1994) 2 SCC -323: JT (1994) 1 SC -281 that when a statue creates a legal fiction saying that something shall be deemed to have been done which in fact, in truth, has not been done, one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents, which, must inevitably have flowed. If a person who is either wholly dependent on or is normally residing with the tenant, acquires a house in a vacant State in the same City, there can be no escape from the conclusion that

the tenant has ceased to occupy the tenanted building. No discretion is left to the court to enquire or investigate as to what was the purpose or object of such a person to acquire another house.

15. In the backdrop of the above legal position, now it is the time to consider the effect of the acquisition of a house by Ashok Chhabara, son of late Radha Kishan Chhabara who originally was the tenant in respect of which a deemed vacancy is said to have arisen. It is an indubitable fact that late Radha Kishan Chhabara, the original tenant was living in the tenanted house along with his wife, Smt. Lilawanti, the present petitioner and three sons, namely, Ashok Chabara, Prem Chabara and Rakesh Chhabara. During the life time of his father, Ashok Chabara who had been married, left the tenanted house and shifted to a rented house- D-41, Govind Nagar Kanpur in the year 1984. He shifted to another house -118/316 kaushalpuri, Kanpur in the year 1985 and acquired on rent house no. 120/192-A, Lajpat Nagar, Kanpur in the year 1989. The original tenant Radha Kishan Chabara died on 16.10.1990. It is common case of the parties that Ashok Chabara was not wholly dependent on his father. Now the question is whether he was normally residing with his father or not. Undoubtedly, prior to his shifting to house no. D-41 Govind Nagar Kanpur in the year 1984, Ashok Chabara was residing with his father. Sri Ravi Kant, learned counsel for the landlord-respondents urged that as a matter of fact and in law, a deemed vacancy had arisen right in the year 1984 when Ashok Chabara who was residing with his father had acquired rented house- D-41 Govind Nagar in Kanpur city itself. In support of his contention, he not only placed reliance on the observation made in **Syed. Mazahar Mustafa Jafri's** case (supra) but also made a reference to the other decisions of this court, namely, **Rajendra Prasad Vs. Ixth Additional District Judge, Kanpur**, -1980 A.C.J. -194; **Mahendere Singh Vs. Xth Additional District Judge, Kanpur Nagar**, 1988 A.W.C.-530; **Smt. Shashi Govil Vs. District Judge, Meerut** - 1989 (1) A.R.C. -108, and **Trust Asha Maj Dharmashala Vs. IIIrd Additional District Judge, Dehradun and others** - 1991 J.R.C. -426 capped by the recent decision in **Hriday Narain Misra Vs. Rajnath Shukla and others** -2000 (1) A.R.C. -272. The gist of all the above decisions is that the relevant point for applying Section 12 (3) of the Act to the tenant is when another residential accommodation is acquired in a vacant state and not on the date on which the application for allotment or release was made. In the instant case, a deemed vacancy arose in the year 1984 when Ashok Chhabara had acquired rented house no. D-41, Govind Nagar, Kanpur. Even otherwise, there is enough evidence on record to indicate that Ashok Chabara was normally residing with his father. The Rent Control and Eviction Officer, after appraising the evidence on record, has recorded a finding of fact that Ashok Chabara staged a come back to the tenanted house when his father late Radha Kishan Chabara was ailing. Ashok Chabara was an accused in a case under Section 13 of the Gambling Act. In the First Information Report in crime case no. 334 of 1990, he was shown to be residing at the address of his father. In the year 1988-89 two sons of Ashok Chabara took birth and the record of birth maintained by the Municipal Corporation indicates that their residence was shown in the

tenanted accommodation (111-A/214 Ashok Nagar, Kanpur). In the ration card, the name of Ashok Chabara is also found along with other family members. All these documents indicate that Ashok Chabara was normally residing in the tenanted house with his father and subsequently shifted to a rented house no. 120/192 -A Lajpat Nagar, Kanpur.

16. There can be no escape from the finding that Ashok Chabara was normally residing with his father in the tenanted house and that he has acquired other houses from time to time on rent for his residence. Ashok Chabara being a member of the family, which expression has been defined under Section 3 (g) of the Act, acquired another residential building in the same city in a vacant stage for his occupation and consequently the tenant (s) ceased to occupy the tenanted accommodation in view of the provision of sub-section (3) of Section 12 read with explanation (b). Thus, the impugned order of vacancy dated 26.2./2000 passed by the Rent Control and Eviction Officer does not suffer from any legal infirmity.

17. Both on the factual and legal matrix, the writ petition fails and is accordingly dismissed without any order as to costs. The interim order dated 12.3.2001 passed by this court, shall stand discharged/vacated.

18. It is made clear that in spite of the fact that the tenanted accommodation has fallen vacant, the petitioner shall be entitled to move an application for fresh allotment in view of the proviso (b) to rule 10 (6) of the Rules framed under the Act and if the District Magistrate is satisfied that the tenanted building as well as the other building in occupation of Ashok Chabara are occupied separately and that there is separate messing, he may re-allot the building under the tenancy of the petitioner and his son Prem Chhabara who have become joint tenants after the death of the original tenant late Radha Kishan Chabara.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 20.4.2001

BEFORE
THE HON'BLE D.S. SINHA J.
THE HON'BLE LAKSHMI BIHARI J.

Civil Misc. Writ Petition No. 27508 of 1993

Dr. Mithilesh Dikshit, ...Petitioner
Versus
Management committee, and others ...Respondents

Counsel for the Petitioner:
Sri Sant Sharan Sharma,
Sri Sadhana Upadhyaya,

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

Constitution of India-Article 226- Before approaching the Court for issuance of a writ of mandamus for securing performance of the statutory duty by the concerned authority the petitioner must approach the said authority and demonstrate to the court that the authority has failed to discharge statutory obligation imposed upon him

(Held in para 13)

In the instant case, petitioner never approached the relevant authorities for enforcement of her legal right and performance of the corresponding duty of the concerned authority However, she may do so now, if advised.

By the Court

1. Heard Shri Sharan Sharma, learned counsel appearing for the petitioner and Sri S.K. Mehrotra, learned Brief-holder of the State of U.P., appearing for District Inspector of Schools, Ferozabad and State of U.P., at length and in detail.

2. The principal prayer of the petitioner, who is the Head of the Hindi Department of B.D.M.M. Girls Degree College, Shikohabad, is that this Court may issue a writ of mandamus commanding the respondents to pay her the arrears of salary for the period October and November, 1991 and salary from March, 1993 onwards. Further prayer of the petitioner is that the respondents be restrained from interfering in her functioning as Head of the Hindi Department of the college.

3. The dispute about the petitioner's functioning as Head of the Hindi Department of the college does not survive, and the learned counsel of the petitioner states that instant petition may be treated to be confined only with regard to the payment of dues of salary.

4. It is not disputed that the Uttar Pradesh Universities Act, 1973, hereinafter called the 'Act', is applicable to the college where the petitioner is serving.

5. Section 60-E of the Act contemplates that for payment of salaries of teachers and employees of every college, governed by the Act due in respect of any period after March 31, 1975 the State Government shall be liable. It is not disputed that the matter regarding payment of salary is looked after by the District Inspector of Schools of the area wherein the college is situated.

6. In the counter-affidavit filed on behalf of the respondent Nos. 1 and 2, the stand taken is that the petitioner had been absenting from duty. She is, therefore, not entitled to the salary claimed. In the rejoinder-affidavit and supplementary rejoinder-affidavit petitioner asserts that it is false to say that she has been absenting from the college. She has made reference of certain documents in support of the assertion that she has in fact been attending the college.

7. Thus, there is serious dispute about the factum of the petitioner's working in the college at the relevant time, and the controversy cannot be decided without evidence to be led by parties and appreciation thereof by the appropriate authority. The appropriate authority in the instant case, in the opinion of the court, would be the district Inspector of Schools in whose jurisdiction the institution in which the petitioner is serving is located.

8. From the record before the court it is not established that the petitioner has ever approached either District Inspector of Schools or the State Government making demand of payment of salary.

9. In its decision rendered in State of Haryana and another Vs. Chanan Mal and others, reported in A.I.R. 1976 S.C. at page 1654, the Hon'ble Supreme Court has clearly and firmly ruled as follows:

"Any petitioner who applies for a writ or order in the nature of a mandamus should, in compliance with a well known

rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established."

10. In another decision rendered by it in Mani Subrat Jain and another Vs. State of Haryana and others, reported in A.I.R. 1977 S.C. at page 276, the Hon'ble Supreme Court has observed thus:

"It is elementary though it is to be restated that no one can ask for a mandamus without a legal right. There must be a judicially enforceable right as legally protected right before one suffering a legal grievance can ask for a mandamus. A person can be said to be aggrieved only when a person is denied a legal right by some one who has a legal duty to do something or to abstain from doing something."

11. In the Bihar Eastern Gangetic Fishermen Co-operative Society Limited Vs. Sipahi Singh and others, (A.I.R. 1977 S.C. 2149) the Hon'ble Supreme Court has again reiterated:

"that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation."

12. From the decisions of the Hon'ble Supreme Court, noticed above, it is clear that before approaching the court for issuance of a writ of mandamus for securing performance of the statutory duty by the concerned authority the petitioner must approach the said authority and demonstrate to the court that the authority has failed to discharge statutory obligation imposed upon him.

13. In the instant case, petitioner never approached the relevant authorities for enforcement of her legal right and performance of the corresponding duty of the concerned authority. However, she may do so now, if advised.

14. On the facts and circumstances and what has been stated above, the court declines to intervene in the matter at this stage. Accordingly, the writ petition is dismissed. There is no order as to costs

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 20.4.2001

BEFORE
THE HON'BLE S.K. SEN C.J.
THE HON'BLE A.K. YOG J.

Civil Misc. Writ Petition No. 5160 of 1993

Ram Nihor Singh, ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anupam Kumar,
Sri T.P. Singh,
Counsel for the Respondents:
Sri Vinod Swaroop,
S.C.

L.R. Manual-Para 7.08- Renewal of terms- D.G.C. completed his terms successfully upto 60 years age- renewal denied as the petitioner not applied within the prescribed period-District Magistrate asked report regarding performances- No reason disclosed for disagreement with report given by concerned D.J..

Held – Para 14 and 15

In our considered view, L.R. Manual does not contemplate embargo of 60 years of age and question of extension/renewal of term of a 'District Government counsel' has to be considered, decided and extended upto the age of 62 years subject to one fulfilling three conditions provided under note to para 7.08 of L.R. Manual. Otherwise action of the Government will be exposed to challenge and vulnerable on the ground of vice of arbitrariness.

Where no plausible reason or principle is indicated the order appears to be fair and reasonable. It is further observed that if the State is unable to produce material to justify its action as fair and reasonable, the burden upon the person alleging arbitrariness must be held to be discharged. The order was not based on relevant consideration hence it was arbitrary. Therefore, the decision of the Government suffers from vice of arbitrariness.

Case law discussed.

1992 ACJ -306 (DB)
1991 SCC -742
2001 ACJ -101
AIR 1996- SC - 864

By the Court

1. A short Counter Affidavit has been filed on behalf of all the respondents. Learned counsels for all the parties agreed that the case may be finally heard and decided at the admission stage as contemplated under Chapter XXII, Rule 2 (Second Proviso) of the Rules of the Court, 1952 (as amended upto date).

2. Heard learned counsels appearing for the petitioner and Sri Vinod Swaroop, Additional Advocate General representing all the Respondents. Facts of the case, required for decision of this petition, are not disputed.

3. Ram Nihor Singh, petitioner, is a duly enrolled Advocate on the Rolls of the Bar Council of Uttar Pradesh. He is a regular legal practitioner of the district Court. He was appointed as Assistant District Government Counsel (Civil) in 1978 by the State Government to conduct cases on its behalf, as is evident from the perusal of the District Magistrate's letter dated October 6, 1978(Annexure-3 to the Writ Petition). Vide Government letter February 3, 1980, addressed to the District Magistrate. Allahabad, Annexure-4 to the Writ Petition, petitioner was required to take charge as District Government Counsel (Civil) as an interim measure on adhoc basis in place of Satya Prakash Goyal, Advocate, the then out going District Government Counsel (Civil). Annexure 5 to the writ petition is a copy of the registered letter dated July 31, 1991 from U.P. Government to the district Magistrate, Allahabad, which contains list of advocates appointed by the Government as District Government Counsels (Civil) and Assistant District Government Counsel (Civil). The name of the petitioner appears at Serial no. 1 in the list. Letter of the Government, dated December 31, 1991, addressed to the petitioner (Annexure-6 to the Writ Petition) shows that his appointment as District Government Counsel (Civil) was extended by the Government subject to submitting certain certificates. The term was again extended vide Government letter September 6, 1996 (Annexure-7 to the Writ Petition) till 4th September, 1999. Government letter dated January 11, 2000 addressed to the District Magistrate, Allahabad filed as Annexure-8 to the Writ Petition shows that term of the petitioner was extended/regularised till January 2, 2001 i.e. till 60 years of age of the petitioner

4. Before aforesaid letter January 11, 2000 (Annexure-8 to the Writ Petition) was issued, it appears, action was taken to consider case of the petitioner for extension/renewal as District Government Counsel (Civil) in pursuance to the provisions of Legal Remembrance Manual ('for short called 'L.R Manual'). Photocopy of Chapter VII of L.R. Manual, dealing with 'District Government Counsel - A. Appointment and Conditions of Engagement' has been filed as Annexure-11 to the Writ Petition. Relevant provisions of L.R. Manual for the purpose of the present case, namely paras 7.01, 7.03, and 7.09 are being reproduced below:-

7.01 Definition :- (1) The District Government Counsel are legal practitioners appointed by the State Government to conduct in any court, other than the High court, such civil, criminal or revenue cases on behalf of the State Government, as may be assigned to them either generally, or specially by the Government.

(2) The legal practitioner, appointed to conduct criminal cases shall be known as District Government Counsel (Criminal). Similarly the legal practitioners, appointed to conduct civil and revenue cases, shall be known as District Government Counsel (Civil) and District Government Counsel (Revenue) respectively.

NOTE- The expression District Government Counsel in this Chapter refers to District Government Counsel (Civil) in respect of civil work, to District Government counsel (Criminal) in respect of criminal work and to District Government counsel (Revenue) in respect of revenue work and includes Additional Assistant/Sub-District Government Counsel, wherever, so required by the context.

7.03 Applications and qualifications- (1) whenever the post of any of the Government counsel in the district is likely to fall vacant within the next three months, or when a new post has been created, the District Officer concerned shall notify the vacancy to the members of the Bar. Members eligible for consideration would be those having at their credit a practice of 10 years in case of District Government Counsel, 7 years in case of Assistant District Government counsel and 5 years in case of Sub-District Government counsel. The District Officer shall ask those who want to be considered for appointment to a particular office to give their names to him with particulars such as age, length of practice at the Bar, proficiency in Hindi, Income-tax paid by them on professional income during last 3 years and if not assessed the return submitted by them, if any, details of the work handled by them during the course of the preceding two years duly verified by court and whether they have practiced on criminal, civil and revenue side.

(2) The district Government Counsel and legal practitioners of the neighboring districts may also send the above particular for the post of district Government Counsel through their district Officers, who shall forward the same to the District Officer of the district in which the appointment is to be made, with such remarks as they deem fit.

(3) The names so received shall be considered by the district Officer in

consultation with the District Judge. The district Officer shall give due weight to the claim of the existing incumbents (Additional/Assistant District Government Counsel), if any, and shall submit confidentially in order of preference the names of the legal practitioners for each post to the Legal Remembrancer giving his own opinion particularly about his character, professional conduct and integrity and the opinion of the District Judge on the suitability and merits of each candidate. While forwarding his recommendations to the Legal Remembrancer the District Officer shall also send to him the bio data submitted by other incumbents with such comments as he and the District Judge may like to make. In making the recommendations, the proficiency of the candidate in civil or criminal or revenue law, as the case may be, as well as in Hindi shall particularly be taken into consideration.

Provided that it will also be open to the District Officer to recommend the name of any person, who may be considered fit, even though he may not have formally supplied his bio-data for being considered for appointment. The willingness of such a person to accept the appointment if made shall, however, be obtained before his name is recommended.

7.08 Renewal of term.- (1) At least three months before the expiry of the term of a District Government Counsel, the District Officer shall after consulting the District Judge and considering his past record of work, conduct and age, report to the Legal Remembrancer, together with the statement of work done by him in Form no. 9 whether in his opinion the term of appointment of such counsel should be renewed or not. A copy of the opinion of the District Judge should also be sent along with the recommendations of the District Officer.

(2) Where recommendation for the extension of the term of a District Government counsel is made for a specified period only, the reasons therefor shall also be stated by the District Officer.

(3) While forwarding his recommendation for renewal of the term of a District Government Counsel :-
(i) the District Judge shall give an estimate of the quality of the Counsel's work form the Judicial stand point, keeping in view the different aspects of a lawyer's capacity as it is manifested before him in conducting State cases, and specially his professional conduct;

(ii) the District Officer shall give his report about the suitability of the District Government Counsel form the administrative point of view, his public reputation in general, his character, integrity and professional conduct

(4) If the Government agrees with the recommendations of the District Officer for the renewal of the term of the Government Counsel, it may pass orders for re-appointing him for a period not exceeding three years.

(5) If the Government decides not to re-appoint a Government Counsel, the Legal Remembrancer may call upon the District Officer to forward fresh recommendations in the manner laid down in Para 7.03

(6) The procedure prescribed in this para shall be followed on the expiry of every successive period of renewed appointment of a District Government Counsel.

NOTE-- The renewal beyond 60 years of age shall depend upon continuous good work, sound integrity and physical fitness of the Counsel.

7.09 Character Roll - (1) The District Officer and the District judge shall, before the end of every year and also while leaving the district on transfer, place on record his opinion on the capacity and work of the District Government Counsel. The District Judge shall before recording such opinion obtain a report about the work and conduct of the District Government Counsel from the presiding officers of the courts, where they are generally required to practice. Similarly, the District Office shall before recording such opinion obtain a report from the Superintendent of Police regarding the counsel's capacity for prosecution of cases and assistance rendered to the investigating agency. The record, which shall be confidential, shall be maintained by the District Officer. Every adverse entry shall be communicated to the District Government Counsel concerned by the district Officer, with the prior approval of the Government.

(2) The character roll of every District Government Counsel shall also be maintained by the Government in Judicial (Legal Advice) Section. For this purpose, the District Officer shall forward to the Legal Remembrancer a copy of all the confidential reports, recorded by him and the District Judge on the work and conduct of the District Government Counsel by the first week of May every year for being incorporated in the character roll, maintained by the Government.

(3) The District Officer shall forward a copy of all the confidential reports, referred to in para 7.09(2) in respect of District Government counsel (Criminal) to Home (Police) Section of Secretariat also for information.

(4) Any shortcomings on the part of the district Government counsel shall at once be brought to the notice of the Legal Remembrancer."

5. Perusal of para 7.01 indicates that District Government Counsel/Government-Legal Practitioner, to be appointed by and on behalf of the State Government to be represented in any court, other than High Court, shall be appointed by the State Government

6. 7.03 contemplates procedure for making such appointment of District Government Counsel. It contemplates that within next three months of a post of District Government Counsel is likely to fall vacant or a new post is created, District Officer concerned shall notify the vacancy to the members of the Bar so that eligible legal practitioners at the Bar may furnish their names along with particulars as required under said manual for consideration of the Government. The names so received have to be considered by the District Officer in consultation with the District Judge and para 7.03 (3) The District Officer shall give due weight to the claim of the existing incumbents (Additional/Assistant District Government Counsel), if any, and shall submit confidentially in order of

preference the names of the legal practitioners for each post to the Legal Remembrancer giving his own opinion on relevant issues e.g. --- professional conduct and integrity and the opinion of the District Judge on the suitability and merits of each candidate. The District Officer is further required to send the bio-data submitted by other incumbents as he may like to make. Under proviso to the aforesaid provisions District Officer can recommend the name of any person, who may be considered fit, even though he may not have formally supplied his bio-data for being considered for appointment. The willingness of such a person, to accept the appointment if made, shall, however, be obtained before his name is recommended.

7. 7.08 L.R. Manual requires District Officer and the District Judge to have consultation, consider past record of work, conduct and age, submit report containing requisite opinion to the legal remembrancer together with the statement of work done by a particular counsel as Government Counsel and whether in his opinion term of such counsel renewed or not. A copy of the opinion of the District Judge is also required to be sent along with the recommendations of the District Officer. Note appended to para 7.08 provides that renewal beyond 60 years of age shall depend upon continuous good work, sound integrity and physical fitness of the Counsel

8. Ram Nihor Singh has approached this court by filing present petition and prays for issuing a writ of certiorari quashing impugned orders dated 1st January, 2001 and 15th January, 2001 (Annexure nos. 1 and 2 to the Writ Petition) passed by the State Government (Special Secretary and Joint Legal Remembrancer, U.P. Government) and consequent order issued by District Magistrate, Allahabad. These impugned orders contain the ground for not extending the term of the petitioner and refusing to renew the same. There is only one ground which is the basis of impugned orders, i.e. the petitioner shall be attaining the age of 60 years on 2.1.2001 and hence required to be relieved from the post of District Government Counsel (Civil) with immediate effect on attaining the age of superannuation.

9. Learned counsel for the petitioner submitted that term of the petitioner as District Government Counsel has been brought to an end on one ground only i.e., he completes age of 60 years on 2.1.2001. According to him said ground cannot be sustained being misconceived and the impugned order suffers from manifest error apparent on the face of record. In support of his contention learned counsel for the Petitioner placed reliance upon the note appended in para 7.08 of the L.R. Manual.

10. It is pleaded in the short Counter Affidavit, filed on behalf of the respondents, that the last order dated 11.1.2000 (Annexure-8 to the Writ Petition) whereby his term was last renewed clearly mentioned that his term shall be up to the age of 60 years and petitioner has not challenged the said order. This contention of the petitioner is misconceived. Order dated January 11,2000 (Annexure-8 to the Writ Petition) merely mentions that the term of the petitioner was extended and regularised upto 2.1.2001 (upto 60 years of age). The said letter nowhere mentioned that 'term'

shall not be renewed or considered for renewal beyond 60 years. The petitioner has no occasion to challenge the said order. He cannot be said to be made aware that his term, as District Government Counsel (Civil), was to be ignored for renewal in spite of L.R. Manual permitting consideration for renewal upto 62 years under para 7.08 (aforequoted). The petitioner, thus has no occasion to feel aggrieved at that stage.

11. Moreover, perusal of short Counter Affidavit shows that respondents have attempted to justify impugned order on the ground that petitioner did not submit relevant information/papers within time. This defence, again, stands belied and has no substance. The fact that candidature of the petitioner was under consideration is borne out from the perusal of the comment of the District judge, Allahabad contained in his letter addressed to the District Magistrate, Allahabad dated 22nd December, 2000 (Annexure-9 to the Writ Petition). This letter of the concerned District Judge clearly mentions that he was asked to submit his comment/report in the light of the para 7 of L.R. Manual. The plea in the short Counter Affidavit (namely, petitioner did not submit his candidature or applied within time)is an after thought and not borne out from record. It is evident that impugned order has not been passed on the ground as alleged in the short Counter Affidavit paragraphs no. 5 to 9 i.e. petitioner having failed to act in time. It is well settled that validity of 'impugned' order has to be tested on the ground mentioned therein. It cannot be allowed to be supported by carving out a new case or assigning new grounds not mentioned in the impugned order.

12. Learned counsel for the Petitioner has annexed several orders of the Government and the District Magistrate, Allahabad to show that term of other counsels representing the State Government have been extended upto 62 years (Annexure-12 to Writ Petition - particular page 65 and Annexure-13 to the Writ Petition - particular page 67 to 79). Respondents have miserably failed in bringing on record the criterion or the rationale on which term of District Government Counsel is extended/renewed up to 62 years. No guidelines have been disclosed to refuse renewal of term beyond 60 years in case candidate under consideration has to his credit continuous good work', 'sound integrity' and 'physical fitness' as counsel.

13. Needless to mention that if District Counsel did not satisfy the aforesaid three conditions contained in the note appended in para 7.08 e.g. (I) continuous good work (ii) sound integrity (iii) physical fitness, it is open to the Government not to renew or extend the term even when counsel has not completed age of 60 years.

14. In our considered view, L.R. Manual does not contemplate embargo of 60 years of age and question of extension/renewal of term of a 'District Government Counsel' has to be considered, decided and extended upto the age of 62 years subject to one fulfilling three conditions provided under note to para 7.08 of L.R. Manual. Otherwise action of the Government will be exposed to challenge and vulnerable on the ground of vice of arbitrariness.

15. Learned counsel for the Petitioner referred to the case of **P.N.**

Sethi versus State of U.P. and others reported in 1992 Allahabad Civil Journal 306 (D.B.), copy of which has been annexed as Annexure 14 to the writ petition. In para 8 of the judgment Hon'ble Brijesh Kumar, J. (as he then was) referring to the aforementioned note appended to para 7.08 observed "… There is no such provisions that the District Government Counsel would attain the age of superannuation on completing 60 years of age. All the difference, that it makes, on attaining the age of 60 years, is that according to note appended in para 7.08 the renewal beyond 60 years of age shall depend upon continuous good work sound integrity and physical fitness of the counsel …. Therefore, there being nothing on the record to indicate that the petitioner had incurred any disability for being continued, in terms of the note appended to para 7.08. It was nothing but a vain effort on the part of the State to take shelter of note to para 7.08. As we have observed earlier, the impugned order, annexure 1 was passed under misconception that the age of superannuation of District Government Counsel is 60 years ……. While referring to the case of Km Shrilekha Vidyarthi and others v. State of U.P. and others reported in 1991 SCC (Land S) page 742. The fact deciding case of P.N. Sethi (Supra) observed … It has been held in unequivocal terms that every State action as has to conform to reasonableness and it must not be arbitrary…The court further observed, however, that where no plausible reason or principle is indicated the order appears to be ex facie arbitrary, the burden shifts upon the state to justify its action as fair and reasonable. It is further observed that if the State is unable to produce material to justify its action as fair and reasonable, the burden upon the person alleging arbitrariness must be held to be discharged ..The order was not based on relevant consideration hence it was arbitrary …Therefore, the decision of the Government suffers from vice of arbitrariness."

There is nothing on record of the present case as to why the District Officer asked for comment from the concerned District Judge and if the District Judge had sent comments in favour of the petitioner, then when and why the same have been ignored. There is not even an iota of evidence on record on this score. No reasons have been indicated for disagreement with the aforesaid recommendation in the impugned order The contention of the respondents in the short Counter Affidavit (e.g. process was not initiated in time as contemplated under relevant provision of L.R. Manual) is merely an eye wash inasmuch as the earlier orders of the respondents clearly show that respondents never stuck to the time schedule contemplated under L.R. Manual. Further the said plea is not open to the respondents inasmuch as these authorities invited comments and asked for report regarding petitioner for considering renewal of his term beyond 60 years ignoring time schedule. Moreover, the time schedule providing for three months for initiating the process of renewal of term of District Government Counsel is not mandatory but only directory being procedural. Its violation does not render the proceedings void or illegal.

We are in full agreement with the ratio descendi laid in the Division Bench decision of this Court in the case of P.N. Sethi (Supra).

In the case of **Brijesh Kumar versus State of U.P. and others decided by Division bench of this (court) reported in 2001 Allahabad Civil Journal 101, para 6 and 8,** this court held that renewal of term of District Government Counsel, based on non existent and extraneous ground cannot be sustained and such 'renewal' being arbitrary is liable to be quashed. Division Bench relied upon the case reported in AIR 1996 SC 864. The Division Bench further observed that experience in profession of law is an important factor and handling cases on behalf of the State Government for a long period of time and incumbent as District Government Counsel is said to have gained valuable/sufficient experience in the nature of work which he was required as District Government Counsel in the past

In view of the above discussion and the undisputed facts on record, we have no hesitation but to hold that in the reason/ground mentioned in the impugned order is misconceived incorrect, unsustainable in law and based on misinterpretation/misconception of relevant provision of L.R. Manual.

Consequently, the impugned orders dated 1st January, 2001 and 15th January, 2001 (Annexure 1 and 2 to the writ petition) having been passed on non-existent ground and the defence taken in the short Counter Affidavit not being sustainable and pleaded as an after thought cannot be sustained and are liable to be set aside.

Consequently, Petition succeeds. Impugned orders dated 1st January, 2001 and 15th January, 2001 (Annexure nos. 1 and 2 to the Writ Petition) are hereby quashed

Further, a writ of mandamus is issued commanding the respondents to pass appropriate order in accordance with law within three weeks of the receipt of a certified copy of the judgment. Decision taken by the concerned authorities under this judgment shall be duly communicated to all the concerned authorities of the District as also to the petitioner within one week of the said decision.

Writ Petition stands allowed with costs, which we quantify at Rupees 2,500/- to be paid within one month of the receipt of certified copy of this order. Learned Standing Counsel shall communicate this judgment to the concerned respondent authorities for necessary action within one week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 17.5.2001

BEFORE
THE HON'BLE B.K. RATHI, J.

Civil Misc. Writ Petition No. 20724 of 2000

Smt. Yoothika Bhadoria ...Petitioner
Versus
Upper Nagar Magistrate (V) and others ...Respondents

Counsel for the Petitioner:
Sri M.P. Srivastava

Counsel for the Respondents:
Sri Rajesh Tandon
Sri S.N. Mishra
Sri Sri Atul Dayal
S.C.

U.P. Urban Building (Regulation of Rent and Letting) Act 1972, Application for allotment of Shop-Rent Control Inspector reported as unauthorise occupant-Despite of Publication of Notice petitioner remained absent- order can not be quashed.

Held- Para 3

This contention cannot be accepted. The premises was inspected by the Inspector and, therefore, it can be presumed that the petitioner came to know of the proceedings. A notice was also sent and was served by affixation as the petitioner was not available. Thereafter, the notice was published in the newspaper, Annexure-5 to the petition. Therefore, there was due service of the notice on the petitioner and the orders cannot be quashed for this reason.

U.P. Act No.13 of 1972- Section 2(1) Explanation I- First Assessment of Building made on 1.4.79-Let out on 22.10.89- Provisions of Act No.13 of 1972 are fully applicable.

Held- Para 9

The result, therefore, is that the premises was constructed in the year, 1979 and the first assessment became operative from 1.4.1979. It was given in the tenancy of the petitioner by the erstwhile landlady on 22.10.1989. Therefore, at that time U.P. Act No. XIII of 1972 was applicable to the premises. There is no allotment in favour of the petitioner. Therefore, the tenancy is illegal and the petitioner is an unauthorised occupant. The vacancy was rightly declared by the respondent no. 1.

By the Court

1. The premises in dispute is a shop situated in premises no.3/119, Vishnupuri, Kanpur Nagar. The respondent Nos.2 to 4 are the landlords of the premises, who purchased the same from the previous owner Smt. Mohini Tiwari by sale deed dated 17.6.1998. One Sri Nirankar Verma applied for the allotment of the shop. The Rent Control Inspector, on the basis of the application for allotment inspected the shop and submitted report on 30.10.1999, Annexure-4 to the petition; that the petitioner is unauthorised occupant of the said shop. Thereafter, a notice was issued to the petitioner which was served by publication. The petitioner did not file any objection in the proceedings. The shop was declared vacant by the respondent no.1 by order, Annexure-9 to the petition on 10.4.2000. Thereafter, the respondents-landlords moved an application for release. Their release application was allowed and the premises was released in favour of the respondents by order dated 17.4.2000, Annexure-11 to the petition. The petitioner has made a request for quashing of the orders, Annexure-9 dated 10.4.2000 declaring vacancy and Annexure-11 dated 17.4.2000 of release in favour of landlords by means of this petition under Article 226 of the Constitution of India.

2. I have heard Sri M.P. Srivastava, learned counsel for the petitioner and Sri Rajesh Tandon, Senior Advocate assisted by Sri S.N. Mishra, learned counsel for respondent no.3.

3. Firstly, it is contended that no notice before declaration of vacancy was served on the petitioner, who is in occupation of the shop. Therefore, the order declaring vacancy is illegal. This contention cannot be accepted. The premises was inspected by the Inspector and, therefore, it can be presumed that the petitioner came to know of the proceedings. A notice was also sent and

was served by affixation as the petitioner was not available. Thereafter, the notice was published in the newspaper, Annexure-5 to the petition. Therefore, there was due service of the notice on the petitioner and the orders cannot be quashed for this reason.

4. The next contention of the learned counsel for the petitioner is that the premises is a new construction and its first assessment came into force from 1.4.1982, that the shop in dispute was given in the tenancy of the petitioner by the then landlady Smt. Mohini Tiwari in July, 1986 and at that time U.P. Act No. XIII of 1972 was, therefore, not applicable to the premises in suit and therefore, there was valid tenancy that, therefore the petitioner is not an unauthorised occupant. In support of argument, the learned counsel for the petitioner has relied on the copy of the assessment, Annexure-2 to the petition. This assessment is of the year 1983 and it is mentioned that it came into force from 1.4.1982. However, it is pointed out that it has been mentioned in this assessment that correction has been made from 30.9.1982. The respondents have filed another assessment, Annexure-7 to the petition which shows that the shop was first assessed from 1.4.1979. In this assessment, Smt. Mohini Tiwari has been shown as landlady and five shops have been shown in the disputed premises and the names of the tenants of all the shops have been shown. Therefore, the contention of the learned counsel for the petitioner cannot be accepted. Had the shop was constructed in the year 1982, there is no question of assessment, Annexure-7 to the petition and details of the shops and tenants. The first assessment is for the years 1978 to 1983 in which it is mentioned that the assessment came effective from 1.4.1979.

5. Learned counsel for the petitioner has also argued that Smt. Mohini Tiwari and others the previous owners filed suit no. 2 of 1986 against Sri Ram Shanker and others tenants of the same house, the copy of the plaint is Annexure-3 to the petition in which it was pleaded that it was constructed in the year, 1982. The suit was decreed on 7.2.1995. It is contended that issue no. 2 was framed in the suit "whether U.P. Act No. XIII of 1972 apply to the premises or not". This issue was decided and it was held that the premises in suit was constructed in the year, 1982 and was first assessed from 1.4.1982. The suit having been filed in the year, 1986, the U.P. Act No. XIII of 1972 does not apply. It is, therefore, contended that the previous landlady alleged that the premises was constructed in the year,1982. This allegation is binding on the respondents as they have purchased the premises from Smt. Mohini Tiwari and others.

6. The argument of the learned counsel cannot be accepted. It appears that Smt. Mohini Tiwari and others filed a suit for eviction wrongly alleging that the premises is a new construction. It appears that they alleged wrong facts to avoid the mischief of U.P. Act No. XIII of 1972 and pleaded that the premises was first assessed from 1.4.1982. The tenant could not show that it was first assessed from 1.4.1979. Therefore, the suit was decreed. On the basis of that judgment, therefore, it cannot be accepted that the premises was first assessed from 1.4.1982 and was constructed in the year, 1982.

7. On the other hand, Annexure-7 to the petition is the assessment for the years 1978 to 1983 which show that the assessment of the building was first made from 1.4.1979. Therefore, the date of the completion of construction is 1.4.1979 according to Explanation-I of Section 2(1) of the Act.

8. The next question that arise for decision from the arguments of the learned counsel is whether the premises was taken on rent by the petitioner from July, 1986. It is contended that the rent receipts were issued which have been filed and are Annexure-1 to the petition. These rent receipts show that they are in the name of Ganga Singh Bhadoria and other persons. The rent receipts in the name of the petitioner were issued from the year, 1989. Therefore, it cannot be accepted that the petitioner took the premises on rent in the year,1986. In this connection, it may be mentioned that agreement of lease, Annexure-6 to the petition was also executed between the petitioner and the then landlady. This agreement of lease is dated 22.10.1989. On the face of this document, it cannot be accepted that the lease was given to the petitioner in the year, 1986. On the other hand, it clearly shows that the lease was given in the year, 1989.

9. The result, therefore, is that the premises was constructed in the year, 1979 and the first assessment became operative from 1.4.1979. It was given in the tenancy of the petitioner by the erstwhile landlady on 22.10.1989. Therefore, at that time U.P. Act No. XIII of 1972 was applicable to the premises. Therefore, the tenancy is illegal and the petitioner is an unauthorised occupant. The vacancy was rightly declared by the respondent No. 1.

As regards the release, it cannot be challenged by the petitioner who is an unauthorised occupant.

The petition is without merit and is hereby dismissed. The stay order dated 3.5.2000 is vacated.
