ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2000

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

Civil Misc. Writ Petition No. 51374 of 2000

Rajeev Kumar Singh ...Petitioner
Versus
State of U.P. through Secretary, Secondary Education, Govt. of U.P., Lucknow and Others ...Respondents

Counsel for the Petitioner:
Shri Kuldeep Kumar Singh

Counsel for the Respondents:
S.C.
Shri M.C. Chaturvedi

U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 read with Regulations, Chapter II Appendix 'A' Serial No. 10 Column Compassionate appointment- No Right to –Desirable or preferential qualification and essential qualification- Difference between-Petitioner not possessing essential qualification under Clause 3 (E) i.e. Intermediate grade Drawing Examination of Bombay'-Hence not qualified to be appointed as Assistant Teacher (Art.) Petition dismissed.

Held-Para-6

Clause(3) (f)envisages, 'Intermediate Grade Drawing Examination of Bombey', as an essential qualification. Petitioner does not possess this qualification..

The Clauses (3) recognize certificates issued by specific institutions mentioned of a particular city or State.

Therefore,, it is not possible to accept that the certificate obtained from any institution in Maharastra would be covered in it. Clause (3) is not illustrative but it is exhaustive.

Therefore, the decision in Sanjeev Kumar Dubey(Supra) is of no help to the petitioner and he is not qualified to be appointed as Assistant Teacher(Art.)
Case Referred.
2000 (1) UPLBEC 634: 200(1)ESC 635
1998 (2) UPLBEC 1310

By the Court

1. Father of the petitioner, Ssita Sharan Singh was working as Art Teacher (L.T. Grade) in Sarvodaya Shiksha Sadan Inter College, Meerapur, Allahabad. He died in harness on 14.01.1999. The Petitioner is the only son of the deceased. He passed High School in 1991, Intermediate in 1993 and B.Sc. in 1996. Thereafter, he passed Intermediate Examination 1998 in Drawing under Regulation 17-3 Chapter XII from Board of High School and intermediate Education U.P., Allahabad .In the same year he passed Intermediate Grade Drawing Examination in 1998 conducted by Maharashtra Government. He belongs to backward class category. He moved an application on 19.5.99 before the District Inspector of Schools, Allahabad (in Brief DIOS) claiming appointment on the post of Assistant Teacher, under ,under the dying in harness rules. The District Committee constituted under Regulation 105, Chapter III of the Regulations framed under the U.P. Intermediate Education Act,1921 (in brief Regulations) considered the petitioners claim on 18.1.2000 and since no class-III post was vacant, recommended appointment on a class-IV post. Letter for appointing the petitioner in Ishwar Saran Inter College. Allahabad was issued on 19.1.2000 by the DIOS. The petitioner did not accept the

appointment on a class-IV post and challenged the order dated 19.1.2000 by means of Civil Misc. Writ Petition NO. 17172 of 2000 before this court chaining appointment on the post of Art Teacher, as per his qualification under the dying in harness rules, This court on 22.4.2000 quashed the order dated 19.1.2000 for appointing the petitioner. And in view of decision of division bench of this court in Sanjeev Kumar Dubey V. District Inspector of Schools, Etawah and others 2000(1) UPLBEC 634 [2000(1)ESC 635] disposed of the writ petition and directed the DIOS to decide the application of the petitioner in accordance with law. The application of the petitioner has been rejected by the DIOS by order dated 1.8.2000 which has been challenged in this petition.

2. Sri Kuldeep Kumar Singh learned counsel for the petitioner has vehemently urged that in view of decision in Sanjeev Kumar Dubey (Supra) petitioner possessed the qualification to be appointed Art Teacher, therefore, the DIOS illegally rejected the application under the dying in harness rules. Learned counsel further urged that even if the petitioner could not be appointed on the post of assistant teacher, the petitioner was entitled for appointment on a class-III post as per his qualification and if no post of class-III was vacant, a supernumerary post should have been created by the DIOS. On the other hand, Sri M.C. Chaturvedi the learned Additional Chief Standing Counsel appearing for respondent no. 1 to 3 urged that the petitioner was not qualified to be appointed assistant teacher, therefore, the decision in Sanjeev Kumar Dubey (Supra) was not applicable to the facts of this case. He further urged that since no class-III post was available and the petitioner did not accept his appointment on class-IV post, there is no option and the petition is liable to be dismissed.

3. The first question is whether the petitioner was qualified to be appointed as Assistant Teacher (Art). The DIOS rejected the claim of the petitioner as he was not 'Trained' as provided in Appendix 'A' to Chapter II of the Regulations. The relevant para 2 to Appendix 'A' is extracted below:-

"Under it in reference to prescribed qualifications the word "trained" means post-graduate training qualification such as L.T. B.T., B. Ed. S.C. or M.Ed. of any university or institution as specified in earlier para or any equivalent (Degree or Diploma). It also includes departmental A.T.C. and C.T. with minimum teaching experience of five years J.T.C./B.T.C. grade teacher shall also be considered to be C.T., if he has worked in C.T. grade at least for five years."

4. The petitioner was not 'Trained' as he did not possess the qualification extracted above. But the learned counsel for the petitioner rightly urged that 'Trained' was not an essential qualification for appointment to the post of Assistant teacher(Art) for teaching class IX and X. In Appendix 'A' the essential and desirable qualification have been prescribed in column 3 and 5. 'Trained' is mentioned as a desirable qualification for the post. It is not an essential qualification for the post of Assistant Teacher (Art) for teaching class IX and X. There is a difference in desirable or preferential qualification and essential qualification. If a candidate does not possess essential qualification, then he

is ineligible for the post. Since 'Trained' was only a preferential qualification the petitioner could not be held ineligible, on this ground. Therefore, the DIOS committed an error in rejecting the application of the petitioner because the petitioner was not 'Trained". To this extent the learned counsel for the petitioner appears to be correct but even then, unfortunately, the petitioner is not entitled to any relief.

5. The petitioner is no doubt B.Sc. One can appreciate his hesitancy in accepting appointment on class-IV post. But he can get benefit of the dying in harness rules and the ration laid down by this court in Sanjeev Kumar Dubey (Supra) only if it is permissible in law. The essential qualification for Assistant Teacher (Art) for teaching class IX and X is not B.Sc. but a training certificate as mentioned in column 3 of serial number 10 of Appendix 'A' to Chapter II of the Regulations. The relevant is extracted below:-

"10 Drawing and commercial art teacher

For High School (Classes 9-10).

(1) Art Master's Training Certificate(formerly known as Teacher's Training Certificate) of Government Art and Craft College, Lucknow.

Or

(2) Intermediate examination of U.P. Madhyamik Shiksha Parishad with technical art

Or

(3) High School examination with technical art and any one of the following qualification:-

(a) B.A. with drawing or painting

Or

(b) Fine Art Diploma of Kkala Bhavan of Shanti Niketan

Or

(c) Certificate of Government Drawing and Handicraft Centre, Allahabad.

Or

(d) Final Drawing Teacher ship Examination of Calcutta

Or

(e) Teacher's Senior certificate Examination of Mayo Schools or Arts of LAHORE

Or

(f) Intermediate Grade Drawing Examination of Bombay

Or

(g) Third grade Arts Schools Examination of Bombay

Note: (1) Under above-mentioned clause (2) passing of Intermediate examination is not compulsory for all. But if there is no proof of having taken technical art in that examination then in its place proof of knowledge of technical art of that standard can be accepted.

Teachers of girls schools are exempted from the qualification of technical art.

(2) Under above-mentioned clause (3) passing of High School Examination is compulsory for all. But if there is no proof of having taken technical art in that examination then in its place proof of knowledge of technical art of that standard can be accepted.

Teachers of girls schools shall be exempted for the qualification of technical art."

6. The petitioner passed Intermediates Grade Drawing Examination conducted by Maharashtra

Government in 1998. The learned counsel for petitioner claims the petitioner was covered in clause (f) and, therefore, he had the essential qualification. This is disputed by the learned counsel for respondents. I have given my anxious consideration to this argument. Clause (3)(f) envisages, "Intermediate Grade Drawing Examination of Bombay", as an essential qualification .Petitioner does not possess this qualification. The clause does not provide intermediate Grade Drawing Examination conducted by Maharashtra Government. The entry is specific. It does not include similar courses conducted by Maharashtra government. This is further clear from a perusal of other clauses of (3).For instance, Fine Art Diploma of Kala Bhavan of Shanti Niketan or Certificate of Government Drawing and Handicraft Centre, Allahabad or Final Drawing Teacher ship Examination of Calcutta, etc. The clause (3) recognize certificates issued by specific institutions mentioned of a particular city for state. Therefore, it is not possible to accept that the certificate obtained from any institution in Maharashtra would be covered in it. Clauses(3) is not illustrative but it is exhaustive. The certificate of Intermediate Grade Drawing Examination conducted by Maharashtra Government, possessed by the petitioner is not recognized as essential qualification in serial number 10 of Appendix. 'A' to chapter II of the Regulations. In Sanjeev Kumar Dubey (supra) the division bench has held that under the dying in harness rule a candidate could be appointed if he possess the essential qualifications for appointment on the post of assistant teacher. Therefore, the decision in Sanjeev Kumar Dubey(supra) is of no help to the petitioner and he is not qualified to be appointed as Assistant Teacher(art).

7. The next question is if a class-III post was not vacant the DIOS should have created a supernumerary post of class-III for appointing he petitioner. The DIOS appointed the petitioner on class-IV post, as no class-III post was vacant. The apex court in Director of Education (Secondary) and another v. Pushpendra Kumar and others 1998 (2) UPLBEC 1310 has held that under the Regulations if a vacancy is not available in class-III post the dependant would be appointed on a class-IV post but a supernumerary post of class-III cannot be created nor any direction can be issued by High Court for creating a supernumerary post of class-III .The rejection of the application of petitioner by DIOS is upheld but for a different reason.

8. For the reasons aforesaid, I do not find any merit in this petition.

9. This petition fails and a accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1..12.2000

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

Civil Misc. Writ Petition No. 420 of 1998

Mariampur Hospital Society ...Petitioner
Versus
Nagar Nigam, Kanpur Nagar and another ...Respondents

Counsel for the Petitioner:
Shri Sheeba Jose
Shri Pankaj Naqvi

Counsel for the Respondents:
Anju Jain

U.P. Nagar Mahapalika Adhiniyam, 1959, S.177 (b)- Petitioner, a charitable society, running a charitable hospital assessed to general taxes-Petitioner claiming exemption under s.177 (b) Appellate order by J.S.C.C. exempting petitioner-subsequently a demand notice for Rs.300865.75 again sent-Petitioner was compelled to pay the same Appeal pending.

Held-Para-9

There can be no manner of doubt that the petitioner is doing charitable work and hence the properties of the petitioners are exempt under S.177 (b) .The Hospital, Nursing homes etc. are being run by the sisters of the Roman Catholic church. It is well know that the sisters of the Roman catholic church are doing very noble work in India and they have made great sacrifices denying to themselves family life and other comforts and pleasure and are serving society by running excellent convent schools, hospitals, etc. It is deeply regrettable that Sister Phyllis was detained by the authorities and the Jeep of the petitioner was attached although the point had already been decided by orders dated 27.7.84 and 11.9.87 which held that the properties of the petitioner are exempt from general taxes. In the circumstances the writ petition is allowed and the respondents are directed to refund the amount of Rs.34685/- illegally realised on 13.2.97 alongwith 15%interest from 13.2.97 till date. The refund of this amount with interest must be made to the petitioner within two months from today by the respondents. In addition the respondents must pay an extra amount of rupees Rs. 25,000/- to the petitioner as damages for the harassment caused to the sisters who are running the hospital and this amount must also be paid to the petitioner within two month from today. The impugned assessment order which is Annexure 2 to the amendment application is quashed. The respondents are also restrained from releasing water tax, sever tax and other municipal dues from the petitioner in future till the aforesaid amounts are paid to the petitioner.

By the Court.

1. This writ petition has been filed for a mandamus directing the respondents to refund the amount of Rs. 346875/- illegally realised from the registrar on 13.2.1997 alongwith interest @ 18% .By an amendment application a prayer for certiorari has also been made to quash the assessment order Annexure 2 to the amendment application . There is a further prayer of mandamus commanding the respondents to pay damages to the petitioner for physical and mental torture suffered by the employees of the petitioners.

2. We have heard learned counsels for the parties.

3. The petitioner is a registered society and is running a charitable hospital in the name of Mariampur Hospital in the city of Kanpur. In para 7 of the petition it is allege that all medical advice and treatment to most of the patients coming to the hospital is given free of cost. No charge is taken from poor patients for beds in general wards and medicine is also given free of cost to such patients. By order dated 21.3.1976 passed by the U.p-Nagar Adhikari Kanpur the said officer assessed the annual rental value of the premises in dispute to be at Rs. 1,58,880/- vide annexure 1 to the petition. In the year 1982 for the first time a dispute arouse as to the liability of the

petitioner to pay general taxes in respect of the premises in dispute By an order dated 26.5.1982 passed by the learned Judge Small Causes court Kanpur the premises in dispute was assessed to annual value of Rs. 80,000/- from 1.6.1976 to 30.9.1978 Both the orders dated 26.5.1982 were challenged by the petitioner by filing 2nd Taxation appeals No. 13 of 1982 and 15 of 1982 respectively. Both the appeals were disposed of by an order dated 27.4.1984 and it was held that the premises in dispute is not subject to payment of general taxes being a charitable society. However, the respondents were at liberty to make annual assessment thereof only for collateral purpose other than realisation of general taxes under Section 177(1) of U.P. Nagar Mahapalika Adhiniyam. A true copy of the order dated 27.4.1984 is Annexure 2..

4. In Jan 1987nagain annual rental value of the premises in dispute was fixed by issuing notice to the petitioner. In its reply dated 28.1.87 the petitioner informed the Nagar Mahapalika, Kanpur that in view of the decision in Taxation Appeals Nos. 13 and 15 of 1982 decided on 27.8.74 the Mariampur Hospital society has already been held to be a charitable society and has thus been exempted from payment of general taxes, and therefore the notice fixing the annual rental value should be cancelled. A true copy of the letter dated 28.1.87 is Annexure 3. However, the respondents assessed two annual valuations of the premises in dispute at Rs. 2 lacs and Rs.1,17,000 Being aggrieved the petitioner filed appeal in the court of Judge small Causes Court ,Kanpur .True copy of the memo of appeal is Annexure 4. In the aforesaid memorandum of appeal the attention of the court was drawn to the fact that the petitioner is running a charitable hospital, wherein medical advice and treatment to patients is mostly given free of cost and that by an order dated 27.4.1984 passed by nagar mahapalika tribunal, Kanpur it was held to be a charitable society and has thus been exempted from payment of general taxes under section 177(b) This appeal was allowed vide order dated 11.9.87 Annexure 5 to the petition and it was held that the petitioner is exempt from general taxes.

5. In para 18 of the petition it is stated that the aforesaid two judgments dated 27.4.1984 and 11.9.1987 were not subject to further appeals before any other competent courts and thus, the said judgments because to remain final and conclusive as between the parties. In jan.1990 a demand of Rs. 300865.75 was raised as arrears of general taxes against the petitioner. The petitioner filed objection dated 22.1.90 vide Annexure 6 to the petition in which it mentioned that the premises has already been exempted from general taxes by judgements dated 27.4.1987 and 11.9.87 and 30.12.93 the Nagar Mahapalika Kanpur was apprised of the fact that the premises in dispute is wholly exempt from payment of general taxes ass per judgments dated 27.4.1984 and 11.9.1987. A true copy of the letter dated 30.12.1993 is Annexure 7 to the petition in this connection and another letter dated 30.1.97 is Annexure 8 to the petition. However, instead of dropping the aforesaid demand the respondents issued a demand dated 6.2.97 seeking t realise a sum of Rs. 346875/- as general taxes, It is alleged in para 23 of the petition that the staff of the respondents misbehaved and harassed Sister Phyllis who had gone to

visit the office of respondents in order to apprise the officer concerned that the petitioner is not liable to pay any general taxes. The said Sister was illegal detained and only set free when she assured the authorities that she would make the payment as early as possible of the amount demanded. In para 24 of the petition it is alleged that the concerned sister was coerced and forced to pay the said amount and the jeep of the hospital had been illegally attached for the payment of the aforesaid dues. The aforesaid facts were brought to the knowledge of the then Administrator, Nagar Nigam, Kanpur vide letter dated 14.2.1997. The petitioner was compelled to pay the aforesaid amount of Rs.346875/- on 13.2.1997 The petitioner filed assessment appeal No. 89 of 1997 which is still pending in the Court of judge, Small Causes, Kanpur Nagar.

6. In this case no counter affidavit has been fined by the respondents though Sri N. Mishra has appeared for the respondents and several opportunities had been given to file counter affidavit. The court on 5.11.98 had issued notice to the respondent and on that date Sri N. Mishra had appeared and prayed fro two weeks to file counter affidavit. The order dated 5.11.98 reads as follows:

"**Issue notice. Notice on behalf of respondent Nos.1 and 2 have been accepted by Sri N. Mishra Advocate . He Prays for and is granted two weeks' time to file a counter affidavit.**

List for admission on 23.11.98"

When the case was listed on 23.11.98 no one appeared for the respondents. Hence the case was ordered to be put on the next date i.e. 24.11.98. The order sheet of 21.11.98 states that Sri N. Mishra is out of station and hence the case was adjourned to 7.12.98 .On 7.12.98 it was adjourned and thereafter on several occasions the respondents counsel was granted time to file counter affidavit. On 8.12.99 he was granted three weeks and no further time to file counter affidavit. On 8.11.2000 the respondents were again granted time to file counter affidavit. However, despite these orders no counter affidavit has been filed so far.

7. We are not inclined to grant any further time as a stop order has already been passed in this case on 4.5.99 that three weeks and no more further time is granted to file counter affidavit.

8. No doubt an appeal is pending against the bill dated 6.2.97 being Assessment appeal No.89 of 1997 but in our opinion no useful purpose would be served by directing that the aforesaid appeal be decided since the point involved has already been decided in the appellate order dated 27.4.87 and 11.9387 Annexures 2 and 5 to the petition. In those orders it has been held that the property of the petitioner is exempt under Section 177-(b) state:

"The general tax shall be levied in respect of all buildings and lands in the City except
(b) buildings and lands or portions thereof solely occupied and used for public worship of for a charitable purpose"

9. There can be no manner of doubt that the petitioner is doing charitable work and hence the properties of the petitioner are exempt under s 177(b) the Hospital, Nursing Homes etc are being run by the

Sisters of The Roman Catholic church. It is well known that the sisters of the Roman Catholic Church are doing very noble work in India and they have made great sacrifices denying to themselves family life and other comforts and pleasure and are serving society by running excellent convent schools ,hospitals etc. It is deeply regrettable that Sister Phyllis was detained by the authorities and the jeep of the petitioner was attached although the point had already been decided by orders dated 27.7.84 and 11.9.87 which held that the properties of the petitioner except from general taxes. In the circumstances the writ petition is allowed and the respondents are directed to refund the amount of Rs.346875/- illegally realised on 13.2.97 along with 15% interest from 13.2.97 till date. The refund of this amount with interest must be made to the petitioner within two month from today by the respondents. addition the respondents must pay an extra amount of rupees Rs.25,000/- to the petitioner as damages for the harassment caused to the Sister who are running the hospital and this amount must also be paid to the petitioner within two month from today. The impugned assessment order which is Annexure 2 to the amendment application is quashed. The respondents are also restrained from realising water tax sever tax and other municipal dues from the petitioner is future till the aforesaid amounts are paid to the petitioner.

10. The writ petition is allowed with the aforesaid directions.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.11.2000

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

First Appeal From Order No. 486 of 1998

Prayag Up Nivesan Avas Avam Nirman Sahkari Samiti Ltd. ...Plaintiff / Appellant
Versus
Faquir Chandra Mehrotra
...Defendant/Respondent

Counsel for the Appellant :
Shri G.N. Verma
Shri S.S.P.Gupta

Counsel for the Respondents:
Shir Krishna Mohan

Code of Civil procedure, 1908, O.IX R.9 and 8 dismissal of suit under 0.9 r.8- Restoration application filed within time Application rejected on ground that no day to day explanation from date of dismissal of suit to date of restoration application given sufficient Cause.

Held-(Para 8 and 11)

If sufficient cause is made out for non-appearance of the plaintiff -on the date fixed for hearing and the plaintiff-approached the court for restoration of the suit within the statutory period, in that event the plaintiff is not required to explain each day from the date of dismissal of the suit till the date of filing of the restoration application. While deciding the application under order 9 Rule 9, the only point which is to be considered by the trial court is the existence of sufficient cause for the non appearance when the suit was called on fit healing, and if it is proved that the plaintiff was prevented from appearing of the date of hearing on account of sufficient cause, normally the restoration

application is to be allowed provided the absence was not mala fide or intentional with a view to delay the disposal of the suit. It has not been found by the learned trial court that the plaintiff mala fiddle and intentionally did not appear on the date of hearing.

In the case in hand, the explanation furnished by the plaintiff appellant was that he had fallen ill and was advised bed rest till 15.1.1996 and, therefore, could not appear. The defendant did not give any evidence to show that the plaintiff was not ill during that period. In our opinion, the explanation furnished by the plaintiff for non-appearance doe s constitute sufficient cause for his absence. In this view of the matter, the appeal deserves to be allowed.

By the Court

1. This appeal has been preferred against the order of the learned civil Judge dated 25.3.1998 rejecting the application of the plaintiff under Order 9 Rule 9 of the C.P.C. for setting aside the order of dismissal of the suit under Rule 8 of Order IX.

2. We have heard Sri G.N. Verma, learned Senior Counsel appearing for the appellant and Sri Krishna Mohan, learned counsel appearing for the respondent.

3. The appellant filed Suit No. 573 of 1990 for specific performance. However, when the plaintiff appellant failed to appear on the date of hearing i.e., 4.1.1996 it was dismissed under Order IX Rule 8 of the C.P.C. An application for restoration of the suit under Order 9 Rule 9 was moved on 2.2.1996 but the learned Ist Additional Civil Judge (Senior Division),Allahabad by the order under appeal dated 25.3.1998, rejected the same, inter alia, on the ground that from the date of dismissal of the suit, i.e. 4.1.1996 till the date of filing of the restoration application, i.e. 2.2.1996,day to day explanation has not been furnished by the appellant; and that the application has not been moved by Abhay Nasrain Pandey who was the Secretary of the plaintiff society.

4. Sri Verma, learned counsel for the appellant vehemently argued that the application under Rule 9 was filed within time and therefore, the learned court below erred in holding that the appellant was required to give explanation of each day from 4.1.1996 up to 2.2.1996.He further argued that as the appellant was seriously ill since 30.12.1995 and was medically advised to take bed rest, he could not appear on the date fixed, i.e. 4.1.1996 but the learned court below without appreciating that there was sufficient cause for not attending the court on the date fixed, wrongly rejected the application.

5. On the other hand, learned counsel for the respondent argued that the suit was fixed for hearing on 4.1.1996 and when the appellant did not appear, it was dismissed under Rule 8 of Order 9 But the appellant did not move the application under Order 9 Rule 9 and, therefore, the alleged application moved on 2.2.1996 being not maintainable, was rightly rejected. He further argued that the suit was filed through jai Prakash Ojha, the Secretary of the society but the application for restoration was moved by Abhay Narain Pandey who is not the Secretary of the plaintiff society and, therefore, at his instance it was not maintainable.

6. It is not in dispute that the suit was fixed for hearing on 4.1.1996 and was dismissed in default under Rule 8 of Order IX. It is also admitted that the application for restoration was moved on 2.2.1996 within time giving explanation for the absence on the date of hearing. However, the learned court below without considering the explanation furnished by the plaintiff appellant for his absence rejected the application mainly on three grounds, viz., (I) that no reasonable explanation for each day with effect from 43131996 to 2.2.1996 has been furnished to show as to under what circumstances he had no knowledge about the order dated 43131996 dismissing the suit in default and why the application has not been moved immediately thereafter (II) On earlier occasion also the suit was dismissed on 9.9.1994 and (III) that the suit was filed through Jai Prakash Ojha, Secretary of the Society but the application for restoration was moved by Abhai Narain Pandey.

7. In our view, the learned court below fell in error by addressing that the plaintiff was required to give satisfactory explanation of each day from the date of dismissal of the suit till the date of filing of the restoration application when admittedly the application for restoration was moved within time.

8. If sufficient cause is made out for non-appearance of the plaintiff on the date fixed for hearing and the plaintiff approached the court for restoration of the suit within the statutory period, in that even the plaintiff is not required to explain each day from the date of dismissal of the suit till the date of filing of the restoration application. While deciding the application under Order 9 Rule 9, the only point which is to be considered by the trial court is the existence of sufficient cause for the non appearance when the suit was called on far heading and if it is proved that the plaintiff was prevented from appearing on the date of hearing on account of sufficient cause, normally the restoration application is to be allowed provided the absence was not mala fide or intentional with a view to delay the disposal of the suit. It has not been found by the learned trial court that the plaintiff mala fidely and intentionally did not appear on the date of hearing.

9. In Para 1 of the affidavit filed along with the restoration application, it has been asserted that the deponent is the Secretary of the Society (plaintiff) since last one year and is doing Pairvi on behalf of the plaintiff which has not been denied in the counter affidavit filed by the defendant before the court below. Thus,. The statement that Abhai Narain Pandey was the secretary since last one year on the date of dismissal of the suit in default goes uncontroverted.

10. The submission advanced on behalf of the defendant that the application was not moved under Order 9 Rule 9 as the provision was not mentioned on the application and, therefore, it was rightly reject, has also no force and deserves to be rejected. It is settled legal position that it is not the form of petition or application but it is the substance and contents. Which is to be seen. Non mentioning of the provision or its wrong labeling will have no effect and the court is required to look to the contents and substance of the application. From a perusal of the application dated 2.2.1996, it is apparent that it was filed to

recall the order dated 4.1.1996 dismissing the suit in default. Therefrom, in effect it was an application under Order 9 Rule 9 and the simple question which the learned trial court had before him for consideration was as to whether on the date fixed for hearing the plaintiff appellant was prevented from attending the court because of sufficient cause or not and the explanation furnished by him for his non-appearance constitutes sufficient cause or no.

11. In the casein hand, the explanation furnished by the plaintiff appellant was that he had fallen ill and was advised bed rest till 15.1.1996 and, therefore, could not appear. The defendant did not give any evidence to how that the plaintiff was not ill during that period. In our opinion, the explanation furnished by the plaintiff for non-appearance does constitute sufficient cause for his absence. In this view of the matter, the appeal deserves to be allowed.

12. In the result, this appeal is allowed. The order of the learned Civil Judge dated 25.3.1998 is hereby set aside and the suit No.573 of 1990 is restored for decision on merit. We further hope and trust that the learned trial court shall endeavor to dispose of the suit expeditiously preferably within a period of six months. Learned counsels for both the parties have made statement on behalf of their clients that they will not seek unnecessary adjournments and will appear before the court below on the date of hearing.

13. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22ND NOVEMBER, 2000

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

Civil Misc. Writ Petition No. 44012 of 2000

Ram Pal Singh ...Petitioner
Versus
The State Transport Appellate Tribunal U.P., Lucknow & others ...Respondents

Counsel for the Petitioner:
Shri H.P. Dube
Shri Ravi Kant

Counsel for the Respondent:
S.C.
Shri A.R. Dubey
Shri R.N. Singh

Motor vehicle Act 1998 Section 72 (2) (xxii) curtailment of Root- operator of buses given licence play = their buses from Surajpur to Dadri – operators stopped playing their buses for 9 Kilomiters R.T.A. after due notices passed curtailing the distance- held –in public interest the impugned order warrant no interference.

Held- Para15.

The Regional Transport Authority has rightly passed the order of curtailment of a portion of the route by about 9 kilometres as it remained totally unserved by the permit holders, including the petitioner. The curtailment of the route is also one of the kinds of variation of the conditions of permit. Such an order could Legally and legitimately be passed by invoking the provisions of S.72 (2) (xxii) of the Act.

Case law discussed
JT1993(6) Supreme Court
1973(2)Section 836
1997(2) Section=368

AIR1969

By the Court

1. The dispute relates to the route known as Sector-8 NOIDA.8-10,8-9, 5-6, 1-2, 2-15.3-19.4-19, 9-20, 20-21, 25-26,the provisions of 31,26-30,27-28 National Botanical Garden. Sector 38-44 40-43,41-42 NEPZ- Kulesra-Surajpur_Dadri and back Surajpur-Kansna Bilaspur. Fourteen persons including the petitioner have been granted permits by respondent no.2 to ply their City Buses on the route. It appears that certain complaints were made that the permit holders were not serving a part of the route i.e. in between Surajpur Dadri and back and Surajpuir kasna Bilaspur. The matter came up for consideration in the meeting of the R.T.A. held on 12.5.2000 and 31.5.2000 on order(Annesure-6) was passed by the R.T.A. curtailing 9 kms. route from Surajpur to Dadri by invoking the provisions of Section 72(2)(xxii) of the Motor Vehicles Act (hereinafter referred to the Act). The effect of this order has been that all the 14 permit holders who were operating their buses are not now entitled to ply their buses on a portion of route in between Surajpur and Dadri though they are entitled to operate their buses on the remaining portion of the City Bus route. This order of the T.T.A was challenged by present petitioner as well as one another operator Rajesh by filing two separate appeal Nos. 52 and 57 of 2000 under Section 89 (1) (b) of the Act. Respondent no.3 Sadhu Ram intervened and the Tribunal refusing to implead him as party to the appeals conceded in his favour a right of hearing after hearing the parties concerned. The Tribunal respondent no.1 dismissed both the appeals by impugned order dated 11.9.2000 (Annesure-10).

2. By means of this writ petition the petitioner has challenged the order dated 31.5.2000 Annexure-6 to the petition. Passed by the Regional Transport Authority, Ghaziabad (hereinafter referred to the R.T.A) respondent no.2 and the orders dated 11.9.2000 Annexure-10 to the writ petition, passed by the State Transport Authority Tribunal, U.P. Lucknow- Respondent No. I in Appeal No. 52 of 2000 whereby the portion of permitted route for City Bus Service has been curtailed. It is prayed that the aforesaid orders be Quashed and a Direction be issued to the respondents not to give effect to the order aforesaid.

3. One Sadhu Ram. Who filed a caveat, was directed to be impleaded as respondent no.3. he has filed a counter affidavit has been filed. In view of the agreement between the parties this writ petitions was taken up for final disposal on merit at the admission stage on the basis of the material available.

Heard Sri Ravi Kant. Learned Senior Advocate Assisted by Sri H.P. Dubey for the petitioner, Sri R.N. Singh Senior Advocate Assisted by Sri A.R. Dubey for respondent no.,3 and the learned Standing counsel for the remaining respondents.

4. Sri Ravi Kant, learned counsel for the petitioner, urged that the impugned orders have resulted in the abridgement of the right of the petitioner to operate his bus throughout the length of the specified and notified route thereby directly affecting his existing right under the permit which was granted to him; impugned orders being in the teeth of

Section 86 of the Act and in violation of the principle of natural justice are required to be quashed by invoking jurisdiction under Article 226 of the Constitution. In substance, the submission of the learned counsel for the petitioner is that the orders in question are vitiated by the failure to observe the principle of natural justice. A faint suggestion was also made that the R.T.A. had taken recourse to an inapplicable provision of Section 86 to issue the notice but the order was illegally passed under Section 72(2) (xxii) of the Act. All these submissions have been repelled by Sri R.N. Singh, Learned counsel appearing on behalf respondent no.3 Sadhu Ram as well as learned Standing counsel and it is maintained that a fair hearing as postulated for the decision making process was given to the petitioner after due notice and that the decision was taken by the R.T.A in the best interest of local population as the petitioner and the other permit holders were not serving the entire route for economic reasons.

5. Both the parties counsel have placed reliance on the plethora of the decisions of the Apex court with regard to enunciation of the principle of natural justice. Without burdening this judgment with all the cited decisions, which I feel is not necessary, the position with regard to the applicability of principle of natural justice may be succinctly culled out. By way of preface, it may be mentioned that the concept of the principle of natural justice is not a rule of thumb or straitjacket formula or an abstract proposition of law. The applicability of principle of natural justice depends upon the nature of proceedings and procedure adopted by the court, Tribunal or Authority, This aspect of the matter has been dealt with by the Apex court in **Managing Director ESIL Hyderabad Vs. B.Karunakaran.** JT 1993 (6) Supreme Court-1, by observing: -

"….The theory of reasonable opportunity and the principles of natural justice has been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are not incantations to be invoked nor rites to be performed on all the sundry occasions. Whether in fact, prejudice has been caused to the employee or not on account of the denial to him of the report, has to be considered on the facts and circumstances of each case…."

6. No hard and fast rule or yard – stick can be provided for testing the question as to whether the principle of natural justice has been complied or not. Sri Ravi Kant laid much emphasis on the point that the conclusion arrived at by the respondent nos.1 and 2 have no nexus with the material available before them and that they failed to record the reasons which were necessary to test the correctness of the findings or conclusions. According to him, the impugned order stands vitiated on account of absence of reasons which impelled the R.T.A. or the appellate Tribunal to conclude that the operators are not serving a part of the route as it is not economically viable. To lend strength to his submission, Sri Ravi Kant placed reliance on the off- quoted celebrated decision of the apex court in Union of India V. Mohan Lal Kappor- (1973) 2 SCC-836, in which it was held that the reasons are the links between materials on which certain conclusions are base to they disclose haw is applied to the subject matter for a decision whether it is purely administrative or Quasi

Judicial. They would reveal nexus between the facts considered and the conclusions reached. This view was reiterated in **Gurdil Singh Fijji Vs. State of Punjab** –(1997)2 SCC-368. In **Mohan Lal Kappor's case (supra)**, the rules and regulations required recording of reasons in support of the conclusions. as mandatory.

7. In an earlier case, **Som Dutt Vs. Union of India** (A.I.R.1969 Supreme Court-414), the apex court was of the view that apart from any requirement imposed by statute or statutory rule either expressly or by necessary implication it can not be said that there is any general principle or any rule of natural Justice that a statutory body should always and in every case give reasons in support of its decision. Such orders can not, therefore, it was observed, be held to be illegal for not going any reasons for confirming the orders of the concerned authority. In view of the expanding horizon of the concept of principle of natural justice, the above wide and general statement came to be restricted and has been hedged with certain conditions. Now the present slant of the doctrine of applicability of principles of natural justice is that unless the rule expressly or by necessary implication excludes recording or reasons, it is implicit that the principles of natural justice or fair play do require recording of reasons as a part of fair procedure. The order of the administrative authority may not be like a judgement of the court. But some reasons, howsoever precise they may be, have to be there. I **S.N. Mukherjee Vs. Union of India** (1990) 4 SCC-594, the constitution Bench of the apex court surveyed the entire case law in this regard and held that except in cases where the requirement has been dispensed with, expressly or by necessary implication, an administrative authority exercising judicial or quasi judicial function, is required to record reasons for its decision. In para 36 of the report, at pages 612 and 613,it was further held that the recording of reasons excludes chances of arbitrariness and ensures a degree of fairness in the process of decision making. The said principle would apply equally to all decisions and its implications can not be confined to the decisions, which are subject to appeal, revision or judicial review. The same view was reiterated in the case of **Maharastra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and others**-(1991)2SCC-716 in which it was observed in para 21 off the report as follows:

" Thus it is settled law that the reasons are harbinger between the mind of the maker of the controversy in question and the decision or conclusion arrived at. It also excludes the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbilt support to the conclusion/ decision reached. The order when it affects the right of a citizen or a person, irrespective of the fact, whether it is quasi-judicial or administrative fair play requires recording of germane and relevant precise reasons. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record….."

8. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in

controversy. In **M.J. Sivani and others. Vs. State of Karnataka and others** (AI.R) 1995 Supreme Court.-1770) it has been observed in para 32 of the report, as under: -

"32, it is also settled laws that the order need not contain detailed reasons like court order. Administrative order itself may contain reasons or the file may disclose reasons to arrive at the decisions showing application of mind to the facts in issue. It would be discernible from the reasons stated in the order or the contemporaneous record contained. Reasons are the link between the order and the mind of its maker. When rules direct to record reasons, it is a sine qua non and condition precedent for valid order, Appropriate brief reasons, though not like a judgement, are necessary concomitant for a valid order in support of the action or decision taken by the authority or its instrumentality of the state,"

9. There is another thinking, which necessitates the recording reasons to support the conclusion. It is well-settled law that every action of the State instrumentality of the State must be informed by reason. Actions uninformed by reason may tantamount to arbitrariness. The State action must be just, fair and reasonable. Fair play and natural justice are part of public administration; non-arbitrariness and absence of discrimination are said to be hallmarks for good governance under the rule of law. One can not, therefore, escape from the conclusion that it is imperative on the State Government to inform its order by recording reasons to reach a particular conclusion.

10. With this caution in mind, and in the perspective of the law, as mentioned above, the question is whether the impugned order withstands the test of scrutiny at the alter of the principles of natural justice or not and if it is found that the reasons are conspicuously missing to arrive at the conclusion, a further question would be whether omission to record reasons, vitiates the impugned order or is in violation of the principles natural justice.

11. Admittedly, before a decision for curtailment of the route, in question, a notice was issued to the petitioner and the remaining permit holders. This notice purported to be under Section 86 of the Act, which deals with the cancellation and suspension of the permits under the circumstances specific in clauses (a) to (f) of sub-section (1). Sri Ravi Knat, learned counsel for the petitioner urged that the provisions of section 86 of the Act were not attracted to the facts of the present case and consequently, the petitioner was misled in submitting the proper reply, This aspect of the matter has been suitably dealt with by the appellate Tribunal respondent no.1 Mention of a wrong Section in the notice would hardly be of any consequence. Even if no provision of law was mentioned in the notice the fact remains that the various details given in the notice clearly indicated that the permit holders were not serving the entire route and, therefore, appropriate action under the law was contemplated against them, Moreover, cancellation and suspension of permit is an extreme step while the Regional Transport Authority has merely passed an order of curtailment of a portion of the route running about 9kms. Section 72 of the Act which deals with grant of stage

carriage permits envisages variation in the conditions of permit. In clause (xxii) of sub-section (2) of Section 72, it is provided that the Regional Transport Authority May, after giving notice of not less than one month.

(a) vary the conditions of the permit;

(b) attach to the permit further condition;

12. Provided that the condition specified in pursuance of clause (i) shall not be varied so as to alter the distance covered by original route by more than 24 kilometres, and any variation such limits shall be made only after the Regional Transport is satisfied that such variation will serve the convenience of the public and that it is not expedient to grant a separate permit in respect of the original route as so varied or any part thereof.

13. Undoubtedly, Regional Transport authority has the authority to vary the conditions of permit subject to the requirement that a notice of not less than one month is given to the permit holder. As is admitted in the present case by the parties, one month's notice was given before passing of the impugned order by the Regional Transport Authority It was immaterial as to what label was given to the notice. The petitioner had well understood the contents of the notice and had entered a proper defence in reply thereto. There was hardly any occasion for confusion or misgiving on the point.

14. Sri Ravi Knt further pointed out that the order of the Regional Transport Authority is based on extraneous considerations and insufficient material, inasmuch as, there was no tangible evidence to indicate that the petitioner and other permit holders were not serving the portion of the route in between the points-Surajpur and Dadri. It was maintained that as a matter of fact, the requisite number of buses were being plied on the aforesaid portion of the route and the local public as such has not reflected any grievance. This submission again is wide off the marks. Conscious of the fact that this Court can not enter into factual aspect of the controversy, suffice it to say that there was enough material before the Regional Transport Authority for recording the finding of fact that the permit holders including the present petitioner, were not serving Surajpur-Dadri route covering a distance of about 9 kilometres for the obvious economic reasons. An enquiry into the matter was made and on the letter of the competent authority, Regional Transport Authority came to the conclusion that the disputed portion of the route totally unserved. Local commuters of this rout obviously suffered serious inconvenience. The passenger had to drop at Surajpur and from there they had to make their own arrangements to go to Dadri and conversely passengers from Dadri had to travel by the selves upto Surajpur. In the matter of grant for permit, the convenience of the public is the supreme consideration. The petitioner as well as other permit holders did not deliberately serve the entire route and left the residents in a state of lurch, uncertainty and inconvenience on the portion of the route between Surajpur and Dadri. This by itself, was a sufficient ground to curtail or vary the specified route for which permit was granted to the petitioner as well as other 13 operators. Except for two persons, who filed appeals under Section 89(1)(b) of the Act, no other operator challenged the impugned order of the

Regional Transport Authority, The finding of fact recorded by the Regional Transport Authority that the portion of the route was not being served by the petitioner and other operators as confirmed in appeal in now final and can not be made a subject matter of scrutiny in writ jurisdiction. The said finding is based on tangible and believable evidence. It can not be termed as perverse or conjectural.

15. The order of the appellate Tribunal is hedged with appropriate reasons which provide links to the conclusion arrived at by it. The impugned order, as said above, has been passed after serving due notice on the petitioner and other operators. The bogey of violation of the principles of natural justice in the present case has been unnecessarily raised. The Regional Transport Authority as well as the appellate Tribunal have taken due precautions to ensure that the principle of natural justice are complied with in all aspects. The Regional Transport Authority has rightly passed the order of curtailment of a portion of the route by about 9 kilometres as it remained totally unserved by the permit holders, including the petitioner. The curtailment of the route is also one of the kinds of variation of the conditions. The curtailment of the route is also one of the kinds of variation of the conditions of permit. Such an order could legally and legitimately be passed by invoking the provisions of S. 72 (2) (xxii) of the Act.

16. In the conspectus of the above facts, I am of the view that is not a case fit enough in which interference by this Court by invoking extraordinary jurisdiction under Article 226 of the Constitution of India is warranted

The writ petition is dismissed without any order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.11.2000

BEFORE
THE HON'BLE M.C. JAIN, J.

Second Appeal No. 2702 of 1980

Dharam Vir Singh ...Appellant
Versus
The State of Uttar Pradesh and others ...Respondent

Counsel for the appellant:
Shri Arun Tandon
Shri D.K. Singh
Shri K.C. Srivastava
Shri B.S. Verma
Shri B. Malic

Counsel for the Respondents:
S.C. (Retainer)

U.P. Intermediate Education Act, 1921 Sub-Section.16-f and 16-E(2) Deemed approval_ Approval sought from District Inspector of Schools without complying with S.16-E-No. deemed approval.

Held- (paras 10 and 13)

Impleadment – Necessary party-Non-impleadment of Committee of Management-Fatal.

Held-Para 14

There is nothing to show that the compliance of the above provision of law was made. In other words, it is not established that the documents as required by the above provisions had been sent to the District Inspector of Schools. In the absence of the same, there could be no question of invoking

the provision of deemed approval in respect of plaintiff appellant.

In the result, the first question is answered this way that the approval of District Inspector of Schools in respect of the alleged appointment of the plaintiff/ appellant could not be deemed by virtue of section 16f of the U.P. intermediate Education Act.

But it is sad and bad that the plaintiff/appellant did not care to implead the committee of management of the institution as a party to the suit and as such it is not possible to grant any relief in his favour against the institution

By the Court

1. This is a plaintiff's second appeal preferred against the judgment and decree dated 11.4.1977 passed by Sri R.P. Misra the then Civil Judge. Muzaffar Nagar in Civil Appeal No.93 of 1976 arising out of Original suit No.498 of 1972 Dharam Vir Singh Vs. State of U.P. and another of the Court of the then Munsif Kairana district Muzaffar Nagar. Respondent No.1 to 3 are the State of U.P. Director of Education U.P. at Allahabad and District Inspector of Schools. Muzaffarnagar respectively where as respondent No.4 is the Manager, Ram Dai Inter College, Sikka (Silwar) Muzaffarnagar.

2. The case giving rise to the second appeal may be stated briefly for proper appreciation. The plaintiff/appellant Dharam Vir Singh brought the suit in the Lower Court for recovery of Rs.415312 as arrears of his salary for the period 8.771 to 7.7.72 together with interim relief. His case was that in consequence of advertisement for the post of a lecturer in Biology subject in Ram Dai Inter College. Sikka (silvar), District Muzaffar Nagar, he had applied for the said post and was selected by the Selection Committee of the college after interview. He joined his post of 7.7.1971 for the academic session 1971-72 on basic pay of Rs.215 Rs.111 As D.A Rs.8-as interim relief. Total Rs.334/- per Month. He served the institution for the full session and was thus entitled to get salary at the above rate including the interim relief granted by the State Government with effect from 1.3.73 His salary totalling Rs.415312 was not paid After 31st March 1971 the lecturers of recognised institution were paid their salary through cheques issued by the State Government. But no Cheque had been issued to him. After serving a notice under Section 80 C.P.C. he brought the suit.

3. The State of U.P.. resisted the suit with the defence that the appointment of the plaintiff was without approval of the District Inspector of Schools. Muzaffar Nagar. No letter of appointment had been issued to him by the Committee of Management of the institution. His appointment being not legal and in accordance with regulations of the Board. He was not entitled to get any salary from the State Government. He could seek his remedy only against the defendant No.2-manager of the College. With this defence the State of U.P. denied its liability to pay any amount to the plaintiff towards his alleged salary.

4. The defendant no.2 respondent no.4 in this appeal filed a separate written statement admitting that the plaintiff worked in the College as lecturer with effect from 7.7.71 and served for the entire session 1971-72 having been appointed on temporary basis. His appointment was made subject to the

approval by the District Inspector of Schools. Muzaffar Nagar and he was told that the terms of his appointment would be in accordance with the approval to be granted by the District Inspector of Schools. The papers relating his appointment were sent to the District Inspector of Schools for approval but no approval was received and as such no salary could be paid to him. The defendant no.2 (manager0 of the institution (Chandra Rani) denied her liability to pay any salary to the plaintiff. According to he defence. The liability to make the payment of the salary of plaintiff was that of the State Government. The trial Court held the plaintiff to be entitled to the relief claimed and decreed his suit against he State of U.P. Aggrieved, the State of U.P. preferred appeal and the first appellate court by the impugned judgment dated 11.477 allowed the appeal and reversed the judgment and decree passed by the trial court with the result that the suit of the plaintiff stood dismissed with costs throughout it is now the plaintiff who has come up second appeal before this Court.

5. This Court while admitting the appeal. Formulated the following two questions of law for decision in this appeal as per order dated 23.7.81 which is reproduced below:

"Admit. Issue Notice

The following questions of law are formulated for decision in this second appeal:

1. Because the approval of the District inspector of Schools having been sough by the management and no orders having been passed on the said request the appellant shall be deemed to have been appointed as a Lecturer in the college by virtue of Section 16 of the U.P. Intermediate Education Act

2. Because the Management of the Institution effectively represented through its manager and the suit could not have been dismissed for non-joinder of necessary parties.

Therefore this Court has to decide the above two questions of law formulated in the appeal.

6. I have Heard Sri Arun Tandon. Learned counsel for the appellant and learned Standing Counsel on behalf of respondent no.1 to 3. Service has been deemed to be sufficient on the respondent no.4-Magager of the institution by order dated 27.7.2000. None turned up from his side at the hearing of the appeal. I take up the two question of law which have to be decided one by one.

7. Question No.1: The argument of the learned counsel for the appellant is that the approval concerning appointment of the plaintiff appellant having not been accorded by the District Inspector of Schools within two weeks, the was to be deemed as having been accorded as per Section 16F of the U.P. Intermediate Education Act. 1921 and the plaintiff appellant could not be deprived of his salary on the premise of approval having not been granted by the District Inspector of Schools. On the other hand, the submission of learned Standing Counsel is that as matter of fact no appointment letter had been issued in favour of the plaintiff appellant. Nor was there any resolution concerning his selection. Therefore, there could be no question of his deemed approval by the District Inspector of Schools.

8. On consideration I find that the argument of "deemed approval" put forth from the side of the plaintiff/appellant is not so simple as has been sought to be projected. Reference to the testimony of Harpal Singh DW 1 and relevant provisions of law would make the things clear. Harpal Singh DW 1 was examined in the Lower Court and he was the member of the Committee of Management of the college in question at the relevant time. According to him, he was the President of the Selection Committee in which the plaintiff had been selected for the appointment as lecturer for the academic session 1971-72 According to him, the Selection Committee recommended the appointment of the plaintiff to the District Inspector of Schools, but no approval was received. It is also his statement that the plaintiff had been appointed subject to approval of the District Inspector of Schools and he had clearly been told that if the approval for his appointment was accorded by the District Inspector of Schools for the lecturer's grade, then he would be treated as lecturer and in case he was approved for untrained grade, then he would be treated accordingly. The witness has further stated that as approval was not received from the District Inspector of Schools within 14 days, the approval was deemed as accorded. The District Inspector of Schools, however, refused to sign the cheque for the salary of the plaintiff. He also stated that the plaintiff was entitled to his salary but the liability was that of the State Government. However, it is crystal clear from his cross examination that no letter of appointment was ever issued to the plaintiff. There also does not appear to be any resolution of the Committee of Management concerning the appointment of the plaintiff. There is also no document on record showing the recommendation of the Selection Committee for the appointment of the plaintiff as teacher. It appears as if all the act proceedings were merely by word of mouth without any proper recording of documents as required by the law and rules.

9. Section 16E of the Intermediate Education Act. 1921 relates to the appointment of teachers of different subjects. Its sub clause (2) says that there shall be constituted in every recognised institution a Selection Committee for the purpose of selecting candidates for appointment as teacher in the institution. Sub clause (2) of Section 16F of the said Act reads as under.

"(2) The names of the selected candidate shall be forwarded for approval, in the case of a teacher, by the Principal or Headmaster to the Inspector, and, in the case of Principal or Headmaster, by the Chairman of the selection committee to the Regional Deputy Director, Education, A statement showing the names, qualifications and other particulars, as may be prescribed of all candidates who may have applied for selection shall also be sent along with the name of the selected candidate. The Inspector or Regional Deputy Director, education, as the case may be, shall give his decision within two weeks of the receipt of the relevant papers, failing which approval shall be deemed to have been accorded."

10. There is nothing to show that the compliance of the above provision of law was made. In other words, it is not established that the documents as required by the above provisions had been sent to the District Inspector of Schools. In the

absence of the same, there could be no question of invoking the provision of deemed approval in respect of the plaintiff appellant.

11. I also find that the Lower Appellate court has rightly relied upon the relevant provisions of Chapter II of the Regulations under Intermediate Education Act, 192211 on paragraph-9 of its judgment. The list thereof is that there has to be the constitution of Selection Committee for appointment of teachers and there is also the requirement for the issuance of appointment letter within two weeks of the receipt of approval of selected candidate for appointment as teacher. It is provided that the Manager shall, on authorisation under a resolution of the Committee of Management, has to issue an order of appointment to the candidate mentioning therein, among other particulars, the salary, scale of pay and period of probation with instruction to join duty within a fortnight of the receipt of appointment letter. A copy of the order of appointment has also to be sent to the authority prescribed in Section 16F (2) read with section 16C(5) for information and record. The compliance of these provisions was not made at all. Without compliance of these legal requirements,, the plaintiff was allegedly permitted to work for the entire academic session. The liability of paying his salary could not be thrust upon the State Government of the simple premise that under the U.P. High School and Intermediate Colleges (payment of salary of teachers and other employees) Act, 1971, it was the liability of State Government to pay the salary of the plaintiff.

12. Learned counsel for the appellant has argued that as per Section 10(2) of the said Act, the State Government could recover the amount of salary from the institution as arrears of land revenue. I do not think that this provision could saddle the State Government with the liability of making payment of any salary to the plaintiff. The clear reason is that the basic requirement of his appointment having been legally made as per the provisions of law is missing in the present case.

13. In the result, the first question is answered this way that the approval of District Inspector of Schools in respect of the alleged appointment of the plaintiff/appellant could not be deemed by virtue of section 16F of the U.P. Intermediate Education Act.

14. Question No.2: It is a fact that the plaintiff/appellant did not implead the Committee of Management of the institution as a party to the suit. He only impleaded the Manager and that, too. Without his name. It goes without saying that the legal person was the Committee of Management of the College, and not the Manager. The Manager was simply the functionary of the institution, but not a legal person who, as said above, was not impleaded by name in his personal capacity. The learned counsel for the plaintiff/appellant has argued that as admitted in the written statement of defendant no.2/respondent no.4 (manager of the Institution), the plaintiff had worked as teacher for the entire academic session 19971-72 and that he was entitled to his salary. I do not think that it brings about any betterment for the plaintiff/appellant. The Committee of Management of the institution having not been impleaded as a party to the suit. No liability could be fastened on the College

management. Had the Committee of Management been impleaded as a party to the suit, then it could be said that as the plaintiff/appellant had admittedly worked as teacher for the entire academic session 1971-72 he should be paid his salary by the Management Committee of the institution out of its own funds. (But it is sad and bad that the plaintiff/appellant did not care to implead the Committee of Management of the institution as a party to the suit and as such it is not possible to grant any relief in his favour against the institution). Non-impleadment of the Committee of Management goes to the root of the matter and it is not a proper answer to over come this basic defect that the Manager effectively represented the Management of the Institution. This Court is of the considered view that the lower appellate court was perfectly justified in finding that the suit was bad for non-joinder of necessary parties. Question no.2 is answered accordingly.

15. It follows from the above discussion on the questions of law formulated in the second appeal that the appeal completely lacks merit and it is destined to be dismissed.

16. This second appeal is hereby dismissed. However, under the circumstances of the case, it is directed that the parties shall bear their costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2000

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

Civil Misc. Writ Petition No. 50286 of 2000

Amit Kumar ...Petitioner
Versus
District Inspector of Schools, Jaunpur and another ...Respondents

Counsel for the petitioner:
Shri Indra Raj Singh

Counsel for the Respondents:
S.C.
Smt. Sunita Agrawal

Intermediate Education Act 1921- Regulation 101 Prior approval- appointment on Class III post as non teaching staff whether these provisions are mandatory or obligatory?
Held-Mandatory.

Held-Para 10

But in absence of prior approval by the DIOS, the appointing authority could not have proceeded to make appointment of the petitioner. And the appointment made by the appointing authority of the petitioner without obtaining prior approval of the DIOS on a non-teaching post was in violation of mandatory provision of regulation 101 and the petitioner could not claim any benefit from such an appointment made by the appointing authority.

By the Court

1. The short question that arises for consideration in this petition is whether the provisions of Regulation 101 of Chapter III of the Regulations framed under U.P. Intermediate Education Act

1921 requiring the appointing authority not to fill a vacancy of a non-teaching post in an aided and recognised institution except with the prior approval of District Inspector of Schools is mandatory of directory.

2. One Ram Lala Singh was working as Junior Clerk (in brief clerk) in an aided and recognised institution Balika Inter College, Shahganj, Jaunpur (in brief institution). In the institution there was only one sanctioned post of clerk. Ram Lala Singh was due to retire on 31.72000. He took medical leave from 19.6.2000 to 31.7.2000. The Committee of management (in brief management) sent a letter on 8.1.2000 to District Inspector of Schools (in Brief DIOS) that since Ram Lala Singh Was due to retire on 31.7.2000, permission be granted to fill the post of clerk. An advertisement was issued on 20.6.2000 by the management inviting applications to fill short-term vacancy of clerk, which was available till 30.7.2000. The petitioner, who is son of Ram Lala Singh, applied. The selection committee selected him on 25.6.2000. He was issued appointment letter on 30.6.2000 in the leave vacancy of his father. He joined on 8.7.2000. On 10.7.2000 the manager wrote a letter to DIOS for granting financial approval to the appointment of the petitioner, No approval was granted, Meanwhile Ram Lala Singh retired on 31.7.2000 and a substantive vacancy of clerk became available. On 24.8.2000 the manager wrote a letter to DIOS, intimation him that he had already written letters on 8.1.2000, 2.2.2000, 22.3.2000, 19.4.2000,26.5.2000,20.6.2000 and 31.7.2000 for grant of permission to fill the post of clerk. But no prior approval has been granted by DIOS. In the leave vacancy of Ram Lala Singh the petitioner had been appointed and it was prayed that appointment of the petitioner be approved on the substantive vacancy of clerk and financial approval be granted. It was also prayed, in the alternative, that for making regular appointment on substantive vacancy of clerk, which occurred on 31.7.2000, permission be granted to the management to fill the post. The DIOS did not pass any order. The management on 4.9.2000 issued an advertisement in local newspaper 'Tarun Mitra' published from Jaunpur inviting applications for appointment on the substantive post of clerk. The petitioner applied and was selected by the respondents on 20.9.2000. The manager sent a letter to DIOS on 12.10.2000 for granting financial approval to the appointment. The DIOS on 12.10.2000 for granting financial approval to the appointment the DIOS on 6.11.2000 refused to grant financial approval on the ground that his prior approval was not taken before making the appointment. It is this order dated 6.11.2000 which has been challenged by the petitioner in this writ petition.

I have heard at length Sri Indra Raj Singh, learned counsel for the petitioner and Smt. Sunita Agrawal, learned Standing Counsel appearing for the respondent no. 1.

3. The learned counsel for the petitioner has vehemently urged that once the management wrote a letter to DIOS for obtaining prior approval before making the appointment of clerk, DIOS could not withhold permission. And he permission was to be granted within reasonable time. He placed reliance on the decision of this court in Rajendra Yadav v. Deputy Director of Education,

Gorakhpur and others 1999 AWC (3) 2123 and has urged that in case prior approval is not granted by DIOS within two weeks it would be deemed that approval has been granted for making appointment and the management was will within its right to make appointment on the post of clerk. The learned counsel urged that the impugned order has been passed by DIOS without affording any opportunity of hearing to the petitioner or the management. He further urged that it is not disclosed in the impugned order if any application for appointment under the Dying in Harness Rules was pending. Therefore, there was no justification to refuse approval of petitioner's appointment. The learned counsel further urged that in view of the decision of the apex court in Post Graduate institution of Medical Education and Research Chandigarh v. Faculty Association and other AIR 1998 SC 1767 that single post cannot be reserved and it could only be filled by direct recruitment the DIOS could not refuse approval on the ground that candidate under Dying in Harness Rules was to be appointed. Learned counsel then urged that even if the appointment of petitioner was irregular, once approval is granted to the appointment by DIOS it will be deemed to be a valid appointment with effect from the date of approval and in this regard he has placed reliance on the decision of this court in Ashika Prasad Shukla v The District Inspector of Schools, Allahabad and another 1998 (3) E.S.C. 2006, Rajesh Kumar Dwivedi v. State of U.P. 1998 (4) AWC 531 and Atul Bhatnagar v. District Inspector of Schools Saharanpur and others 1997 ALR (30) 627. Learned counsel for the petitioner lastly urged that since he worked as clerk he is entitled for salary, it should be paid either by DIOS or the management of the institution.

4. Smt. Sunita Agarwal, learned standing counsel has urged that Regulation 101 provides that prior approval of DIOS has to be obtained by the appointing authority before making any appointment on a non-teaching post of class III or IV, therefore, regulation 101 is mandatory and it has not been complied with by the appointing authority. She urged that two weeks period for grant of prior approval under regulation 101 could not be treated to be reasonable as held by this court in Rajendra Yadav (supra). She further urged that under regulations 101 to 107 of the Regulations framed under U.P. Intermediate Education Act, 1921 (in brief regulation) appointment under the Dying in Harness Rules have to be provided to the dependent of the deceased. If two weeks' period were treated, in law, to be sufficient period, then the interest of the dependant of the deceased who is claiming appointment would seriously be jeopardised. She further urged that decision of apex court in Post Graduate Institute of Medical Education (supra) was not applicable to the facts of the instant case as the single post of clerk is to be filled by direct recruitment. And appointments under the Dying in Harness Rules are also made by direct recruitment. Learned standing counsel urged that the petitioner being the son of the retired clerk Ram Lala Singh the management appears to be interested in appointing him as the advertisement issued to fill the post of clerk was published only in one local newspaper "Tarun Mitra" published from Jaunpur. It is not a newspaper having wide circulation. Further the advertisement is

required to be issued in two newspapers, therefore the management did not follow the procedure and the appointment was illegal and contrary to the provisions of regulations, therefore, the petitioner is not entitled to any salary.

5. The question is whether the provisions of Regulation 101 of Chapter III of the Regulations framed under U.P. Intermediate Education Act 1921 requiring the appointing authority not to fill a vacancy of a non-teaching post in an aided and recognised institution except with the prior approval of District Inspector of Schools is mandatory or directory. Regulations 101 to 107 was inserted in Chapter III of the Regulations framed under U.P. Intermediate Education Act, 1921 by State Government notification dated 30.7.1992. Regulation 101 and Regulation 103 to 107 were subsequently substituted by notification dated 2.2.1995 The relevant Regulations 101 in Hindi and its translated version in English as quoted by apex court in Director of Education (Secondary) and another v. Pushpendra Kumar and others 1998 (2) UPLBEC 1310 are extracted below:_

"101. The appointing authority shall not fill any vacancy in the non-teaching staff of a recognised aided institution except with the prior approval of the Inspector".

"नियम 101- नियुक्ति प्राधिकारी, निरीक्षक के पूर्वानुमोदन के सिवाय किसी मान्यता प्राप्त, सहायता प्राप्त संस्था के शिक्षणोत्तर पद की किसी रिक्ति को नहीं भरेगा ।

प्रतिबन्ध यह है कि जमादार के पद की रिक्ति को निरीक्षक द्वारा भरने की अनुमति दी जा सकती है ।"

6. Regulation 100 provides that appointing authority for the post of class-III employee is committee of management and for the class-IV post is Principal of the institution. Regulation 101 provides that vacancy of a non-teaching post in a recognised aided institution shall not be filled by the appointing authority without obtaining prior approval of the DIOS. Regulation 102 provides that the appointing authority would intimate within three months before the occurrence of vacancy due to the retirement, to the DIOS. Regulation 103 provides that dependent of teaching or non-teaching staff who has died in harness he given appointment on a non-teaching post. Regulation 106 provides that such appointment has to be given to candidate under the Dying in Harness Rules as far as possible in the same organisation. And if there is no vacancy available the organisation he could be appointed in any other organisation of the district. The reason for obtaining prior approval of the DIOS is that he shall look into class IV post as per qualification to any candidate in the district under Dying in Harness Rules. If not, he may grant prior approval to the appointing authority. Thereafter, the appointing authority makes appointment on the non-teaching post, in accordance with the procedure prescribed by law and forwards the papers to the DIOS for grant of financial approval.

7. The language of the regulation is clear that appointing authority shall not fill any vacancy in non-teaching staff of a recognised aided institution except with the prior approval of the inspector. Two words in regulation 101 are important. The use of word "shall" makes it obligatory for the appointing authority before filling the vacancy of non-teaching

post to obtain prior approval of the Inspector. The use of word "except" mandates the appointing authority not to fill the vacancy without obtaining prior approval of the Inspector. The question which arise is that what is the import of word "shall" and 'except' used in regulation 101. When the legislature or the rule making authority uses the word "shall", normally it is used in imperative or mandatory sense. After reading the provision it has to be culled out as to whether word "shall" has been used in mandatory or directory sense.

The word "except' has been defined in Webster's Third New International Dictionary to mean,

"unless" or "only"

The word "except" has been defined in Black's law Dictionary revised fourth edition as the expression "except for" in synonymous in many cases with,

"but for" and "only for"

"In Black's Law Dictionary sixth edition the word "except" has been defined as,

but for; only for; not including other then otherwise than; to leave out of account or consideration;

"In Grolier New Webster's Dictionary the word "except" has been defined as,

apart from, excluding only, but".

"In Black's Law Dictionary sixth edition the word "shall" expressed as used in statutes, contracts, or the like, this word is generally imperative or mandatory. In Common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must" and is inconsistent with a concept of discretion. It has the invariable significance of excluding the idea of discretion, and has the significance of operating the impose a duty which may be enforced, particularly if public policy is in favour of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears. But it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefit to nay one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense."

8. From the aforesaid meaning of the word "except" it is clear that the expression "except" has been used in regulation 101 to mean "only". Therefore, the appointing authority before making appointment on a non-teaching post could make any appointment only after obtaining prior approval of DIOS. In my opinion use of these two words "shall and "except" have been used in imperative terms. And clearly express that prior approval of DIOS is a condition precedent for making any appointment on a non-teaching post. Use of word "except" with the prior approval of DIOS does not leave any discretion to the appointing authority to make any appointment without obtaining his prior approval. If regulation 101 is treated to be directory then the appointing authority could make appointment on non-teaching post even without prior approval of the DIOS. It would result in giving power to the appointing authority to make appointment first, and thereafter obtain financial approval. This was not the intention of

legislature or the rule making authority. And it clearly intended that before making any appointment the appointing authority must obtain prior approval of the DIOS. The legislative intent has to be given effect to while interpreting regulatory provisions of regulation 101. Regulation 103 to 106 to Regulations further make it clear that the regulation 101 cannot be construed as permissive or directory. Further the procedural safeguard contained in regulation 101, making it obligatory for the appointing authority in matters of making appointment on non-teaching posts, not to fill the vacancy except with the prior approval of the DIOS, as an element of public interest. Regulation 103 providing for appointments under the Dying in Harness Rules makes it obligatory on the DIOS to provide appointment to dependants not only in the institution where the deceased was working but any other institution, therefore, the only reasonable interpretation which can be given to the two words "shall" and 'except used in regulation 101 is that these expressions are imperative and the regulatory provision contained in regulation 101 is mandatory and cannot be treated to be directory. The requirement of obtaining prior approval of DIOS is not an empty formality. It is in public interest. The appointment of petitioner being contrary to Regulation 101 did not vest any right in him either to claim his appointment as regular or any salary.

9. The nest question is whether the court could fix any time limit for exercise of power by the DIOS under regulation 101. The legislature or the rule making authority while amending regulation 101 did not dix any time limit for DIOS within which he has to grant or refuse prior approval to the appointing authority for filling the non-teaching post. Learned counsel for the petitioner has strongly relied on a decision of this court in Rajendra Yadav (supra). It has been urged that in view of this decision once appointing authority sends a request to approval is not granted within two weeks after papers are received by DIOS, then it would be deemed that the DIOS has granted approval to the appointment sought to be made by the appointing authority. The learned judge has relied on the decision of apex court in Regional Provident Fund Commissioner v M/s K.T. Rolling Mills Private Limited JT 1995 (1) SC 38. The apex court held that where a power is conferred on an authority under the Statute it has to be exercised within a reasonable period. Ture but what is reasonable period would depend on the facts of each case. It cannot be fixed by the Court. It can only determine whether the power exercised by the authority was within reasonable time or not, in the facts of a particular case. The authority while framing Regulations 101 to 107 did not fix any time limit within which the DIOS could grant prior approval to the recommendation made by the appointing authority for filling the non-teaching post. The reason is obvious. The DIOS has to verity from the records as to whether any candidate in the district is to be appointed under the Dying in Harness Rules and vacancies for making appointments are available or not in the institutions of the district. Therefore, the authority in its wisdom did not think it reasonable to fix any time limit for the DIOS under regulation 101 for exercising power of granting prior approval. Wherever, either in the U.P. Intermediate Education Act, 1921 or the Regulations framed thereunder, legislature or the rule making

authority, thought it proper to fix a time limit, it clearly provided the time within which the power is to be exercised and it the power is not exercised within fixed time limit, it provided that it would be deemed that prior approval has been granted by the educational authority, in regulation 6 of chapter II of the regulations deemed approval has been provided if on the proposal for promotion of a teacher, the DIOS does not communicate his decision within three weeks to the management. The provision for deemed approval, therefore, was a conscious omission. It is settled rule of interpretation that where legislature or the rule making authority enacts different provisions for similar situation, then it should be interpreted in the manner it has been provided for. On the construction of the regulation 101 and in absence of any provision for deemed approval the learned standing counsel rightly argued that the decision in Rajendra Yadav (supra) is not helpful.

10. The appointing authority had applied to the DIOS for grant of prior approval before making any appointment on the class-III post. No or granting the permission. Without obtaining prior approval of the DIOS the appointing authority proceeded to make appointment of the petitioner on the non-teaching post. It the DIOS failed to perform his statutory duty under regulation 101 and did not grant prior approval, then it was open to the management to approach this court for issuance of a writ of mandamus for direction to the DIOS for deciding the application of the appointing authority for grant of prior approval. But in absence of prior approval by the DIOS, the appointing authority could not have proceeded to make appointment of the petitioner. And the appointment made by the appointing authority of the petitioner without obtaining prior approval of the DIOS on a non-teaching post was in violation of mandatory provision of regulation 101 and the petitioner could not claim any benefit from such an appointment made by the appointing authority.

11. The petitioner is not entitled to any relief, as the management in violation of mandatory provisions of regulation 101 made his appointment. Therefore, it is not necessary for me to consider the other questions raised by the learned counsel for the parties.

For the aforesaid reasons, I do not find any merit in this writ petition.

This writ petition fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2000

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

Civil Misc. Writ Petition no. 48316 of 2000

Rakesh Chandra Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents.

AND

Civil Misc. Writ Petition No. 30438 of 2000

Rakesh Chandra Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Shri Birendra Pratap Singh

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

U.P. Intermediate Education Act, 1921 read with Regulations 101- Institution upgraded from Junior High School to High School on 24.8.93-Petitioner appointed as Clerk by management thereafter without approval of DIOS-Appointment, held, viod and illegal.
Held-Paras 6 and 7)

Since the institution was upgraded as High School in 1993, Rules 1984 ceased to apply to the institution. And the only provision to fill the non-teaching post of clerk was regulation 101 of chapter III of the regulations. Under regulation 101 prior approval of District Inspector of Schools had to be obtained before making appointment on a class III post.

Therefore, appointment of the petitioner on the post of clerk could not be made by the management without obtaining prior approval of the District Inspector of Schools, BSA had no power to grant approval to the appointment of the petitioner. Thus, the approval granted to the petitioner's appointment on 20.4.1999 by BAS was viod. It has rightly been cancelled by BSA.

Therefore, even thought he institution is not receiving grant in aid from the government and has been granted recognition as unaided High School. The management could fill vacancy of clerk, only by following the provisions of recruitment as provided under the U.P. Intermediate Education Act 1921 and Regulations framed thereunder. Since the management did not appoint the petitioner under Act 1921 and Regulations, therefore, no relief could be granted to the petitioner.

Case referred:
CMW No. 50286 of 2000Amrit Kumar v. DIOS Jaunpur decided an 21.11.2000 1986 UPLBEC 477.

By the Court

1. Janta Uchchatar Madhyamik Vidyalaya, Arkauli, Moradabad (in brief institution) was a recognised on 26.4.1968 as Higher Secondary School. It was taken in grant-in-aid list under The Uttar Pradesh Junior High Schools (Payment of Salaries to Teachers and other Employees) Act, 1978 (in brief Act 1978) with effect from 1.5.1979. the institution was upgraded and granted unaided recognition as High School on 24.91993. Permission to open class IX was granted on 4.12.1993. after up gradation of the institution as High School a Writ Petition was filed before this court being civil Misc. Writ Petition No. 947 of 1995 and under the interim order of this court dated 11.1.1995, salary of teachers and staff of the institution is being paid from the grant-in-aid received by the institution under Act 1978 till the institution is brought in the grant-in-aid list of High School.

2. After up gradation of the institution as High School, one clerk working in the institution was dismissed from service. The post of clerk fell vacant. The management issued an advertisement on 2.4.1999 in newspaper 'Nav Amar Bharat' inviting applications for appointment on the post of clerk. The petitioner applied and he was selected by the selection committee on 24.4.1999. appointment letter was issued to him 22.4.1999 he joined on 23.4.1999. the management sent the papers of appointment of the petitioner for granting financial approval to District Basic Education Officer (in brief BSA) who granted approval on 20.4.1999 with a condition that if any fact was found incorrect then the approval shall be

treated to the viod. The management sent salary bill of the petitioner for the month of April 1999. The Accounts Officer working in the office of BSA raised objection on the salary bill and sent a letter to Director of Education, U.P., Allahabad along with the documents making a query as to whether payment of salary could be made or not. Correspondence took place between the office of the Director and the Accounts Officer but salary was not paid. The petitioner filed Civil Misc. Writ Petition no. 30438 o f2000 praying that his salary be paid by the respondents. This Court, on 26.7.2000, issued an interim mandamus to the Accounts officer to pass salary bill be the petitioner or show cause by filing counter affidavit within six weeks. In paragraph 18 of the counter affidavit filed by the Accounts Officer it was been stated that after up gradation of the institution as High School, provisions of the U.P. Intermediate Education Act, 1921 is applicable to the institution; it was further stated that by order dated 2.9.2000 approval granted to the appointment of the petitioner on 20.4.1999 has been cancelled by BSA, as it was viod. This order dated 2.9.2000 passed by BSA has been challenged by the petitioner by means of Civil Misc. Writ Petition No. 48316 of 2000.

3. I have heard Sri Birendra Pratap Singh, learned counsel for the petitioner and Sri P.D. Tripathi, learned counsel appearing for respondents no. 3 and 4 and Standing Counsel appearing on behalf of respondents no. 1 and 2. Since both the writ petitions raise a common dispute, therefore, they are being taken up together for final disposal with the consent of the learned counsel for the parties.

4. Learned counsel for the petitioner has urged that once BSA granted approval to the appointment of the petitioner as clerk he could not cancel the approval granted earlier by him. Learned counsel has further urged that since the petitioner was paid from the grant-in-aid received by the Junior High School, the petitioner could be appointed as clerk under the rules applicable to clerks of junior High Schools and BSA has the power to grant approval to the appointment. Hence, the approval granted by the BSA could not be cancelled by him.

5. Learned counsel appearing for respondents has urged that after up gradation of the institution as High School appointment of clerk could only take place under the provisions of U.P. Intermediate Education Act, 1921 and the Regulations framed thereunder (in brief Act 1921 and Regulations) and the petitioner could not be appointed under the rules which applicable to clerks of junior High School imparting education from classes VI to VIII. He urged that since appointment of the petitioner was not made under Act 1921 and Regulations, BSA did not have any power to grant approval to the appointment of the petitioner. Since the order passed by BSA was viod he was empowered to cancel the approval earlier granted by him.

6. The first question which arises for consideration is whether after up gradation of the institution of High School if a vacancy of clerk occurs in the institution, it has to be filled under the provisions of the Act 1921 and Regulations framed thereunder or under the provisions of the U.P. Recognised Basic Schools (Junior High Schools)

Recruitment and Conditions of Service of Ministerial Staff and Group 'D' employees) Rules, 1984 (in brief Rules 1984). It is not disputed that the institution was upgraded from Junior High School to High Scholl on 24.8.1993. A clerk of the institution was dismissed from service after the institution was upgraded and this vacancy was sought to be filled by the management through an advertisement made on 2.4.1999. Section 2 (e) of Rules 1984 defines a Junior High School to mean an institution other than High School or intermediate College imparting education to boys and girls or both from class VI to VIII. Therefore, Rules 1984 would apply to the institutions where education is imparted from class VI to VIII but it shall not apply to the institutions which impart education from classes IX and X. since the institution was upgraded as High School in 1993, Rules 1984 ceased to apply to the institution. And the only provision to fill the non-teaching p0st of clerk was regulation 101 of chapter III of the regulations. Under regulation 101 prior approval of District Inspector of Schools had to be obtained before making appointment on a class –III post. It has been held by this court in Civil Misc. Writ Petition No. 50286 of 2000 Amit Kumar V District Inspector of Schools, Jaunpur and another decided on 21.11.2000 that provisions of Regulation 101 are mandatory. Therefore, appointment of the petitioner on the post of clerk could not be made by the management without obtaining prior approval of the District Inspector of Schools. BSA had no power to grant approval to the appointment of the petitioner. Thus, the approval granted to the petitioner's appointment on 20.4.1999 by BSA was viod. It has rightly been cancelled by BSA.

7. The next question is what would be the effect of payment of salary etc. to the teachers and staff from the grant-in-aid received from the government as Junior High School under interim order passed by this court and whether services of such teachers and staff would be governed by Basic Education Act and Rules or U.P. Intermediate Education Act 1921 and Regulations framed thereunder. I have earlier held that after up gradation of the institution to high School, the provisions of Act 1921 and Regulations would apply and the provisions of Rules 1984 would not be applicable for recruitment on the non-teaching post. If teachers and non-teaching staff of the institution are receiving salary from grant-in-aid which was earlier payable to the institution are receiving salary from grant-in-aid which was earlier payable to the institution prior to its up gradation as High School. Even then, fresh appointments in unaided recognised High School would be governed by the provisions of Act 1921 and Regulations. A division bench of this court (Lucknow Bench) in Shiksha Prasar Samiti Babhnan, District Gonda v. State of U.P. and others 1986UPLBEC 47 has held that the provisions of U.P. intermediate Education Act 1921 apply to a recognised institution. It is not necessary that the institution should be received grant in aid, therefore, even thought he institution is not receiving grant-in-aid from the government and has been granted recognition as unaided high School. The management could fill vacancy of clerk, only by following the provision of recruitment as provided under the U.P. Intermediate Education Act 1921 and Regulations framed thereunder. Since the management did not appoint the petitioner under Act 1921 and Regulations,

therefore, no relief could be granted to the petitioner.

8. For the aforesaid reasons, I do not find any merit in these petitions.

9. Both the writ petitions fail and are hereby dismissed.

10. Parties shall bear their own costs.

.....

ORIGINAL JURISDICTION
DATED: ALLAHABAD:1, December, 2000

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

Civil Misc. Writ Petition No. 970 of 2000

A.S. Advertising Company, Railway Road, Meerut and another ...Petitioner
Versus
Nagar Nigam, Meerut and another ...Respondent

Counsel for the Petitioner:
Sri Shashi Nandan
Sri R.S. Mishra

Counsel for the Respondents:
Sri K.R. Sirohi
Sri R.B. Singhal

Constitution of India, Article 14- Auction/Tender for advertisement by fixing hoardings by roadsides within limits of Nagar Nigam published in News papers having little or no circulation, held, violative of Article 14.

Held- Para 16

In our opinion advertisement in an unknown newspaper stands on the same footing as no advertisement at all since, the purpose of the advertisement is that there should be wide publicity otherwise Article 14 of the Constitution will be violated.

Case referred
1995 ALR (2) 601
W.P. NO.41992 of 1993, decided on 16.12.1993.
Lallojee & Sons Vs State of U.P.

By the Court

1. This writ petition was filed for a mandamus directing respondent no.1 the Nagar Nigam Meerut not to settle the contract in respect of advertisement hoardings in favour of respondent no.2 and to restrain the respondents from interfering with the possession of the petitioners over the hoardings sites.

2. We have heard learned counsel for the parties.

3. It has been alleged in paragraph 2 of the petition that the petitioners are engaged in the business of advertising by fixing hoardings on the roadsides within the municipal limits of the Nagar Nigam, Meerut. In paragraph 3 of the petition it is alleged that the Nagar Mahapalika (now known as Nagar Nigam) has framed rules for settling such contracts. True copy of the rules is annexed as Annexure-1 to the petition.

4. The aforesaid rules do not prescribe the manner in which the hoardings are to be let out. The petitioners have erected their own hoardings on the roadsides within the Meerut City and they are regularly depositing tax in accordance with the aforesaid rules vide Annexure-2 to the petition. In paragraph 7 of the petition it is alleged that a tender notice was published in the daily newspaper 'Dainik Jagran' on 16.6.2000 by which the Nagar Nigam has invited tenders in

respect of the hoarding boards. A true copy of the tender notice is annexed as Annexure-3 to the petition. Against this tender notice writ petition no. 27680 of 2000 was filed in this Court which is still pending. However, as stated in paragraph 9 of the petition no steps were taken by the Nagar Nigam in pursuance of the aforesaid notice dated 16.6.2000 and the notice stood withdrawn.

5. In paragraph 10 of the petition it is alleged that now the Nagar Nigam has without inviting any application or holding any auction settled the contracts of all the hoarding sites within the Municipal limits of Meerut for a period of three years w.e.f. 1.10.2000. In paragraph 11 of the petition it is alleged that the petitioners have already deposited the requisite tax with the Nagar Nigam authorities for the financial year 2000-2001 in respect of the hoardings which are being utilised by the petitioners for the purposes of advertisement. Hence it is alleged that the Nagar Nigam cannot settle that contract in favour of any third person.

6. It is alleged in paragraph 18 of the petition that the Nagar Nigam has issued notice in the daily newspaper 'Amar Ujala' on 24.9.2000 for removing the hoardings, on road sites/private places by 28.9.2000, failing which they shall be forcibly removed vide annexure-5 to the petition. It is alleged in paragraph 17 of the petition that the notice is in violation of this Court's Order as quoted in paragraph 17 of the petition.

7. A counter affidavit has been filed de the respondent no.2.

8. In paragraph 10 of the same it is alleged that publication of the auction was made in two daily newspaper on 13.7.2000 and 14.7.2000 vide annexure CA-1 and CA-2 to the affidavit. These advertisement state that the auction will take place on 22.7.2000 at 11.00 a.m. in the office of the Addl. Mukhya Nagar Adhikari, Nagar Nigam. The respondent no. 2 participated in the auction and he was the highest bidder whose bid was 11,26,600/= and he deposited a sum of Rs.2,81,650/=. True copy of the receipts of the same is annexed as Annexure/=CA-3 to the affidavit. The auction was confirmed and a letter was dispatched to that effect by the Tax Superintendent, Nagar Nigam, Meerut on 24.7.2000. Thereafter an agreement was executed vide Annexure No. CA-4 to the affidavit. It is alleged that the petitioner had a full opportunity of participating in the auction by they did not do so. In paragraph 11 of the affidavit it is stated that petitioners have no right to continue and they cannot obstruct respondent no.1 to make the auction.

9. A rejoinder affidavit has been filed.

10. In paragraph 10 of the same it is stated that Annexure-CA-1 and CA-2 are bogus documents and no reliance could be placed on the same. It is further alleged that no advertisement was published in the two newspapers Dainik Heera Times and Meerut Samachar on 13.7.2000 and 14.7.2000. It is further alleged that it is highly doubtful whether any auction took place on 22.7.2000. It is alleged that there was collusion between the Nagar Nigam and the respondent no.2. The newspaper Dainik Heera Times is exclusively owned by Subhash Chandra Gupta who is father

of Sri Parimal Chand the owner of respondent no.2. Subash Chand Gupta is also the owner of Heera Advertising Company, which is shown to have participated in the auction.

11. In paragraph 11 it is stated that Meerut Samachar and Dainik Heera Times have absolutely no circulation within the Municipal limits of Meerut. In fact previously the Nagar Nigam had issued advertisement on 16.6.2000 in reputed newspaper 'Dainik Jagran' which had wide circulation but subsequently the proceedings was given up by the Nagar Nigam. The subsequent advertisement of 13.7.2000 and 14.7.2000 was made in two unknown newspaper of Meerut and this shows collusion between the Nagar Nigam and the respondent no.2.

12. It settled law that auction by public authorities is not largest vide Ramanna Shetty Vs. International Airport Authority AIR 1979 SC 1628. Hence contracts by such bodies can only be given after wide publication in well known newspapers so that all eligible persons can participate in the auction/tender. It is well known that there are reputed newspapers like Dainik Jagran, Amar Ujala, etc in Hindi and Times of India, Hindustan Times, etc. In English which have wide circulation in Meerut but it is very surprising that the impugned auction notice was not made in any of these well known newspapers but in the newspapers called 'Meerut Samachar' and 'Dainik Heera Times' which are practically unknown. We are not satisfied that 'Meerut Samachar' and 'Dainik Heera Times' are well known newspapers having wide circulation. In fact it is strange that whereas the notice dated 16.6.2000 was published in the well known newspaper Dainik Jagran, but thereafter the contract was not finalised and instead the Nagar Nigam strangely again advertised the auction but this time practically in unknown newspapers.

13. As observed by this Court in S.K. Dixit Vs. DIOS 1995 ALR (2) 601. "It is well known that in the State of Uttar Pradesh several fraudulent newspapers have sprung up in almost every city and these newspapers have very little circulation and they publish only a few copies with the intention of creating an impression that the vacancy or auction was advertised (in case there is any challenge to the same). Very often it happens that even these few newspaper copies carrying the so called advertisement are either not distributed or sold, or the relevant page is removed before distribution or sale. This nefarious practice has become so widespread that not the time has come when it must be stopped. There are well known Hindi newspapers e.g. Dainik Jagran, Aaj, Amar Ujala, Swatantra Bharat, Nav Bharat Times, etc., having wide circulation in the State of Uttar Pradesh and it is surprising that in almost all the cases which have come up before this Court the vacancies are not advertised in these well known newspapers which have wide circulation but they are advertised in some fraudulent or unknown newspaper having little or no circulation."

14. In a Division Bench decision of this Court in the case of M/s Lalluji & Sons and others Vs State of U.P. Writ petition no. 41992 of 1993 and others decided on 16.12.93 it has been held that publication must be in a well known newspaper having wide circulation, and the advertisement in a newspaper having

little or no circulation cannot be of any avail to the petitioner.

15. We are fully in agreement with the said Division Bench Decision.

16. In our opinion advertisement in an unknown newspaper stands on the same footing as no advertisement at all the purpose of the advertisement is that there should be wide publicity otherwise Article 14 of the Constitution will be violated.

In the circumstances the petition is allowed. The impugned auction as well as the contract in pursuance there of are quashed. However, we are not going into the other points raised in this petition, as that is not necessary for the purpose of this case. The petition is allowed. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2000

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 45711 of 2000

Jauwad Ali ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Syed Wajid Ali

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Natural Justice Caste Certificate granted after the Amendment-Cancellation of, in violation of principles of natural justice-illegal.

Held-Para 7

Following this settled principle that since by issuance of Caste Certificate certain rights have accrued to the petitioner which cannot be taken away without giving him any opportunity of hearing and which violates the principles of natural justice, we are of the view that it was not proper on the part of the authorities to cancel the Caste Certificate without issuing any show cause notice and without giving him any opportunity of hearing and the said order of the cancellation of the Caste Certificate suffers from violation of the principles of natural justice.

Case law discussed
Air 1999SC 3803.

By the Court

1. Heard learned counsel for the parties.

2. The petitioner has challenged the impugned order dated 7th August, 2000, whereby the Caste Certificate granted to the writ petitioner on 21st June, 2000 by the Tehsildar, Tehsil Sahjanwan, District Gorakhpur (respondent no. 2) has been cancelled. By means of the present writ petition the petitioner has challenged the legality and validity of the impugned order dated 7th August,2000 cancelling the Caste Certificate issued to the petitioner on 21st June, 2000.

3. It is the contention of the petitioner that the petitioner belongs to the 'Sheikh' caste and the said caste was recognized as Backward Caste by respondent no. 1 the State of Uttar Pradesh. The petitioner applied for issuance of the Caste Certificate before

respondent no. 2. Respondent no. 2 after having made necessary enquiry issued the Caste Certificate in favour of the petitioner on 21st June,2000. By the impugned order dated 7th August, 2000 respondent no. 2 has cancelled the Caste Certificate issued to the petitioner on 21st June,.2000 on the ground that on account of the amendment made by the Backward Caste Kalyan Anubhag-1, State of U.P., in Notification No. 315/64—1-98-70/96 Lucknow dated 31st May, 1998, the 'Sheikh' caste has been amended as 'Sheikh Sarvari (Pirayee)' and, therefore, the Caste Certificate issued for 'Sheikh' caste is not in accordance with law. The contention of the learned Advocate for the petitioner is that on the basis of the Caste Certificate that he was a 'sheikh' by caste, certain facilities and rights accrued to the petitioner which he will be deprived of under the impugned order. The impugned order will affect him adversely and as such it is bounden duty on the part of the concerned authority to take action after affording an opportunity of hearing to the petitioner. The impugned order violates the principles of natural justice and appears to be absolutely arbitrary being issued after amendment. It is not in dispute that no opportunity of hearing was afforded to the petitioner before the Caste Certificate was cancelled.

4. The contention of the learned Standing Counsel, however, is that under the original notification issued in 1997 'Sheikh' caste was treated as a Backward Caste. However, after amendment in that notification instead of 'Sheikh' caste, 'Sheikh Sarvari (Pirayee)' has been recognized as Backward Caste.

5. It is significant, therefore, that when the petitioner was granted Caste Certificate on 21st June, 2000, the amendment had already come into force and the petitioner was granted the Caste Certificate after such amendment. There is no reason for the authorities to take it back now on the basis of the amendment itself without giving opportunity to the petitioner. In any event, even if the Caste Certificate was wrongly issued, it was incumbent duty on the part of the authorities to provide an opportunity of hearing and to issue a show cause notice to the petitioner before canceling the Caste Certificate issued earlier to him. Before canceling the Caste Certificate the petitioner has been denied any such opportunity. It is well settled principle that when an order is passed by any authority bearing penal consequences, it is proper that an opportunity of hearing should be given. In the instant case the same has not been done. Shri S.W. Ali, learned Advocate for the petitioner, has relied upon the judgment and decision rendered by the Hon'ble Supreme Court in the case of Gulzar Singh Vs Sub-Divisional Magistrate & another, reported in A.I.R. 1999S.C. 3803. In the aforesaid decision a certificate was issued to the appellant to the effect that the appellant belonged to 'Majhbi Sikh' Caste which was recognized as Scheduled Caste. On enquiry conducted it was found that the appellant belonged to Christian community. The Scheduled Caste certificate of the appellant was cancelled without issuing any show cause notice to the appellant. The Hon'ble Supreme Court held that the said order of cancellation violated the principles of natural justice.

6. We are of the view that the argument advanced by the learned Advocate for the petitioner cannot be said

to be without any substance. We feel it appropriate in the circumstances to reproduce the relevant portion of the aforesaid judgment of the Hon'ble Supreme Court which is set out herein below:

" The appellant had been issued a caste certificate on 10th October, 1988 in which it was inter alia stated that the appellant belongs to Majhbi Sikh Caste which was recognized as Scheduled Caste. The grievance of the appellant was restricted to the decision communicated to him by the sub-Divisional Magistrate, Gurdaspur dated 3rd June. 1997 whereby the Certificate No. 9336 dated 10-10-1988 was cancelled. The said certificate was cancelled because of an enquiry, which was stated to have been conducted. It was found that the appellant belongs to the Christian community. The cancellation of the Scheduled Caste certificate was challenged by the appellant by filing a writ petition in the High Court. The High Court dismissed the same by observing as follows:

"From the pleading of the parties it is crystal clear that an open enquiry was made with regard to the Scheduled Caste certificate issued to the petitioner and in the said enquiry petitioner was associated. On proper appraisal of all aspects of the case, it has been held that the petitioner is not Scheduled Caste but a Christian. That being so, we find nothing wrong in the order vide which Scheduled Caste certificate issued to the petitioner has been cancelled."

It is clear from the facts on record that prior to the cancellation of the Scheduled Caste certificate by the impugned order dated 3rd June,1997 no show cause notice was issued to the appellant. It cannot be denied that with the issuance of Scheduled Caste certificate certain rights accrued to the appellant. If this certificate was to be cancelled on the basis of some enquiry which had been conducted by the department it was incumbent on the department, keeping in view the principles of natural justice, to issue a show cause notice to the appellant requiring him to explain as to why the Scheduled Caste certificate which had been issued should not be cancelled. If there were statements of other persons which were recorded, as seem to have been done in the present case, on the basis of which the department came to the conclusion that the appellant was not Majhbi Sikh by caste but was Christian. Then fairness would require that the said statements should be put to the appellant before a final decision is taken.

In view of the fact that principles of natural justice were violated in the present case we allow this appeal, set aside the judgment of the High Court and quash the impugned order passed on 3rd June. 1997 leaving it open to the respondent to take action in accordance with law. There will be no order as to costs."

7. Following this settled principle that since by issuance of Caste Certificate certain rights have accrued to the petitioner which cannot be taken away without giving him any opportunity of hearing and which violates the principles of natural justice, we are of the view that it was not proper on the part of the authorities to cancel the Caste Certificate without issuing any show cause notice and without giving him any opportunity of hearing and the said order of the

cancellation of the Caste Certificate suffers from violation of the principles of natural justice.

8. The impugned order dated 7th August, 2000 cancelling the Caste Certificate accordingly stands quashed and set aside. This will, however, not restrain the respondent authorities to take appropriate action in accordance with law. The petition accordingly succeeds and the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD OCTOBER 31,2000

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

Civil Misc. Writ Petition no. 43142-2000

Dr. Poonam Khare ...Petitioner
Versus
State of Uttar Pradesh & others ...Respondents

Counsel for the Petitioner:
Shri Aditya Kumar Singh
Shri Ashok Khare

Counsel for the Respondents:
S.C.
Shri H.R. Misra

U.P. Service (Reservation for Sc/ST and other Backward Classes), 1994-Section 3 (5) Reservation-single Post Cadre-Reservation not applicable.

Held Para 10

While appreciating the ratio laid down in the above cases, the question raised for consideration before the Apex Court must be borne in mind, Nothing in these decisions precludes linking of posts in the same grade/cadre, though in different subjects for the purpose of working out the quota for reserved category candidates. It must also be borne in mind that selection is made in respect of vacancies at the State level, Sub-section (3) of Section 12 of U.P. Higher Education Services commission Act, 1980 provides for notification to the Commission" a subject wise consolidated list of vacancies from all colleges." This also suggests integration of vacancies in a grade/cadre for the purpose of working out the number of reserved posts.

Case law discussed
AIR 1998SC – 959
1990 (4) Sec.- 55
JT 1998 (3) SC-223
AIR 1997 (7) Sec.-662

By the Court

1. Advertisement No. 29 of 2000 issued by the U.P. Higher Secondary Education Service Commission, Allahabad in so far as it pertains to the post of Lecturer in Geology in P.P.N. College, Kanpur is sought to be quashed by means of this petition under Article 226 of the Constitution of India. The petitioner who is working in the college as an Anshkalik teacher appointed as such by the management with the approval of the Director, Higher Education Service Commission in view of the provisions contained in Government Order No. 467 (1) Sattar-2-98-3(9)/93 T.C. dated 7.4.1998, claims that she is eligible and fully qualified for being appointed as Lecturer Geology but stands precluded from applying to the post in question because of the reason that it has been illegally reserved for scheduled caste candidate.

2. It has been submitted by Sri Ashok Khare, Advocate appearing for the petitioner that the sole vacancy in the post

of Lecturer in Geology mentioned in the impugned advertisement pertains to the P.P.N. College, Kanpur wherein there are only two sanctioned posts of Lecturer in the concerned discipline which cannot be subjected to reservation and roster provided in the U.P. Public Services (Reservation for Scheduled Caste, Scheduled Tribe and other Backward Classes) Act, 1994 (hereinafter referred to as the U.P. Act No. 4 of 1994) for in order to apply the reservation and roster provided under the Act, there must exist at least five vacancies in the particular discipline/subject. Reliance has been placed on Government Order No. 780/15-10-95(18)/94 Shiksha Anubhag-10, Lucknow dated 6th March, 1995 (Annexure no. 14 to the writ petition.)

3. The submission, in our opinion, is based on misconstruction of the Government Order aforestated which was issued in answer to queries made by certain Universities as to whether reservation as provided in U.P. Act. No.4 of 1994 would apply to a single post and if not what should be the minimum number of posts in a given service in order to attract reservation as provided under the U.P. Act.No. 4 of 1994. The Government Order aforestated reads thus:

"इस सम्बन्ध में यह स्पष्ट किया जाता है कि यदि सम्वर्ग में एक ही पद सृजित/ स्वीकृत है, तो उस पर आरक्षण अनुमन्य न होगा ।

जहाँ तक आरक्षण व्यवस्था को सुनिश्चित किये जाने हेतु अपेक्षित न्यूनतम पदों की संख्या का प्रश्न है । यह स्पष्ट किया जाता है कि सीधी भर्ती में पाँच अथवा उससे अधिक पदों के सम्वर्ग में ही आरक्षण के प्राविधान होंगे ।"

4. It is evident from the Government order aforestated that reservation is not applicable to a single post cadre. In other words where there is a single post created or sanctioned in a cadre reservation will not apply to such post. In service jurisprudence, the term 'cadre' has a definite legal connotation. Fundamental R. 9(4) defines the word 'cadre' to mean the strength of a service or par5t of a service sanctioned as a separate unit. In the legal sense, the word 'cadre' is not synonymous with 'service'. The legal position stated in the Government Order that reservation would not apply to a single post cadre is quite in conformity with the law declared by the Supreme Court in **Dr. Chakradhar Paswan Versus State of Bihar**[1].' In that case Bihar Public Service Commission had invited applications for the posts of Deputy Director (Homeopathic) in the Directorate of Indigenous Medicines, Health Department, State of Bihar from scheduled caste candidates Dr. Chakradhar Paswan, a scheduled caste candidate, was selected by the Commission and consequently appointed by the State Government vide order dated 30.5.1979.Validity of the advertisement issued by the Bihar Publice Service Commission as also appointment of Dr. Chakradhar Paswan was questioned in the High Court by Dr. Kameshwar Prasad, a candidate belonging to general class, on the ground that a single post was not liable to be reserved Admittedly, in the Directorate of Indigenous Medicines, Health Department of State of Bihar, there was one sanctioned post of Director on which one Dr. Nagesh Dwivedi had already been appointed on ad-hoc basis. In addition to the post of Director there

[1] AIR 1988 SC 959

were two posts initially in the Directorate of Indigenous Medicines. The system was initially a part of the Health Department of Government of Bihar. Subsequently the State Government on 6.5.1978 directed creation of a separate Directorate of Indigenous Medicines. The Director being from one of the system of medicines consisting of Ayurvedic, Unani and Homeopathic. At the time of creation of the separate Directorate, the Government sanctioned two posts of Deputy Directors- one for each of the two remaining systems. The State Government by its circular dated 8.9.1975 had prescribed the 50 point roster to implement the policy of reservation to posts and appointments for members of the backward classes under article 16(4) of the Constitution. It was laid down therein, having regard to the language used in the Government Order, that "if in any grade, there is only one vacancy for the first time, then it will be deemed to be unreserved and for the second time also, if there be only one vacancy, then it will be deemed to be reserved." It would appear from the facts of that case that a proposal was made by the Joint Secretary to the Government, General Administration Department (Personnel) for reservation of the post of Deputy Director (Homeopathic) for members of the scheduled castes . In making this proposal the post of Director of Indigenous Medicines was taken into reckoning for applying the 50 point roster. Since the post of Director which had been filled by Dr. Nagesh Dwivedi was treated as unreserved, the vacancy in the post of Deputy Director (Homeopathic) was treated by the Government as reserved for scheduled caste according to 50 point roster treating it to be the second vacancy and the Bihar Public Service Commission, accordingly, had advertised the post of Deputy Director (Homeopathic) as reserved for scheduled caste. Dr. Chakradhar Paswan a scheduled caste candidate was selected for, and appointed on, the post. But on a writ petition filed by Dr. Kameshwar Prasad, the Patna High Court quashed the impugned advertisement as also the appointment of Dr. Chakradhar Paswan to the post of Deputy Director (Homeopathic) on the ground that the post was illegally reserved for scheduled caste. The High Court took the view that (i) reservation to the only post of Deputy Director (Homeopathic) for members belonging to the scheduled caste amounted to 100% reservation; (ii) the two posts of Deputy Director (Homeopathic) and Deputy Director (Ayurvedic) could not be clubbed together for purposes of reservation of posts and; (iii) the order reserving the post of Deputy Director (Homeopathic) infringed the principles embodied in the Government circular introducing 50 point roster according to which the first vacancy should have been filled from amongst general candidates i.e. to say it should have been treated as unreserved. The Supreme Court held that the post of Director and the post of Deputy Director do not constitute one cadre and therefore, the vacancy in the post of Deputy Director (Homeopathic) being the first one in the cadre of Deputy Directors ought to have gone to the general class. The relevant observations as under

" According to the 50 point roster, if in a particular grade a single post falls vacant, it should, in the case of first vacancy, be considered as unreserved i.e., general and on the second occasion when a single post again falls vacant, the same must be treated as reserved. Admittedly, the post of the Director is the highest post in the

Directorate of Indigenous Medicines and is carried in the Higher pay scale or grade of Rs. 2225-75-2675 while the posts of the Deputy Directors are carried in the higher pay scale or grade of Rs.1900-75-2500. In service jurisprudence, the term 'cadre' has a definite legal connotation. In the legal sense, the word 'cadre' is not synonymous with 'service' Fundamental R.9(4) defines the word' cadre to mean the strength of a service or part of a service sanctioned as a separate unit. The post of the Director which is the highest post in the Directorate, is carried on a higher grade or scale, while the posts of Deputy Directors are borne in a lower grade or scale and therefore constitute two district cadres or grades. The conclusion is irresistible that the posts of the Director and those of the Deputy Directors constitute different cadres of the Service. It is manifest that the post of the Director of Indigenous Medicines, which is the highest post in the Directorate carried on a higher grade or scale, could not possible be equated with those of the Deputy Director on a lower grade or scale, In view of this, according the 50 point roster, if in a particular cadre a single post falls vacant, it should, in the case of first vacancy, be considered as general. That being so, the State Government could not have directed reservation of the post of Deputy Director (Homeopathic) which was the first vacancy in a particular cadre i.e. that of the Deputy Directors, for candidates belonging to the scheduled castes. Such reservation wad not in conformity with the principles laid down in the 50 point roster and was impermissible under Art. 16(4) of the Constitution and clearly violative of the guarantee enshrined in Art; 16(1) of equal opportunity to all citizens relating to public employment."

5. The question as to whether isolated posts could be subjected to the 50 point roster, albeit mooted, was left undecided. It was held as under:

" It is a moot point whether the isolated posts like those of the Deputy Directors can be subjected to the 50 point roster by the rotational system. We refrain from expressing any opinion on this aspect, as it does not arise in the present case, Assuming that the 50 point roster applies, admittedly, the first vacancy in the cadre of Deputy Directors was that of Deputy Director (Homeopathic) and it had to be treated as unreserved, the second reserved and the third unreserved. The first vacancy of the Deputy Director (Homeopathic) in the cadre being treated as unreserved according to the roster, had to be thrown open to all, A Candidate belonging to the scheduled caste had therefore to compete with others."

6. As regards the minimum number of posts required for invoking the law of reservation it is provided in the Government Order aforestated that reservation would apply in recruitments in respect of five or more posts in a cadre. In the present case admittedly there are two sanctioned posts of Lecturer in the Department of Geology in P.P.N. College, Kanpur out of which only one post which is the subject matter of impugned advertisement is reserved. There must be other posts in the college in the cadre of Lectures. The present is, there fore, not a case of single post cadre. Reservation of one of the two posts in the Geology Department does not create a monopoly nor does it violate the guarantee of equality of opportunity contained in clauses 1 And 2 of Article 16 of the Constitution of India Dr. Chakradhar is, in

our opinion, an authority on the principles that, "if there is only one post in the cadre, there can be no reservation with reference to that post either for recruitment at the initial stage or for filling up future vacancy in respect of that post." Section 3 of U.P. Act No. 4 of 1994 provides 21% reservation in favour of the scheduled caste candidates in 'public service and posts." Recruitment to which must be made in accordance with the roster prescribed by the State Government by a notified order i.e. notification no. 481/Ka-1-94-1-1-94 dated March 29, 1994 published in the U.P. Gazette, Extra, Parti (Ka) dated 29th March, 1994 being annexure no.10 to the writ petition. The term "Public services and posts." As defined in Section 2© of U.P. Act No.4 of 1994, means the services and posts in connection with the affairs of the State and includes, among others," services and posts in an educational institution owned and controlled by the State Government or which receives grant in aid from the State Government, including a university established by or under a Uttar Pradesh Act, except an institution established and administered by minorities referred to in clause (1) or Article 30 of the Constitution." The word 'services' in the context would mean 'services of teachers' in P.P.N. College, Kanpur which is affiliated to a University established under the U.P. State Universities Act, 1973, "Teachers" in the State Universities are classified as Lectures, Readers and Professors. In affiliated colleges there are only two categories: Lecturers and Principals. True, under personal promotion scheme visualized in Section 31-A of the U.P. State Universities Act, 1973, status of Reader is, perhaps, admissible to Lecturers of the affiliated college as well but this will not make any difference. The word 'Posts' in Section 3 of the U.P. Act No. 4 of 1994 in relation to affiliated colleges would mean teaching and non teaching posts in different cadres/grades. The posts of Lectures, in a College affiliated to a University would be subject to reservation on a roster point prescribed under the Act. The Act will in our opinion, apply whenever there is plurality of posts. The Government Order cannot over ride the Act. Admittedly, There are two sanctioned posts of Lecturer in the Department of Geology, P.P.N. College, Kanpur. The vacancy in question being the first vacancy in the Department of Geology must go to reserved category as per roster prescribed under Section 3 (5) of the U.P. Act 4 of 1994.

7. Shri Ashok Khare submits that each subject or discipline of study in a college should be treated as a separate 'cadre' for applying reservation and roster prescribed under the U.P. Act 4 of 1994. Reliance was placed by Sri Khare on **Dr. Suresh Chandra Verma and Others Versus The Chancellor, Nagpur University and others**[2] in support of his contention that reservation should be made 'subject wise. In order to appreciate the law laid down by the Apex Court in Suresh Chandra Verma (Supra) it would be necessary to set out the facts of that case. The University of Nagpur had in that case invited applications for the total number of 77 posts of teachers which included posts of Professors, Readers and Lecturers in different subjects. The notice mentioned the total number of reservations category wise but not subject-wise. A question arose as to whether general reservation but not

[2] (1990) 4 SCC 55

subject-wise. A question arose as to whether general reservation category-wise instead of subject wise was illegal. In the High Court there was a difference of opinion between two Division Benches-one taking the view that the postwise reservation was not necessary whereas another Division Bench differed with the said view and sent the papers to the Chief Justice for referring the matter to a larger bench. The issue referred to the larger Bench was "Is non-reserving the posts of University teachers subjectwise in the employment notice a breach of letter and spirit of reservation policy contained in Section 77c read with Section 57 of the Act?" The Full bench held that general reservations were in breach of the provisions of the Act and against the reservation policy and, therefore, illegal. The view taken by the Full Bench of the High Court was approved by the Supreme Court in the following words:

"According to us, the word "Post" used in the context has a relation to the faculty, discipline, or the subject for which it is created. When, therefore, reservations are required to be made "in posts", the reservations have to be post wise i.e. subject wise. The mere announcement of the number of reserved posts is no better than inviting applications for posts without mentioning the subjects for which the posts are advertised, when, therefore Section57 (4) (a) requires that the advertisement or the employment notice would indicate the number of reserved posts, if any, it implies that the employment notice cannot be vague and has to indicate the specific post, i.e. the subject in which the post is vacant and for which the applications are invited from the candidates belonging to the reserved classes. A non-indication of the post in this manner itself defeats the purpose for which the applications are invited from the reserved category candidates and consequently negates the object of the reservation policy" (Emphasis is ours)".

And further:

"It is common knowledge that the vacancies in posts in different subject occur from time to time according to the exigencies of the circumstances ad they arise unequally in different posts. There may not be vacancies in one or some posts whereas there may be a large number of vacancies in other posts. In such circumstances, it is not possible to comply with the minimum reservation percentage of 34 Vis-à-vis each post. It is for this reason the at the resolution states that although minimum percentage of reserved posts may not be filled in one or some posts, it will be enough if in that year it is filled in taking into consideration the totals number of appointments in all the posts. This, however, does not absolve the appointing authority from advertising in advance the vacancies in each post and the number of posts in such vacancies in each post and the number of posts in such vacancies meant for the reserved category, and inviting applications from the candidates belonging to the reserved and unreserved a categories with a clear statement in that behalf, In fact, the overall minimum percentage has to be kept in mind, as stated in the resolution, at the time of issuing the employment notice or the advertisement as the case may be" (Emphasis is ours).

8. The core and essence of the ratio decidendi of the above case is that notice for recruitment should not be vague and rather it must specifically state the post

actually meant for reserve category. It does not rule against clubbing of posts belonging to a given cadre/grade so as to workout the total number of reserved posts. In the instant case advertisement very clearly states the number of posts reserved for scheduled caste 'subject-wise.' The advertisement, in our opinion, is well in accordance with law laid down by the Supreme Court in Dr. Suresh Chandra Verma's case. The argument advanced by Sri Ashok Khare, Senior Advocate that computation of the number of reserved posts should be subjectwise does not appeal to us. In fact the total number of reserved posts under Section 3 of U.P. Act No. 4 of 1994 is to be worked out on the basis of the total vacancies in a given cadre and recruitment to such number of reserved posts should be made in accordance with roster prescribed under sub Section (5) of Section 3 of the U.P. Act No. 4 of 1994. 'Cadre' in relation to teaching staff of affiliated colleges means the cadre of 'Lecturer' In our opinion, posts of Lecturers in various subjects should be clubbed in order to work out the exact number of posts to be reserved under the Act. 4 of 1994 and then it should be determined as to which post is to be reserved and for whom. That, in our opinion, appears to be the thrust of the exposition laid down in Dr. Suresh Chandra.

9. The other decision on which reliance was placed during the course of argument is the case of **P.G. Institute of Medical Education and Research Versus Faculty of Associations and others**[3]. The question that arose in the said case was as to whether in a single cadre post reservation for the backward class. can be made directly or by applying rotation of roster point. The said decision reiterates the law laid down in Dr. Chakradhar Paswan's case and is an authority on the principle that reservation will not apply in respect of a single post-cadre for, if applied, it would result in exclusion of general candidates and there would be cent percent reservation for backward classes which is not permissible within the constitutional framework. The observation made therein that "until there is plurality of posts in a cadre, the question of reservation will not arise" necessarily implies that if there is a plurality of posts in cadre or grade, reservation will apply. In Indira Sawhney's[4] case it has been propounded by a nine Judge Bench of Supreme Court that there should be adequate representation in each cadre and each grade. In our opinion, therefore, the number of reserved posts is to be worked out on the basis of posts/is to be worked pit pm the nasos pf [posts/vacancies in each cadre and if there exists a plurality of posts in a cadre/grade the advertisement must specifically state as to which post in the cadre/grade is reserved. In other words the advertisement must state the reserved post with reference to the subject of study in a cadre. Admittedly, there exists a plurality of posts both in the concerned discipline as also in the cadre/grade of Lectures . It being not a case of single post cadre, the law of reservation and roster has rightly been applied by the respondents Advertisement in question does not suffer from any infirmity and warrants no interference by the Court. The following observations made by the Apex Court in State of U.P.

[3] JT 1998(3) S.C.223

[4] AIR1993 SC 477

vs. Dr. Dina Nath Shukla[5] on which reliance was placed by the learned counsel too should be construed in the like manner:

"Thus it could be seen that if the subjectwise recruitment is adopted in each service or post in each cadre in each faculty, discipline specialty or super specialty, it would not only be clear to the candidates who seek recruitment but also there would not be an over-lapping in application of the rule of reservation to the service or posts as specified and made applicable by Section 3 of the Act. On the other hand, if the total posts are advertised without subjectwise specifications, in every faculty, discipline, specialty or super specialty it would be difficult for the candidates to know as to which of the posts be available either to the general or reserved candidates or whether or not they fulfill or qualify the requirements so as to apply for a particular post and seek selection."

10. The words 'subject-wise recruitment' in Dina Nath Shukla's case and the words the reservations have to be pose wise i.e., subject-wise used in the case of Dr. Suresh Chandra Verma mean only this that the recruitment notice/advertisement must clearly state the posts i.e. the subject/discipline reserved under the U.P. Act 4 of 1994. These expressions, in our opinion, do not sup0port the contention that total number of reserved posts should be worked out subject-wise and not cadre/grade wise. While appreciating the ratio laid down in the above cases, the question raised for consideration before the Apex Court must be borne in mind. Nothing in these decisions precludes linking of posts in the same grade/cadre, though in different subjects for the purpose of working out the quota for reserved category candidates. It must also be borne in mind that selection is made in respect of vacancies at the State level Sub section (3) of Section 12 of U.P. Higher Education Services Commission, Act, 1980 provides for notification to the Commission " a subjectwise consolidated list of vacancies from all colleges." This also suggests integration of vacancies in a grade/cadre for the purpose of working out the number of reserved posts.

In the result, the petition being devoid of merits, fails and is dismissed in limine.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 2.11.2000

BEFORE
THE HON'BLE S.K.SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition no. 45629 of 2000

Mukesh Glass Industries ...Petitioner
Versus
Station Master Firozabad (Northern Railway) & others ...Respondents

Counsel for the petitioner:
Shri Rakesh Kumar Garg

Counsel for the Respondents:
S.C.
Sri Shitla Sahai
Sri Anand Kumar

U.P. Control order 1977- clause 11 Requirement of Counter Signature- Petitioner neither licence or the person

[5] (1997) 7 SCC 662

acting on behalf of licensee – counter signature not required.

Held Para 2

The petitioner is not a licensee or any other person acting on behalf of the licensee under clause (11) of U.P. Coal Control Order, 1977 and as such, in our view there is no requirement of counter signature.

By the Court

1. We have heard Sri Rakesh Kumar Garg, learned Advocate for the writ petitioner and Sri Shitla Sahai, learned Advocate for the respondents.

2. The petitioner is not a licensee or any other person acting on behalf of the licensee under clause (11) if U.P. Coal Control Order, 1977 and as such, in our view, there is no requirement of counter signature. The view which, we have taken, is supported by the decision of unreported judgment of a Division Bench of this Court in the case of S.R. Glass Industries, Mainpuri Gate, Firozabad and others Vs Station Master, Firozabad, Northern Railway and others (Writ Petition no. Nil of 1989) decided on 13.12.1989. In the aforesaid decision, it was held that since the petitioners are neither licensees nor persons acting on behalf of any licensee within the meaning of Clause (11) of U.P. Control Order, 1977, the opposite- parties are not justified in insisting that the coal consignment of the petitioners can be released only after they obtain the endorsement from the Director of Industries. Another Division Bench of this Court has also followed the same view in the case of Atul Glass Industries, Mahalarpur, and others Vs Station Master, Firozabad, Shikohabad, Northern Railway and others (Writ Petition no. 13612 of 2000) decided on 27.3.2000. we do not find any reason to take a different view in the instant case. Considering all aspects of the matter, we are of the view that the petitioner should succeed in the writ petition.

The writ petition is, accordingly, allowed.

Accordingly direction is issued to respondent No. 1 to give the delivery of coal consignment without insisting the petitioner for obtaining counter signature from respondent No. 3.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 13.11.2000

BEFORE
THE HON'BLE S.K.SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition no. 39445 of 2000

Dharamvir Agarwal ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri B.B. Pandey
Sri Ravindra Singh
Sri Amar Saran

Counsel for the Respondents:
Sri R.P.Goel, Advocate General
Sri Aditya Narain
Sri B.D.Mandhyan

U.P. Municipalities Act 1916-Age limit for President fixing 30 years whether is ultra vires being contrary to Article 243-V of the Constitution of India? Held- 'No' fixing age limit is within the competence

of the legislature- Court can not sit over the legislature.

Held – Para 13

In view of the provisions of law as noted above, we are of the view that the State legislatue was competent to legislate for fixing the age of President for contesting the election and the provisions under the Municipalities Act fixing the age limit at 30 years for the post of President is not violative of any fundamental right of the petitioner.

Case law discussed

1996 (3) Sec.-709 at page 737 & 738

By the Court

1. We have heard Sri B.B. Pandey, Sri Ravindra Singh, learned Advocates for the petitioner and Sri R.P. Goel, learned Advocate General for the State and Sri Aditya Narayan. Learned counsel for the State Election Commission.

2. Learned Counsel for the petitioner has urged that nomination paper of the petitioner for the post of President has been wrongly rejected on the ground that he has not reached the age of 30 years which is prescribed age for the post of President. He has also referred to Article 243 V of the Constitution of India which provides as follows:-

"243 V. Disqualification for membership –(1) A person shall be disqualified for being chosen as, and for being a member of a Municipality-

(a) If he is so disqualified by or under any law for the time being in force for the purpose of elections to the Legislature of the State concerned:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age; if he has attained the age of twenty one years;

(b) If he is so disqualified by or under any law made by the Legislature of the State.

(2) If any question arises as to whether a member of a Municipality has become subject to any of the disqualification mentioned in Clause (1), the question shall be referred for the decision of such authority and in such manner as the Legislature of a State may, by law, provide"

3. Relying upon the said Article he has submitted that since he has attained the age 21 years, the disqualification on the ground of age cannot be applicable to him. He has also referred to Article 243 ZF which provides as follows:-

"243ZF. Continuance of existing laws and Municipalities – Notwithstanding in this part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that Sate or, in the case of a State having a

Legislative Council, by each House of the Legislature of the State."

4. Relying on the said Article 243ZF he has urged that since there is no amendment for the age limit of President, his nomination should have been accepted and the age limit prescribed is 21 years in terms of Article 243V.

5. We are unable to accept both the contentions of Mr. Pandey. So far Article 243 V is concerned in our view it has no application for the post of President. The said Article 243 V is applicable for the person who is going to contest for the election of a Member. Since the election of President is a direct election, the said Article is not attracted.

6. In that view of the matter the contentions made by learned Advocate for the petitioner appear to us to be not applicable for the post of President.

7. Apart from the aforesaid questions, the question ultra of virus has also been taken by learned Advocates for the petitioner. It has been argued by them that the President of the Municipality is elected directly in direct election. The age prescribed under the Constitution is less than 25 years. Therefore the provision of U.P. Municipalities Act fixing the age of the President at 30 years is contrary to the provisions of the- Constitution. The said fixation of age for the post of President is arbitrary and discriminatory and therefore has to be struck down.

8. It has further been contended by the learned advocates for the petitioner that in view of Article 243 ZF provisions relating to election of Panchayat or president has been amended in U.P. Kshetriya Evem Panchayat Act, 1961. No such amendment however has been made in the U.P. Municipalities Act and as such the provision in the U,P. Municipalities Act fixing the age limit at 30 years is contrary to the provisions of the Constitution and should be struck down. It has also been argued that this is violative of Article 14 of the Constitution inasmuch as for the purpose of election of Member of Legislative Assembly and Member of Parliament, the age limit prescribed is only 25 years for the direct election.

9. Sri R.P. Goel, learned Advocate General on behalf of the State has argued that it is not open to the Court to go into the question of reasonableness of the statute. The Court can only look into the question of competence of the legislature with regard to the violation of any of the fundamental rights guaranteed under the Constitution of India. That apart the Court has no power to go into the question of arbitrariness and reasonableness. In support of his said contention, the learned Advocate General relied upon the decision in the case of **State of A.P. & others Vs. Mcdowell & Co., and others** (1996)3 Supreme Court cases 709 paragraph 43 at page 737 & 738)

10. Sri Aditya Narain, learned counsel for the State Election Commission apart from adopting the submission of the learned Advocate General has submitted before us that constitution itself authorizes the State Legislature to pass law with regard to the State Municipalities. In support of the said contention he referred Article 243 R (2) (iv) of the Constitution.

We have considered the submissions of the learned counsel for the writ petitioner and learned counsel for the respondents.

11. It appears to us that the question of virus of the provisions of the U.P. Municipalities Act should be judged in the light of the competence of the State Legislature as well of the violation of the fundamental rights. In the case of State of A.P.(Supra), the Supreme Court at paragraph 43 (page 737 & 738) has held as follows:-

"43. Shri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is arbitrary' and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgement of this Court in State of T.N. vs. Ananthi Ammal (1995) I SCC 519). Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, Parliament is supreme. There are no limitations upon the power of Parliament No. Court in the United Kingdom can strike down an Act made by Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, Viz., the division of legislative powers between the States and the Federal Government and the fundamental right (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United of America. The power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness concepts inspired by the decisions of United States Supreme Court. Even in U.S.A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the courts as arbiters of the wisdom of the legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by clauses (a) to (g) of Article 19 (I), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found

before invalidating an Act.. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The court cannot its in judgement over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz.,(i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety (see Council of Civil Service Unions vs. Minister for Civil Service (1985 AC 374: (1984) 3 ALL ER 935☹1984) 3 WLR 1174) which decision has been accepted by this Court as well). The applicability of doctrine of proportionality even in administrative law sphere is yet a debatable issue. (See the opinions of Lords Lowry and Ackner in R.V. Secy. of State for Home Deptt. Exp Brind (1991 AC 696: (1991) I ALL ER 720) AC at 766-67 and 762). It would be rather odd if an enactment were to be struck down by applying the said principle when its applicability even in administrative law sphere is not fully and finally settled. It is one thing to say that a restriction imposed upon a fundamental right can be struck down if it is disproportionate, excessive or unreasonable and quite another thing to say that the court can strike down enactment if it things it unreasonable, unnecessary or unwarranted. Now, coming to the decision in Ananthi ammal, we are of the opinion that it does not lay down a different proposition. It was an appeal from the decision of the Madras High Court striking down he Tamil Nadu Acquisition of Land for Harijan Welfare Schemes Act, 1978 as violative of Articles 14,19 and 300-A of the constitution. On a review of he provisions of the Act, this Court found that it provided a procedure which was substantially unfair to the owners of the land as compared to the procedure prescribed by the Land Acquisition Act, 1894, insofar as Section 11 of the Act provided for payment of compensation in installments if it exceeded rupees two thousand. After noticing the several features of the Act including the one mentioned above, this Court observed: (SCC p 526,para 7)

"7.When a statute is impugned under Article 14 what the court has to decide is whether the statute is so arbitrary or unreasonable that it must be struck down. At best, a statute upon a similar subject which derives its authority from another source can be referred to, if its provisions have been held to be reasonable or have stood the test of time, only for the purpose of indicating what may be said to be reasonable in the context. We proceed to examine the provisions of the said Act upon this basis."

12. The principle for determination of the question of virus is therefore now settled by the aforesaid decision of the Supreme Court. In the instant case there is no question that the State Legislature was not competent to pass appropriate legislation relating to the age and in fact the Constitution itself has authorised the State Legislature, as appears from Article 243 R (2) (iv), which provides as follows:

"243 R Composition of Municipalities- (1)….

(2) The Legislature of a State may, by law, provide-

(a) for the representation in a municipality of-

(i) Persons having special knowledge or experience in Municipal administration;
(ii) The members of the House of the People and the members of he Legislative Assembly of the State representing constituencies which comprise wholly or partly the Municipal area;
(iii) The members of the Counsel of States and the members of the Legislature of the State registered as electors within the Municipal area;
(iv) The Chairpersons of the committees constituted under Clause (5) of Article 243 S."

Provided that the persons referred to in paragraph (I) shall not have the right to vote in the meetings of the Municipality
(b) the manner of election of the Chairperson of a Municipality"

13. In view of the provisions of law as noted above, we are of the view that the Stat Legislature was competent to legislate for fixing the age of President for contesting the election and the provisions under the Municipalities Act fixing the age limit at 30 years for the post of President is not violative of any fundamental right of the petitioner.

14. That apart the other arguments advanced on behalf of the petitioner also we do not find any substance.

There is no merit in the Writ Petition and it is, accordingly, dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 10, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY. J.
THE HON'BLE S.K. JAIN., J.

Civil Misc. Writ Petition No. 7603 of 1995

M/S Prasad Industries Allahganj Shahjahanpur & others ...Petitioners
Versus
District Magistrate/ Collector Shahjahanpur & others ...Opp. Parties

Counsel for the Petitioners:
Sri K.M.L. Hajela

Counsel for the Respondents:
Smt. Sarita Singh
S.C.

Code of Civil Procedure, 1908,S.XI- Res. Judicata-Constructive res Judicata-Applicability to writ petitions Estoppal-Waiver- Acquiescence.

Held- Para 5

Apparently, the prayers made by the petitioners in this writ petition, which were also made in the earlier writ petition, were not granted. Thus, this writ petition for the same relief's, which is second one, in the absence of grant of leave to the petitioners to -the sue afresh barred by the principle of res judicata constructive res judicata in view of the ratio decidendi laid down by the Hon'ble Supreme Court in Sarguja Transport Service Vs. State Transport Appellate Tribunal, walior and others AIR 1987 Supreme Court 88 besides on the grounds of estoppel, waiver, acquiescence and abandonment and, thus, this writ petition is dismissed, but without cost.
Case referred
AIR 1987 SC 88

By the Court

1. Petitioner No. 1 M/s Prasad Industries, and Petitioner Nos. 2 to 4 who are its partners, have come up with a prayer to quash the entire recovery proceedings initiated at the instance of Respondent No. 3, Deputy Regional Marketing Officer, Shahjahanpur, through Respondent Nos. 1 and 2 for realisation of Rs.19,36,784=40 paise from them as arrears of land revenue under the provisions of the Rules framed under the U.P.Z.A. & L.R.Act,1951 and to command them not to realize the said amount from them.

2. Paragraphs 29 and 42 of this writ petition reads thus:-

"**29**. That the petitioner ultimately filed a writ petition no. 21812 of 1994 for a writ of Certiorari for quashing the citation dated 31.5.1994 and also for a writ of Mandamus that the amount of Rs.1936,784=40p. be not realized from the petitioners in lump-sum.

x x x x

42. That this Hon'ble Court finally disposed of the said writ petition no. 21812 of 1994 by order dated 30.9.1994 permitting the petitioners to pay the amount in dispute in installments. The first Installment was required to be paid by 31.3.1995.

3. Sri Hajela learned counsel appearing on behalf of the petitioners, shows us the order dated 30.9.1994 by which the earlier writ petition was disposed by this Court. It is useful to reproduce that order:-

"This an application by the petitioners seeking installments of Rs.2 lakhs of three months each.

Learned counsel for the petitioners submits that the applicants are willing to repay the entire out-standing amount as mentioned in the impugned citation dated 31.5.1994 (Annexure – 15A to the writ petition), provided reasonable instalments are made..

Hearing of the case has been expedited as prayed by the petitioner. Both learned counsel for the parties agree to take up the matter today itself.

Ordinarily, we would not have interfered in such matter as the liability has not been denied, but as Sri S.K. Srivastava, the learned Standing Counsel has no objection to the installments being granted, provided the petitioners deposit half of the impugned amount upto 31.3.1995 and pay the balance amount in monthly instalments of rupees 1 lakh each, we dispose of the writ petition finally with the observations that further recovery proceedings pursuant to the impugned citation dated 31.5.1994 (Annexure-15-A to the writ petition), will remain stayed, provided the petitioners deposit half of the amount as mentioned in the aforesaid impugned citation upto 31.3.1995, and thereafter continue to deposit monthly instalments of Rs. 1 lach each. The first instalment shall be paid by the petitioners on or before 30.4.1995 and the remaining instalments shall be paid on or before the last date of each succeeding month. In case for default of any such condition, the respondents will be free to proceed against the petitioners."

4. From a bare perusal of the aforementioned order it is crystal clear that the petitioners had not pressed their prayers either for quashing of the proceedings and/or for restraining the

Respondent from proceeding further with the proceedings, rather the only prayer which they made was to fix instalments so that they could clear off the dues sought to be recovered which was allowed on certain terms and conditions. It appears from the submissions made at the Bar that the petitioners failed to comply with the terms and conditions imposed by this Court.

5. Apparently, the prayers made by the petitioners in this writ petition, which were also made in the earlier writ petition, were not granted. Thus, this writ petition for the same relief's, which is second one, in the absence of grant of leave to the petitioners to sue afresh is barred by the principle of res judicata/constructive res judicata in view of the ratio decidentdi laid down by the Hon'ble Supreme Court in Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior and others AIR 1987 Supreme Court 88 besides on the grounds of estoppel, vaiver, acquiescence and abandonment and thus, this writ petition is dismissed, but without cost.

6. When we pointed out the aforementioned legal position Sri Hajela, learned counsel for the petitioners, very fairly accepted it and thus we do not impose cost on the petitioners.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2000

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

Civil Misc. Writ Petition No. 40714 of 1996

The Committee of Management, Sri Ram Janki Intermediate College, and Another ...Petitioners

Versus

The Director of Education, Uttar Pradesh and others ...Respondents

Counsel for the Petitioners:
Shri Anand Kumar Gupta
Shri Rakesh Kumar
Shri R.S. Misra

Counsel for the Respondents:
S.C.
Dr. R.G. Padia
Shri P. Padia
Shri S.K. Lal
Shri A. Kumar
Shri Rakesh Kumar

Constitution of India, Article 226 – Petition filed by old Committee of Management for removal of principals New Committee of Management adopting resolution to withdraw Writ Petition – Maintainability – Locus standi.

Held – Paras 10 and 11)

The fact remains that the respondent No. 5 has been / working on the post of Principal in spite of the Order of dismissal Passed in the Year 1981. The said Order was never given effect to. There are also documents on record to indicate that Sri Sant Ram Chaudhar and Sri Ram Kishore Das Bhikari who have filed the present writ Petition in one capacity or the Other, had themselves been responsible to permit the

Respondent No. 5 to Function and continue as Principal of the College.

In the conspectus of the above facts, the present Writ Petition is held to be not maintainable at the instance of Sant Ram Chaudhary as Well as Sri Ram Kishore Das Bhikari. They have no locus standito continue the Writ Petition in view of the resolution adopted by the new Committee of Management to withdraw the Petition.

Case Law Discussed.

1999 (1) & C.C. 492 (Note B)
1998 (2) S.C.C. 449 (Note B, Pr. 24.25)
AIR 1993 S.C. 1769 (Note F. Pr. 74)
1985 LIC 337 (Pr. 25)
1999 ACJ 682.
1977 ALJ. 341.

By the Court

1. The dispute relates about the continuance and functioning of Sri Dharam Raj Chaudhary – Respondent No. 5 as the Principal of Sri Ram Janki Intermediate College, Girdharpur, Kungai, Siddharthanagar. The facts leading to the present Writ Petition are as follows:

2. There is an institution known as Sri Ram Janki Intermediate College, Girdharpur, Kungai, Siddharthanagar which has been upgraded from time to time and now has acquired the status of an Intermediate College. Sri Dharma Raj Chaudhary – Respondent No. 5 was admittedly appointed as the Principal of the College. On account of certain allegations of squandering of the huge amount of the College and Commission of various other irregularities, he was placed under suspension by the Committee of Management by order dated 10.1.1981. After due enquiry, he was dismissed from service on 1.9.1981.The relevant papers were sent for approval to the Basic Siksha Adhikari who refused to accord necessary approval as required by Law by Order dated 1.6.1982. The Committee of Management preferred an Appeal before the Basic Siksha Parishad. The said Appeal was Allowed by Order dated 3.1.1983 and the Order passed by the Basic Siksha Adhikari to refuse the approval to the Order of dismissal of the respondent No. 5 was set aside. Sri Dharma Raj Chaudhary challenged the Order passed by the Basic Siksha Parishad by instituting Civil Misc. Writ No. 727 of 1982 Which was dismissed at the initial Stage by this Court on 21.1.1983. Thereafter Sri Dharam Raj Chaudhary filed a Civil Suit No. 19 of 1983 in the Court of Munsif Bansi, District Siddharthanagar to challenge the Order passed by the Basic Siksha Parishad. With the filing of the suit, he also moved an Application (12-C) for temporary injunction for a direction to restrain the defendants not to interfere with his functioning as the Principal of the College. An exparte Order of injunction was granted which was later on confirmed on 30.5.1983. The Committee of Management was not a party to the suit and, therefore, the present petitioner No. 2- Ram Kishore Das Bhikari, Chela Baba Mangal Das moved an application for impleadment which was rejected by the trial Court by Order dated 30.5.1983. The Petitioner No. 2 filed a Civil revision No. 181 of 1983 to challenge the Order of the trial Court where by the application for impleadment was rejected, A misc. Civil Appeal No. 207 of 1983 was also preferred against the Order of injunction Both the revision application and the Misc. Civil Appeal were allowed by two separate Orders dared 3.9.1984. The Petitioner No. 2 was directed to be impleaded as party to the suit The Appeal

with regard to the Order of injunction was allowed and the Order of injunction granted by the trial Court was set aside. It was directed that the application for temporary injunction shall be decided afresh after giving an opportunity of hearing to both the parties. Sri Dharam Raj Chaudhary. Preferred a Civil Misc. Writ No. 14148 of 1984 against the said Orders. The said Writ Petition was dismissed on 9.9.1996 by observing :

"An application has been filed by the Petitioner supported by his affidavit to dismiss the Petition as not pressed. It is alleged that the Petitioner has received the desired relief and as such he does not want to further adjudicate the matter. Copy of this application was served on the learned Counsel for the respondents. There is no opposition. The application is allowed. The Writ Petition is dismissed as not pressed.

9.9.1996 Sd/-S.C. Varma, J"

Undeterred by the various Orders Passed in the Civil suit and the Writ Petition the respondent No. 5- Dharam Raj Chaudhary continued to function as Principal of the College which had in the meantime come to be upgraded. The Committee of Management of the College its president Sri Sant Ram Chaudhary and Ram Kishore Das Bhikari claiming himself be a life member of the society and interested in the welfare of the institution run by the society, filed the present Writ petition under Article 226 of the Constitution of India with the prayer that the defendant- respondent No.5 be prevented from acting and functioning as the Principal of the College and that the proceeding in suit No. 19 of 1983 Now pending in the Court of Civil JUDGE (Junior Division) Siddharthanagar be quashed. It was also prayed that the respondent Nos.1 to 4 be directed to make an enquiry into the alleged continuance of respondent No. 5 as Principal of the College after 3.1.1983 and to recover the amount paid to him as salary.

3. A number of counter, rejoinder and Supplementary affidavits have been exchanged. This Writ Petition was taken up for hearing on 28.1.1999 on which date Sri Rakesh Kumar appearing of and on behalf of the Committee of Management of the institution. Moved an application that the petition be dismissed as not pressed as the newly constituted Committee does not want to prosecute the Writ Petition. Accordingly on the statement of Sri Rakesh Kumar, Advocate, who was engaged by the Committee of Management of the institution concerned, the Writ Petition was dismissed on 28.1.1999. Thereafter Sri A.K. Gupta. Who had earlier filed the Writ Petition, moved an application with the prayer that the Order of dismissal of the Writ Petition passed on 28.1.1999 be recalled and the Writ Petition be heard on merits. After hearing Sri Rakesh Kumar along with Sri S.K. Lal, Counsel for the newly constituted Committee of Management, the Order dated 28.1.1999 was recalled on 15.3.1999 for determining the question of maintainability or otherwise of the present Writ Petition in the light of the subsequent events. This is how the present Writ Petition has again come before this Court for hearing

4. Heard S/ Sri R.S. Misra, A.K. Gupta, learned Counsel for the petitioners, S/Sri Rakesh Kumar and S.K. Lal for the alleged newly constituted Committee of Management, Dr. R.G. Padia appearing on behalf of Sri Dharam

Raj Chaudhary, respondent No. 5- Principal of the College, as well as learned Standing Counsel on behalf of the other Respondents, at length.

5. There is no doubt about the fact that the present writ Petition has been filed by the Committee of Management of the College concerned through its erstwhile president Sri Sand Ram Chaudhary and a life member of the society. A new Committee of Management has come into being consequent upon the elections held on 25.6.1997 under the control and supervision of District Inspector of Schools (for short called 'the DIOS'). S/Sri Jagram and Ram Ajorey Chaudhary were elected as the president and Secretary respectively of the newly constituted Committee of Management. The signatures of Sri Ram Ajorey Chaudhary were attested by the DIOS. The resolution to withdraw the present Writ Petition was adopted by the newly elected Committee of Management on 13.7.1997, a copy of which is Annexure 3 to the application No. 45185 of 1997 moved for the withdrawal of the present Writ Petition and a copy of which was served on Sri Anand Kumar Gupta Advocate for the old Committee of Management. This application remained pending for a considerable long time without any objection. On the strength of the statement made by Sri Rakesh Kumar, Counsel for the new Committee of Management, the Petition was dismissed On 28.1.1999.

6. S/Sri R.S. Misra and A.K. Gupta urged that there is no Committee of Management in existence and the function of the Committee of Management being discharged by the DIOS; that the election which is alleged to have taken placed on 25.6.1007 is the subject matter of challenge in Civil Misc. Writ Nos. 20194 of 1997 and 26563 of 1997 in which the Order dated 26.6.1997 attesting the signatures of Sri Ram Ajorey Chaudhary by the DIOS has been stayed. Against the said Order, Special Appeal No. 920 of 1998 has been filed. It is still pending. Pursuant to the Orders of this Court, the DIOS has recorded the finding on 17.8.1998 that the election held on 25.6.1997 was in Order. The said Order of the DIOS has again been challenged in Civil Misc. Writ No. 32506 of 1998 in which a stay Order has been passed on 27.3.1999. Sri Ram Ajorey Chaudhary claiming himself to be the duly elected Manager has filed Special Appeal Nos. 255 and 256 of 1999. The present position as it stands is that the institution is under the Management and Control of the DIOS who is discharging the function of Committee of Management. It is also not disputed that the Respondent No. 5- Sri Dharam Raj Chaudhary is still functioning as Principal of the College.

7. It is an indubitable fact that the Committee of Management of which Sri Sant Ram Chaudhary was President in the year 1996 when the Writ Petition was filed is no more in existence. The earlier Committee of Management, by lapse of time, became functus Officio. In its place. A new Committee of Management has come into being and as said above, S/Sri Jag Ram and Ram Ajorey Chaudhary have been elected as president and Manager respectively. This Committee of Management was recognised by the DIOS and on 13.7.1997, on which date the resolution to withdraw the present Writ Petition was passed by the new Committee of Management, there was no

Writ Petition or stay Order with regard to the election or functioning of the Committee of Management. On the strength of resolution, a copy of which is Annexure 3 to the application for withdrawal of the present Writ Petition, the Writ Petition was dismissed as withdrawn. In any case. Sri Sant Ram Chaudhary who filed the present Petition, on behalf of the Committee of Management, has lost his right to continue the Writ Petition as the earlier Committee of Management stands substituted by the newly constituted Committee of Management. Even if it be taken that the new Committee of Management cannot function in view of the stay Order Passed by this Court, this legal and factual aspect of the matter cannot be lost sight of that the earlier Committee of Management represented by Sri Sant Ram Chaudhary cannot be revived once it has ceased to exist. It is either the newly constituted Committee of Management which is to function in place of old Committee or the DIOS would perform the function of the Committee of Management under the Orders of the Court and the higher authorities. The DIOS who is performing the function of the Committee of Management has not challenged the right of the Respondent No. 5 to function and continue as Principal of the College. Therefore, if the new Committee of Management has taken a decision to withdraw the Writ Petition, the old Committee of Management which had instituted the Writ Petition can have no grudge in the matter.

8. Sri R.S. Misra, learned Counsel for the Petitioners urged that in the absence of the Committee of Management, Sri Ram Kishore Das Bhikari-Petitioner No.2 has right to continue the Writ Petition as being the life member of the society and interested in the welfare of the institution. It has come on record that the membership of Ram Kishore Das Bhikari- Petitioner No. 2 has been terminated by the general body on 6.7.1986 as has been averred in paragraph 20 of the main Counter affidavit of the Respondent No. 5 Sri Ram Kishore Das Bhikari, therefore, has ceased to have any interest in the matter and, thus, he cannot by himself continue the Writ Petition. There is yet another aspect of the matter. Sri Ram Kishore Das Bhikari in his individual capacity or even otherwise, has no locus standi to challenge the appointment of the Respondent No. 5 It is the Committee of Management, which is the aggrieved party and if it chooses to accept the Respondent No. 5 as Principal of the institution and permits him to continue as such and function in the said capacity, the Petitioner No.2 cannot, by any stretch of imagination, take an exception the validity of the function being discharged by the Respondent No. 5 as Principal. On behalf of the new Committee of Management and the Respondent No. 5, a Number of decisions were cited to lend strength to the point that the present Writ Petition cannot be treated as a public interest litigation on behalf of Sri Ram Kishore Das Bhikari. In this behalf, reference was made to the following decisions:

1999 (1) Supreme Court Cases – 492 – *Raunaq International Vs. IV R. Construction (Note B)*

1998 (2) Supreme Court Cases -449 – *Bhartiya Homeopathy College Vs. Student Counsel (Note B paras 24 and 25)*

A.I.R.1993 S.C. 1769 – *R.K. Jain V. Union of India (Note F Para 74)*

1985 LIC – 337 *U.P. Bank Employees Union V. State of U.P. (Para 25)*

1999 ACJ – 682 *Mohd. Idris Vs. State of U.P.*

My Considered view of the matter is that independent of the Committee of Management, Ram Kishore Das Bhikari has no right to challenge the Continuance of the Respondent No. 5 as the Principal of the College.

9. In view of the subsequent events, which have taken place after the institution of the Writ Petition and particularly the fact that new Committee of Management has adopted a resolution to withdraw the Writ Petition, the present Writ Petition has, of necessity, to be dismissed as the original Petitioners have lost their right to pursue the same.

10. A passing reference may be made to the merits of the case of the Petitioners. Whether the Respondent No. 5 has to function or continue as the Principal of the College is a question, which is now to be determined and decided by the Civil Court where suit No. 19 of 1983 is pending in which the Order of the Basic Siksha Parishad has been challenged. The controversial facts, which are the subject matter of scrutiny before the Civil Court can appropriately be decided after evidence. In the Writ Jurisdiction the scrutiny of facts is not possible. The Order to dismiss the Respondent No. 5 was passed way back in the year 1981, i.e., two decades ago. This Order could not be implemented on Account of refusal of the Basic Siksha Adhikari to Accord the necessary approval. An Order of dismissal Passed by the Committee of Management cannot be translated into action unless it is approved by the appropriate statutory authority. The Basic Siksha Parishad before which the Order of the Basic Siksha Adhikari was challenged allowed the Appeal. It was urged on behalf of the Petitioners that after the vacation of the Order of injunction by the appellate Court in Misc. Appeal No. 207 of 1983, it shall be deemed that necessary approval has been granted and consequently, Respondent No. 5 stood dismissed from service. Dr. Padia urged that mere passing of the resolution by the Committee of Management is not enough. For the grant of approval by the competent authority, further steps are required to be taken by the Committee of Management to determine the employment of an employee. In support of his contention, Dr. Padia Placed reliance on a Division Bench decision of this Court in the case of *A.S.H.P. Association and others Vs. Deputy Director of Education Agra* Region, Agra – 1977 A.L.J. – 341 in which the following view was taken:

"It is true that before the Managing Committee of an Institution applies to the Inspector of Schools soliciting his approval for terminating the service of an employee, it has to meet and decide that the service of the employee is to be terminated by giving him one month's notice and that such decision of the Managing Committee is to be expressed in the form of a resolution. The service of the employee is not affected by such resolution. Mere approval by the Inspector also does not have the effect of determining the employment of the employee. The Committee of

Management has to, after its resolution has been approved, take steps to determine the employment either by giving the employee one month's notice or one month's pay in lieu there of. It is thus evident that what can be approved by the Inspector is the proposal made by the Committee for terminating the service of the employee and not its action in determining his employment."

On the strength of the above observation, it was maintained that no steps were taken by the committee of Management to dispense with the services of Respondent No. 5 after the Appeal was allowed by the Basic Siksha Parishad and the Order of injunction had been vacated by the appellate Court in Misc. Appeal No. 207 of 1983. On the Order hand, it was pointed out that the Respondent No. 5 has been allowed to continue and function as Principal of the College by the Committee of Management throughout the long period of about 17 years. Sri R.S. Misra Pointed out that the Respondent No. 5 has been sticking to the office by manipulating disputes between the rival Committee of Management, particularly, the managers and has taken full advantage of such conflict of interest. This submission besides being merit-less, does not to too far. The Respondent No. 5 cannot be expected to have such monstrous capacity as to maneuver office bearers of various Committees of Management and the authorities concerned with a view to cling to office. The fact remains that the Respondent No. 5 has been working on the post of Principal in spite of the Order of dismissal passed in the year 1981. The said Order was never given effect to. There are also documents on record to indicate that Sri Sant Ram Chaudhary and Sri Ram Kishore Das Bhikari who have filed the present Writ Petition in one capacity or the Order, had themselves been responsible to permit the Respondent No. 5 to function and continue as Principal of the College.

11. In the conspectus of the above facts, the present Writ Petition is held to be not maintainable at the instance of Sant Ram Chaudhary as well as Sri Ram Kishore Das Bhikari. They have no locus standi to continue the Writ Petition in view of the resolution adopted by the new Committee of Management to withdraw the Writ Petition.

The Writ Petition is accordingly dismissed without any Order as to cost Dated November 11.12.2000.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 9, 2000

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

Civil Misc. Writ Petition No. 20761 of 1996

Smt. Anamika ...Petitioner
Versus
State of U.P. & others ...Respondent

Counsel for the Petitioner:
Shri V.S. Dwivedi
Dr. R.. Dwivedi

Counsel for the Respondent:
Sri T.P. Singh
Shri P.K. Srivastava
Shri N.L. Srivastava
Shri S.K. Singh
Shri Ashok Khare
S.C.

Intermediate Education Act- S-16 (2)- Direct appointment on the post of Lecturer- if the vacancy is substantive, adhoc appointment can not be made without following the procedure as provided in Radha Raizada Case- It the vacancy was short terms one – only a qualified L.T. grade can be promoted – authorities at the time of deciding representation ignored these as aspect matter remitted back for fresh decision.

Held – Para 5

It would be pertinent to observe that validity of appointment depends on whether the prescribed procedure was followed and indisputedly different procedures are prescribed for adhoc appointments on substantive and short term vacancies. If vacancy had become permanent on 1.7.1990, as held by the Regional Deputy Director of Education, then appointment of the petitioner would be void in view of section 16 (2) of the Act being in contravention of the Law laid down by the Full Bench of this Court in Radha Raizada's case'. The procedure for adhoc appointment against the substantive vacancy was admittedly not followed. In case, however, the vacancy was a short term one, the appointment of the petitioner would be illegal only if a qualified teacher in L.T. grade was available in the College for being promoted in as much recourse to direct recruitment on adhoc basis is permissible only if no qualified teacher is available for promotion Law in this regard is well settled in view of the Full Bench decision in Radha Raizada (supra)and the earlier Division Bench decision of this Court in Charu Chandra Tiwari Vs, District Inspector of Schools, Deoria and Others. Further if the vacancy become substantive of any time subsequent to appointment of the petitioner then in view of the Full Bench decision in Pramila Misra Vs. Deputy Director of Education, adhoc appointment against short tern vacancy would automatically cease w.e.f. the date the vacancy become substantive.

Case Law discussed

1994 (3) U.P.L.B.E.C. 1551, 1990 (1) U.P.L.B.E.C.-160
1997 (2) U.P.L.B.E.C.- 1329

By the Court

1. This Petition is directed against the Order dated 17.6.1996 Passed by the Regional Deputy Director of Education (Secondary), IVth Region, Allahabad and the consequential notice dated 1.7.1996 issued by the Manager, Kamla Balika Inter College, Khaga, Fatehpur being annexure Nos. 11 and 13 respectively to the Writ Petition. The Regional Deputy Director of Education IVth Region, Allahabad by her order dated 17.6.1996 has set aside the Petitioners ad-hoc appointment to the post of Lecturer (Economics) in Kamla Balika Inter College, Khaga, Fatehpur (in short the College) and Ordered for promotion of Respondent Smt. Suman Sinha on the said post. The impugned notice dated 1.7.1996 was consequently issued by the Manager terminating the services of the Petitioner w.e.f. 31.7.1996.

2. The facts giving rise to this Writ Petition briefly stated are these, Smt. Sarla Joshi, Permanent Principal of the College died resulting in a vacancy in the post of Principal Smt. Pramila Sinha the senior most teacher of the College in Lecturer grade was given ad-hoc appointment on the post of Principal Smt. Pramila Sinha was Lecturer in Economics. Her appointment as Principal resulted in a short term vacancy in the post of lecturer in Economics. One Smt. Pratibha Paul the senior most teacher of the College in L.T. Grade was given ad-doc promotion to the vacant post of Lecturer in Economics. Smt. Pratibha Paul was, however, superannuated on

30.6.1990 and consequently the post of Lecturer in Economics again fell vacant. The Management of the College being of the view that no qualified teacher was available for Promotion advertised the vacancy to be filled in by direct recruitment on ad-doc basis vide publication in news paper "Aaj" on December 8.1990. The Petitioner being a candidate was selected and appointed on the post in question vide letter dated 24.12.1990 which contained a stipulation that the ad- hoc appointment would come to an end on the reversion of Smt. Pramila Sinha from the post of Principal to her substantive post of Lecturer. The appointment was approved by the Regional inspectress of the Girls School IVth Region, Allahabad vide letter dated 6.6.1991 (annexure No. 3 to the Writ Petition) It would appear that the fourth Respondent Km. Suman Sinha represented her case to the Regional Deputy Director of Education and also filed a Writ Petition being Civil Misc. Writ Petition No. 33143 of 1995 challenging the appointment of the Petitioner on the post in question. The said Writ Petition came to be disposed of by judgment and order dated 21.11.1995 with a direction to the Regional Deputy Director of Education, IVth Region, Allahabad to look into the grievances of the Petitioner therein and dispose of her representation in accordance with Law. Consequent upon the said Order. The Regional deputy Director of Education, IVth Region, Allahabad after affording opportunity of hearing to the parties passed the impugned Order dated 17.6.1996 thereby holding that the appointment of the Petitioner on the post was illegal in that the post ought to have been filled under 50% quota by promotion of fourth Respondent Smt. Suman Sinha who was qualified for appointment by promotion.

3. Dr. R. Dwivedi, Senior Advocate appearing for the Petitioner urged that the fourth Respondent was not eligible and qualified for promotion to the post in question and the Management, therefore, Justified in taking recourse to direct appointment and the Regional Deputy Director of Education has erred in holding otherwise. It has been submitted by Dr. Dwivedi that the fourth Respondent was appointment as C.T. grade teacher in which grade she was confirmed in 1973 and the post and status of L.T. grade teacher was not given to her albeit the scale of pay admissible to L.T. grade teachers was given pursuant to Government Orders on the basis of having completed a stipulated length of service in the C.T. grade. It has also been submitted by Dr. Dwivedi that the pay of the fourth Respondent was illegally fixed even in the Lecturer grade w.e.f. 1.7.1988 and on that basis she was Paid salary of Lecturer grade for the recovery of which on Order dated 11.12.1990 being annexure No. 5 was passed by the District Inspector of Schools, Fatehpur. Sri T.P. Singh, Senior Advocate appearing for the fourth Respondent submitted on the other hand that the Petitioner was a teacher in L.T. Grade and being possessed of requisite qualifications on the date of occurrence of vacancy was entitled to be promoted to the post of Lecturer in Economics which was illegally filled up by direct Respondent.

4. Having given my anxious consideration to the submissions made by the learned Counsel. I an of the view that the impugned Order Passed by the Regional Deputy Director of Education, is

unsustainable for the Regional Deputy Director of Education does not appear to have properly perceived the controversy involved in the case. The vacancy, as would appear from the pleadings of the parties, was of a short term nature liable to be filled up in accordance with the U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981 Mere fact that the teacher who was given ad-hoc promotion on the post in question retired would not change the nature of vacancy into permanent one The Regional Deputy Director of Education has illegally proceeded on the assumption that the vacancy had became permanent w.e.f. 1.7.1990 due to the retirement of Smt. Pratibha Paul w.e.f. 30.6.1990. The vacancy in fact could be converted into permanent one, either on the permanent incumbent Smt. Pramila Sinha being substantively appointed as Principal or on her being superannuated. No finding has been recorded by the Regional Deputy Director of Education on either of the two eventualities.

5. It would be pertinent to observe that validity of appointment depends on whether the prescribed procedure was followed and indisputably different procedures are prescribed for ad hoc appointment on substantive and short term vacancies. If vacancy had become permanent on 1.7.1990. as held by the Regional Deputy Director of Education, then appointment of the Petitioner would be void in view of Section 16 (2) of the Act being in contravention of the Law laid down by the full bench of this Court in **Radha Raizada's case[1]'** The procedure for ad-hoc appointment against the substantive vacancy was admittedly not followed In case however the vacancy was short term one, the appointment of the Petitioner would be illegal only if a qualified teacher in L.T. grade was available in the College for being promoted in as much recourse to direct recruitment on ad-hoc basis is permissible only if no qualified teacher is available for promotion Law in this regard is well settled in view of the Full Bench decision in Radha Raizada (supra) and the earlier Division Bench decision of this Court in **Charu Chandra Tiwari Vs. District Inspector of Schools, Deoria and Other's[2]**. Further if the vacancy became substantive at any time subsequent to appointment of the Petitioner then in view of the Full Bench decision in **Pramila Misra Vs. Deputy Director of Education[3]**, ad-hoc appointment against short term vacancy would automatically cease w.e.f. the date the vacancy became substantive. The vacancy in that event may be filled in substantively by promotion if it falls in 50% quota Fixed for promotion as claimed by 4th Respondent or on ad-hoc basis by promotion or direct recruitment under Section 18 of the Act read with the related Rules or Removal of Difficulties Order then in force.

6. Ad-hoc appointment by promotion in a short term vacancy could be made by the management as provided in U.P. Secondary Education Service Commission (Removal of Difficulties) (Second) Order, 1981 but as against the substantive vacancies Management had no power to select a candidate for appointment by direct recruitment as

[1] (1994) 3 U.P.L.B.E.C. 1551

[2] (1990) 1 U.P.L.B.E.C. 160

[3] (1997) 2 U.P.L.B.E.C. 1329

explained by the Full Bench in Radha Raizada's case. After insertion of Rule 9-A and 9-B vide notification dated 16.7.1992 published on 4.9.1992 in the U.P. Secondary Education Service Commission Rules, 1983 the procedure for ad-hoc appointment under Section 18 if the U.P. Act 5 of 1982 could be made in substantive vacancies only in accordance. With these provisions. Similarly Rules 15 and 16 of U.P. Secondary Education Service Commission Rules 1955 lay down the procedure for ad-hoc appointment by direct recruitment and promotion respectively in respect of vacancies to be filled in by direct recruitment and promotion under Section 18 of the Act. The Regional Deputy Director of Education under these Rules could not have had himself promoted the fourth Respondent even if the appointment of the Petitioner were to be held illegal. The Regional Deputy Director of Education does not appear to have adverted herself to the relevant questions.

7. The Regional Deputy Director of Education has held in the Order impugned herein that the 4th Respondent was a teacher in L.T. grade and her claim for promotion was illegally ignored by the Management. In this connection the Regional Deputy Director of Education does not appear to have addressed herself to the relevant Government Orders where by teachers in C.T. grade and L.T. grade were given only the scales of pay admissible to L.T. grade and lecturer grade respectively on completion of a specified period of substantive service in the lower grade. The question whether grant of higher scale of pay on account of completion of prescribed length of service would result in the teacher being promoted to the next higher grade/ cadre has not been examined by the Regional deputy Director of Education . Even the 4th Respondent in para 3 of her representation dated 16.12. 1995 (Annexure No. 8 to the Writ Petition) addressed to the Regional Deputy Director of Education, had stated that grant of higher scale of pay is not equivalent to grant of post in the higher grade. Para 3 of the representation reads thus:

"YEH KI PACHAS PRATISHAT KOTE MEIN PADONNATI KA AUCHITYA KALA PRAVAKATA VETANKRAM PAD NAHIN HAI.

KEVAL VETANMAN HAI ATAH MERI PADONNATI PACHAS PRATISHAT KOTE KE ANTARGAT ARTHSHASTRA PRAVAKATA PAD PAR HONI CHAHIYE KYONKI MUJHE PRAVAKTA VETANMAN MILA HAI PRAVAKTA PAD NAHIN. VIDYALAYA SE PRAPT KALA PRAVAKTA VETAN KRAM JO DINANK 1.7.88 SE DARSHAYA GAYA HAI LEKIN SAN 1991 SE DIYA GAYA HAI KO DEVAL PRAVAKTA VETANKRAM HAI PRAVAKTA PAD NAHIN."

8. In my opinion, the matter needs to be remitted back to the Regional Deputy Director of Education for decision afresh in the light of the above observations after affording opportunity to the parties.

9. Accordingly the Petition succeeds and is allowed. The impugned Order dated 17.6.1996 and the notice. 1.7.1996 are quashed. The Regional Deputy Director of Education is directed to decide the representation afresh in the light of the

observations made in this judgment within a period of three months from the date of receipt of this Order. Parties may submit their written statements etc. before the Regional Deputy Director of Education within a month.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.11.2000

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

Civil misc. Writ Petition No. 1088 of 2000

M/s. Alka Coal Traders ...Petitioner
Versus
The Commissioner Trade Tax, U.P. Lucknow and others ...Respondent

Counsel for the Petitioner:
Shri Alok Kumar

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act, S. 30-powers to grant stay: discussed-

Held – para 3

We make it clear that under section 30 of the U.P. Trade Tax Act the authority concerned has power to issue a stay order or grant interim relief

If stay application is filed by the petitioner, the same shall be decided by the authority concerned within three days from the date of filing of the application.

By the Court

1. The petitioner filed an application under section 30 of the U.P. Trade Tax Act copy of which has been filed as Annexure I to the Supplementary affidavit.

2. The petitioner is disposed of with the direction to the authority concerned to decide the application preferably within one month from today.

3. We make it clear the under Section 30 of the U.P. Trade Tax Act the authority concerned has power to issue a stay order of granting interim relief if stay application is filed by the petitioner the same shall be decided by the authority concerned within three days from the date of filing of the application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 24.10.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE G.P. MATHUR, J.

Civil Misc. Writ Petition No.43800 of 2000

Vidyanand ...Petitioner
Versus
State of U.P. through Secretary and others ...Respondents

Counsel for the Petitioners :
Mrs. Poonam Srivastava

Counsel for the Respondents:
S.C.

U.P. Municipalities (Reservation and allotment seats and offices) Rules 1994-Rule –4 (1)-Reservation of seats for backward classes – in accordance with population the number of reserve wards comes 10, but keeping in question 27% comes 7.83 hence instead of 8 wards, the number of wards to be reserved for backward classes has to be 7 only –

effect of main part of sub rule (1) of rule 4 is curtailed by proviso.

Held – para 5

Therefore, the effect of main part of sub-rule (1) of rule 4 is curtailed of circumscribed by the proviso as mentioned earlier, the total number of wards in nagar palika parishad is 29 and its 27 per cent comes to 7.83 If the said figure is taken to be 8 in view of the main part of sub-rule (1) It will definitely exceed 27 per cent which is clearly prohibited by the proviso. In view of proviso, the number of wards to be reserves for backward classes cannot exceed 27 percent and, the before, 7.83 is the outer figure. In such circumstances, the number of wards to be reserved for backward classes has to be 7 and not 8.

Case law discussed

AIR 1959 SC –713 at 717
AIR 1985 SC – 582

By the Court

1. This writ petition under article 226 of the constitution has been filed praying that the notification issued by the state government on September 27,2000 reserving only 7 wards in Nagar Palika Parishad Farrukhabad for backward classes be quashed and a writ of mandamus be issued restraining the respondents from issuing any notification for holding election for the said Nagar Palika Parishad till the number of wards reserved for backward classes is increased.

2. Mrs. Poonam Srivastava learned counsel for the petitioner has submitted that the last election for electing Sabhshads for Nagar Palika Parishad was held in the year 1995 on the basis of the census conducted in 1994 In the said election. The Nagar Palika Parishad was divided into 29 wards and 8 wards were reserved for backward however in the notification issued by the state Government on September 27.2000 the wards reserved for backward classes have been reduced from 8 to 7 learned counsel has elaborated her argument by submitting that though according to the population of the backward classes they are entitled to reservation in to wards in view of formula contained in U.P. municipalities (Reservation and allotment of seats and offices) Rules, 1994 but as their number cannot be more than 27 per cent. The number of wards to be reserved for them should by 8 as was done in the last election which was held in 1995.

3. The State Government in exercise of powers conferred by section 296 of the U.P. Municipalities Act read with section 9-A of the said Act has made the U.P. Municipalities (Reservation and allotment of seats and offices) Rules, 1994 rule 4 (1) provides the method for determination of seats to be reserved for scheduled castes and scheduled tribes this rule was amended on April 20.1995 and after the amendment it reads as follows:

"4 (1) The number of seats to be reserved in a municipality for the Scheduled Castes for the Scheduled Tribes, or the backward classes under sub-section (1) of section 9-A of the act shall be so determined that it shall bear, as nearly as may be, the same proportion to the total number of seats in a municipality as the population of the Scheduled Castes in the municipal area or the Scheduled Tribes in the municipal area or the backward classes in the municipal area bears to the total population of such area and if in determining such number of

seats there comes a remainder then if it is half or less than half of the divisor. It shall be ignored and if it is more than half of the divisor. the quotient shall be increased by one and number so arrived at shall be the number of seats to be reserved for the Scheduled Castes or the Scheduled Tribes or the backward classes as the case may be:

Provided that number of seats to be reserved in a municipality for the backward classes under sub-section (1) of section 9-A of the Act, shall not be more than twenty seven per cent of the total number of seats in a municipality."

According to the aforesaid rule the number of wards to be reserved for backward classes has to be calculated on the basis of following formula:

Number of wards X Backward Classes population of Nagar Palika Parishad
Total number of population

4. It is averred in the writ petition that the total population of Nagar Palika Parishad as per the census of 1994 is 1,94,567 and the population of backward classes is 67,953. By applying the aforesaid formula, the number of wards to be reserved for backward classes come to 10.12. However, in view of the restriction that the wards reserved for such category of persons cannot exceed 27 percent which when calculated on the total figure of 29 comes to 7.83. The contention of Mrs. Srivastava is that as the remainder is more that half, the quotient should be increased by on. It is thus urged that the figure 7.83 so calculated should have been treated as 8 and such number of wards should have been reserved for the backward classes.

5. The argument of learned counsel for the petitioner looks attractive at the first blush but a deeper scrutiny would show that it has no substance. Though the main part of sub-rule (1) of rule 4 provides that if after determining the number of wards according to the formula these comes a remainder which is less than half, it shall be ignored and if more than half, the quotient shall be increased by one but there is proviso to the sub-rule which clearly lays down that number of wards to be reserved for backward classes shall not be more than 27 per cent of the total number of wards in a municipality. In **CIT, Mysore** Versus **Indo Mercantile Bank Ltd. AIR 1959 SC 713 at 717,** it was held that the proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Similar view was taken in **S. Sundaram Pillai** Versus **P. Pattabiraman, AIR 1985 SC 582.** As a general rule a proviso is added to an enactment to qualify or create an exception to what is in the enactment. Therefore, the effect of main part of sub-rule (1) of rule 4 is curtailed or circumscribed by the proviso. As mentioned earlier, the total number of wards in Nagar Palika Parishad is 29 and its 27 per cent comes to 7.83. If the said figure is taken to be 8 in view of the main part of sub-rule (1), it will definitely exceed 27 percent which is clearly prohibited by the proviso. In view of proviso, the number of wards to be reserved for backward classes cannot exceed 27 per cent and, therefore, 7.83 is the outer figure. In such circumstances, the number of wards to be reserved for backward classes has to be 7 and not 8.

For the reasons mentioned above, we find no merit in the writ petition, which is hereby dismissed summarily at the admission stage.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 8, 2000

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

Civil Revision No. 419 of 2000

Prabhu Dayal Tiwari, Chela Sri Ram Das (Sarvrakar) and others
...Opp. Parties/Applicants.
Versus
Lakhan Singh son of Sri Sukh Sahab Singh & others ...Applicants/ Opp. parties.

Counsel for the Applicants:
Shri Shakti Dhar Dube
Shri A.R.B.Kher

Counsel for the Opposite Parties:
Shri A.N.Bhargawa.

Code of Civil Procedure, 1908, Ss. 92, 104 and 115 readwith 0.43 R.1 – Pre-requisites or Preconditions for applicability of – Revision against order granting permission to file suit, where application for leave filed simultaneously-Maintainability.

Held –

A reading of the aforesaid Section 92 reveals that leave of the court is a condition precedent for institution of a suit to obtain a decree of the nature enumerated in clause (a) to (h) of sub-section (1) of Section 92, C.P.C. In the present case, application for leave is stated to have been filed alongwith the plaint, which was legally not permissible. The learned District Judge, Jhansi acted illegally in entertaining the plaint as well as the application for leave simultaneously.

From a reading of the aforesaid Rule, it is evident that the appeal lies from an order refusing leave to institute a suit of the nature referred to in Section 92 C.P.C. and not from an order granting the leave. In the instant case, therefore, the order was not appealable and inasmuch as the application 3-A for permission to file a suit under Section 92 C.P.C. was granted by the District Judge by means of the impugned order.

Under the facts and circumstances stated above and in the light of the law laid down of this Court and other Courts as well as the Apex Court, the District Judge, in exercise of power under Section 92 C.P.C., must act judiciously, if objections are filed before or after the order under section 92 C.P.C., is passed granting or refusing the leave to file a suit he is bound to take into consideration the documentary or oral evidence on record and examine the same critically and thereafter pass the order. In the instant case, court below did not take the evidence filed by the applicants into consideration and did not record congent reasons, therefore, the impugned order is liable to be set aside. (paras 8, 10 and 13)

Case law discussed
2000 (3) AWC, 2064, (1991) ICC 48
1987 ALJ 369

By the Court

1. In this case counter and rejoinder affidavits were filed by the parties. As desired by the learned counsel for the parties, case was heard and is being decided finally at this stage.

2. The instant revision arises out of the proceedings under section 92, C.P.C. and is directed against the judgment and order passed by the District Judge, Jhansi,

dated 4.12.1992, granted permission to the contesting respondents to institute a suit under Section 92, C.P.C., with respect to the temple, known as, Sri Kalyan Rai Ji Virajman Mandir, Madhopura, village Bhasneh, Pargana Garautha, district Jhansi, for short 'property in dispute'. The opposite parties filed an application under Section 92, C.P.C. praying for granting permission to file the suit for constitution of a trust committee and to frame a scheme of administration for managing the trust property. It was claimed that the said property was a public trust, which was being mismanaged, therefore, it was necessary to frame a scheme of administration for proper administration of the trust property. On receipt of the notices from the court of the District Judge, applicants filed their objection pleading that the trust in question was not a public trust, that it was an ancestral and personal temple established by Bhagwan Das who appointed Mahant Ram Das Chela as Manager/Sarvarakar of the properties of the temple. He also executed and registered will dated 6.9.1983 in favour of Chela Prabhu Dayal. It was contended that the application filed under Section 92, C.P.C. therefore, was liable to be dismissed.

3. It is evident from the material on record that the suit, for the above mentioned relief, was filed and simultaneously application under Section 92, C.P.C. was also filed. The applicants are alleged to have filed voluminous documentary evidence in support of their case. The court below, thereafter, passed the following order.

"4.12.1999 Case called out. The parties' counsels are present

3-A is an application for permission under Section 92, C.P.C. to file the suit in respect of the property of the trust created for the religious purpose. The plots mentioned in the list 4-A-I are said to be the property of the deity Kalyanji Maharaj, situated in village Madhopura. The revenue records have been filed and the entries are shown to be in the name of the deity. Subsequently the efforts are shown to have been made to convert - the property in the private names of opposite parties Udai Narain Chela Prabhu Dayal, Ramjiwan and Girjanandan. Since the property is shown to be that of deity and efforts have been made to privatise and take it by usurpation, under the aforesaid circumstances it appears quite justifiable to give permission under Section 92, C.P.C. This finding will not however prejudice the final disposal of the suit between the parties.

ORDER

Application 3-A is hereby allowed Prayer for permission to file the suit Under Section 92, C.P.C. is granted.

District Judge,
Jhansi."

4. Challenging the validity of the above noted order, as stated above, the present revision has been filed by Prabhu Dayal Tiwari and others.

5. Learned counsel for the applicants vehemently urged that permission to institute a suit under section 92, C.P.C., was a condition precedent. The respondents have acted illegally in filing the suit and simultaneously applying for permission under Section 92, C.P.C. The court below is also stated to have acted illegally and in excess of its jurisdiction for entertaining the said application and

allowing the same. It was also urged that the order passed by the court below is a non –speaking order inasmuch as the court below failed to take into consideration and examine critically the documentary evidence filed by the applicants and acted illegally and arbitrarily in allowing the same. The impugned order was, thus, liable to be quashed. On the other hand, learned counsel appearing for the contesting respondents submitted that the order impugned in the present revision was an administrative order, which was not revisable under Section 115, C.P.C. The revision as framed and filed, was therefore, liable to be dismissed. It was submitted that the court below has rightly granted permission to institute the suit under the facts and circumstances of the present case. The revision filed by the applicants was, therefore, liable to be dismissed. It was also urged that the order under challenge was appealable under Order 43 Rule I read with Section 104, C.P.C. Learned counsel for the parties in support of their contentions also referred and relied upon certain decisions of this Court as well as the Supreme Court, which I will deal with hereafter at appropriate place.

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

7. The impugned order dated 4.12.1999 was passed by the District Judge, Jhansi purported to be in exercise of power under Section 92, C.P.C. Section 92, C.P.C. reads as under :

(Only relevant quoted)

"92. Public charities.-(1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the (leave of the Court), may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree-

(a) removing any trustee;
(b) appointing a new trustee;
(c) vesting any property in a trustee;
[(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property;)]
(d) directing accounts and inquiries;
(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
(f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged;
(g) settling a scheme; or
(h) granting such further or other relief as the nature of the case may require."

8. A reading of the aforesaid Section reveals that leave of the court is a condition precedent for institution of a suit to obtain a decree of the nature

enumerated in clause (a) to (h) of sub-section (1) of Section 92, C.P.C. In the present case, application for leave is stated to have been filed alongwith the plaint, which was legally not permissible. The learned District Judge, Jhansi acted illegally in entertaining the plaint as well as the application for leave simultaneously. By order dated 19.5.2000, however, proceedings of the above noted suit were stayed. The interim order granted by this Court remained operative till date. The questions which arise for consideration in the present case are as to whether present revision was legally maintainable, whether the impugned order was appealable and as to whether the impugned order passed by the court below was a valid order or not.

9. So far as maintainability of the revision or appeal is concerned, Order 43 Rule 1, C.P.C., provides that the appeal shall lie under Section 104, C.P.C., from the orders enumerated under Rule (1) of the said Order. Clause (ff-a) of sub-rule (1) of Section 104, C.P.C. reads as under:-

"104.(1).(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;"

Section 91 deals with public nuisance and other wrongful acts affecting the public while Section 92 deals with public charities.

10. From a reading of the aforesaid Rule, it is evident that the appeal lies from an order refusing leave to institute a suit of the nature referred to in Section 92, C.P.C. and not from an order granting the leave. In the instant case, therefore, the order was not appealable and inasmuch as the application 3-A for permission to file a suit under Section 92, C.P.C., was granted by the District Judge by means of the impugned order. In Lilanand Thakur Pagal Baba Trust Prabandh Samiti Vs. Thakur Radha Govindji Maharaj Vrindaban and others, reported in 2000(3) AWC 2064, learned Single Judge dealing with the question as to whether order passed under the said Section granting leave was revisable or not was pleased to hold as under:

"Grant of leave to institute a suit does not amount to case decided within the meaning of the term used under Section 115, C.P.C. It was subject to revocation of objection/application filed by the opposite party, therefore, against an order granting leave, a revision under Section 115, C.P.C. was not maintainable."

11. In *R.M. Narayana Chettiar and another Vs. N.Lakshmanan Chettiar and others*, reported in (1999) 1 S.C.C. 48, the Supreme Court took the view that before institution of the suit for the relief in the nature enumerated under Section 92, C.P.C., leave must be obtained from the Court as it imposes certain check on filing of frivolous suits. It was held that leave could be granted without any notice to the respondents as it can be set aside on the application by party aggrieved. The Apex Court has upheld the validity of the said order challenged, subject to the condition only that the Court while granting permission under Section 92 C.P.C., must afford opportunity of hearing and to file objection, to the contesting opposite parties and to record reasons for granting or refusing to grant permission. Even in Mahanth Gurmukh Das Vs. Bhupal Singh and others, reported in 1987 ALJ 369, learned Single Judge was pleased to hold

that the Court should apply its mind to the question on the basis of the material on record and come to a conclusion that prima facie though it may be, on the question whether person seeking its leave can be treated to be a person having an interest in the trust. The insistence was given to record reasons before an order either granting or refusing to grant permission is passed by the District Judge and revision filed in this Court was disposed of with certain directions to record reasons. Now coming back to the case of R.M. Narayana Chettiar, referred to above, the Apex Court has specifically ruled that obtaining permission before institution of a suit for the relief of the nature mentioned in Section 92 C.P.C., obtaining permission is a condition precedent, the Court before granting such permission should give notice to the defendant, as a rule of caution. According to it, non-issuance of a notice would not render the suit bad inasmuch as the defendants can any time apply for revocation of the leave. It was observed as under:

"The legislative history of Section 92 of the Code indicates that one of the objects which led to the enactment of the said section was to enable two or more persons interested in any trust created for a public purpose of a charitable or religious nature should be enabled to file a suit for the relief's set out in the said section without having to join all the beneficiaries since it would be highly inconvenient and impracticable for all the beneficiaries to join the suit; hence any two or more of them were given the right to institute a suit for the relief's mentioned in the said Section 92 of the Code. However, it was considered desirable to prevent a public trust from being harassed or put to legal expenses by reckless or frivolous suits being brought against the trustees and hence, a provision was made for leave of the court having to be obtained before the suit is instituted."

It was ultimately ruled as under:-

"Keeping in mind these considerations, in our opinion, Although, as a rule of caution, court should normally give notice to the defendants before granting leave under the said section to institute a suit, the court is not bound to do so. If a suit is instituted on the basis of such leave, granted without notice to the defendants, the suit would not thereby be rendered bad in law or not maintainable. The grant of leave cannot be regarded as defeating or even seriously prejudicing any right of the proposed defendants because it is always open to them to file an application for revocation of the leave which can be considered on merits and according to law."

12. In the instant case, as stated above, the grievance of the applicants, in substance, is that they have filed objection and as many as 52 documents in support of their cases, but the court below acted wholly illegally and arbitrarily and completely ignoring the said documents and passed an order, which is bereft of reasons. The same is, therefore, liable to be set aside.

13. Under the facts and circumstances stated above and in the light of the law laid down of this Court and other Courts as well as the Apex Court, the District Judge, in exercise of power under Section 92, C.P.C., must act judiciously, if objections are filed before or after the order under Section 92 C.P.C.,

is passed granting or refusing the leave to file a suit he is bound to take into consideration the documentary or oral evidence on record and examine the same critically and thereafter pass the order. In the instant case, court below did not take the evidence filed by the applicants into consideration and did not record cogent reasons, therefore, the impugned order is liable to be set aside.

14. This revision succeeds and is allowed. The order dated 4.12.1992 is hereby set aside. The case is, however, sent back to the court below for decision in the light of the observations made above expeditiously within a period of two months from the date a certified copy of this order is communicated to the court below. It is further provided that the case shall be decided by a Judge other than the Judge who has passed the impugned order. The District Judge, Jhansi shall pass appropriate orders in this regard in exercise of power under Section 24, C.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE G.P.MATHUR, J.

Civil Misc. Writ petition No. 44546 of 2000

Ratan Kumar Dixit & others...Petitioners
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioners:
Shri Pushkar Mahrotra
Shri Ravi Kiran Jain

Counsel for the Respondents:
S.C.
Shri B.D. Mandhyan
Shri Ashok Mehta

Constitution of India, Part IX A, Article 243 P(g) readwith U.P. Municipal Corporation Adhiniyam, 1959, Ss.32(1) and 2(53-A)-Municipal Elections-Notification by State Government regarding reservation of Seats in different Wards-Delimitation of wards and reservation on basis of 1991 consensus -objections to draft notification disposed of-challenge to Notification-Maintainability.

Held-

Learned counsel for the petitioners has not been able to point out any provision which may require that before holding the election a fresh survey of the entire population ought to have been done or that the reservation of wards for different categories of persons could not be done till a fresh survey had been done and the population of different categories for persons for whom reservation has to be provided namely, Scheduled Castes, Scheduled Tribes and women had been ascertained. We, therefore, do not find any illegality in the order of the State Government by which delimitation or reservation of wards has been done.

It is not the case of the petitioners that no objections were invited or they were not given any opportunity to file objection. The draft order was published by the State Government in accordance with sub section (2) of section 32 of the Act and the petitioners were given opportunity to file objections. Thus the ground on which an order of delimitation and reservation of constituencies can be challenged, as observed by the Apex Court, is not available to the petitioners. (Para 6 and 12)

Case law discussed
1996AWC 153
JT 1996 SC (8) 733
AIR 1995 SC 1512

By the Court

1. This writ petition under Article 226 of the Constitution has been filed praying for several relief's and the principal relief's are that the notification issued by the State Government providing for reservation of wards in all the eleven Nagar Nigams (Municipal Corporations) in the State be quashed and a direction be issued to the respondents not to proceed with the election in the Municipal Corporations until the exercise of determination of actual population of the Scheduled Castes, Scheduled Tribes, Backward Classes and also the total population of different wards of Nagar Nigams is completed and the seats in the wards are reserved in accordance with law for different categories of persons who are entitled for reservation.

2. Petitioner nos. 1,3 and 4 are residents of and are registered as voters in Nagar Nigam, Gorakhpur and petitioner no. 5 is resident of and is registered as voter in Nagar Nigam, Aligarh. The respondents arrayed in the writ petition are State of U.P., Director, Local Bodies, State Election Commission, and the District Election Officers/District Magistrates, Allahabad, Gorakhpur and Aligarh.

3. Sri Ravi Kiran jain, learned senior counsel for the petitioners has submitted that the last census in the State of U.P. had been held in the year 1991 and the figures of population are available of the said census only and thereafter a rapid survey was done in the year 1994 with a view to determine the population of other backward classes alone. No fresh survey has been undertaken to determine the actual population of the different categories of persons namely, Scheduled Castes, Scheduled Tribes and other backward classes. The numbers of wards in the Nagar Nigams as per the Delimitation Order of 1995 done consequent upon the Constitution (74^{th} amendment) Act of 1992 were substantially increased. In Allahabad the number of wards which were 40 in the year 1991 have been increased to 70 in the year 1995 and in Gorakhpur and Aligarh they have been increased from 30 to 60 in the same period. However, for the purpose of forthcoming election of Nagar Nigams in the State which is scheduled to take place in November, 2000 no survey of population has been done either of the general category or of reserved category nor the population of individual wards has been ascertained. According to the learned counsel the mandatory requirement of sub-section (1) of section 32 of U.P. Municipal Corporations Adhiniyam, 1959 (hereinafter referred to as the Act) had not been complied with, and therefore, the notification issued by the State Government regarding reservation of seats in different wards was wholly illegal. Learned counsel has thus urged that till such exercise was done and the provisions of sub-section (1) of section 32 of the Act and also the directions issued by a Division Bench of this court in Mukesh Ram Chandani Vs State of U.P. 1996 AWC 153 had been complied with, no election for electing sabdhasads of Nagar Nigam should be held in the State.

4. Sri Ashok Mehta, learned Chief standing counsel appearing for the respondents has submitted that the Nagar Nigams have been divided into wards strictly in accordance with clause (a) of sub-section (1) of section 32 of the Act

and the delimitation of wards and reservation thereafter for different categories of persons have been done in accordance with the provisions of the Act and the rules and there was no illegality in the same. He has further contended that the draft of the order under sub-section (1) of section 32 of the Act, which was proposed to be passed by the State Government, was published in the official gazette and also in the newspapers inviting objections and the objections filed thereto had been considered which were decided by speaking order. There was no error or illegality in creating the wards or reserving the same for different categories of persons and provisions of section 32 of the Act had been fully complied with and, as such, there was no ground for quashing the final order or for staying the holding of elections.

The submission of Sri Jain is based upon section 32 of the Act relating to Delimitation Order which is being reproduced below:

"Delimitation Order-(1) The State Government shall, by order, determine----

(a) a city shall be divided into wards in such manner that the population in each ward shall, so far as practicable, be the same throughout the municipal area;
(b) the extent of each ward;
(c) -----(Omitted by U.P. Act 12 of 1994);
(d) The number of seats to be served for the scheduled Castes, the Scheduled Tribes, backward classes and women;
(2) The draft of the Order under sub-section 91) shall be published in the official Gazette for objections for a period of not less than fifteen days.
(3) The State Government shall consider any objection filed under sub-section (2) and the draft Order shall if necessary, be amended, altered or modified accordingly and thereupon it shall become final."

6. The main ground of challenge of Sri Jain is that the State Government did not conduct any survey for determining the exact population of Scheduled Castes, Backward classes and women before issuing the notification and as such the provisions of clause (a) of sub-section (1) of section 32 of the Act have not been complied with. A plain reading of clause (a) of sub-section (1) will show that a City is to be divided into wards in such manner that the population in each ward shall, so far as practicable, be the same throughout the municipal area. The word 'population' has been defined both in the Constitution and also in the Act. Part IXA of the Constitution deals with Municipalities and clause (g) of Article 243 P defines 'population' which means the population as ascertained at the last preceding census of which the relevant figures have been published. Section 2 (53-A) of the Act also defines 'population' and it is the exact reproduction of clause (g) of Article 243P of the Constitution. Therefore the word 'population' as used in clause (a) of sub-section (1) of section 32 of the Act would mean the population of the city as ascertained at the last preceding census of which the relevant figures have been published. It is averred in paragraph 13 of the writ petition that in the entire State of Uttar Pradesh, the last census was undertaken in the year 1991 and the only published figures available are that of the said census. Subsequently a rapid survey was undertaken in the year 1994 to determine the population of other Backward Classes only. It is further averred that no fresh survey of population

was undertaken to determine the actual population of other categories namely Scheduled Castes and Scheduled Tribes at the time of rapid survey. Therefore, it is the own case of the petitioners that the relevant figures of last preceding census, which was held in the year 1991 alone, are available. This factual position has also been admitted by the learned Chief Standing counsel. Therefore, the division of the city into wards has to be done on the basis of the figures which have been published on the basis of census conducted in the year 1991 and reservation of seats in the wards had to be done after taking into consideration the figures of Backward Classes as revealed by the rapid survey. Learned counsel for the petitioners has not been able to point out any provision which may require that before holding the election a fresh survey of the entire population ought to have been done or that the reservation of wards for different categories of persons could not be done till a fresh survey had been done and the population of different categories of persons for whom reservation has to be provided namely, Scheduled Castes, Scheduled Tribes and women had been ascertained. We, therefore, do not find any illegality in the order of the State Government by which delimitation or reservation of wards has been done.

7. Sri Jain has laid great emphasis on certain observations made by a Division Bench of this Court while deciding a bunch of writ petitions which had been filed challenging the elections of Nagar Nigams which were going to be held in November, 1995. According to learned counsel the observation made in paragraphs 79 to 81 of the judgment in Mukesh Ram Chandani Vs State of U.P. 1996 AWC 153 are still applicable as the situation has not changed. The relevant portion of the judgment in the said case on which reliance is placed is being reproduced below:

"79 The facts of the present case; fully demonstrate that there did not exist any material or basis either in the census of 1991 or with the respondents on the basis of which the general population or the population of Scheduled Caste could be assessed or determined from any of the wards notified. The State Government acted arbitrarily in delimiting the wards and allocation of reserve seats without undertaking any survey operations for determining the actual population which alone could be the sole criteria provided under the Act. Both for the purpose of delimitation of constituencies as also for reservation and for allocation of reserved seats. The act of putting the figures of population general and reserved category in each of the newly carved out wards has been done on mere imagination on the basis of the census of 1991 and which was only for the erstwhile wards and was not based on mohallas or localities or part of the locality which have now been; included in the new wards.

80. On account of the failure of the State Government to determine the ward wise population, which was absolutely essential for the purpose of allocation of seats and for making reservations in their favour, the reservation of seats for the Scheduled Castes stands vitiated.

81. This survey of the backward class population made during the years 1994 and 1995 when delimitation of constituencies was in process, also stands vitiated on account of the fact that survey

of their population has been done without either identifying or excluding those persons who fall in the category of creamy layer. In fact, there does not exist any norm for excluding the creamy layer. The State Government has not yet framed any valid norms for identification of the creamy layer and their exclusion and therefore, it is not permissible in law to provide reservation in favour of the back ward classes."

8. Sri Ashok Mehta, learned chief standing counsel has however submitted that the decision in the case of Mukesh Ram Chandani (supra) was challenged by filing an appeal and the same was allowed by the Supreme Court on September 10, 1996. He has referred to paragraphs 32 to 34 of the decision of the said case in Anugrah Narain Singh and another vs. State of U.P.& others (JT 1996SC (8) 733 which are relevant to the controversy in hand and they are reproduced below:

"32. The case of the State Government in the court below as well as here is that the election has to be conducted on the basis of the last census which was held in the year, 1991. The next census is due to be held in 2001. But in the meantime, election to the municipal bodies will have to be held. The basis for holding such elections is the last available census figures. But where no census figures are available, then a survey has to be made by the Government to find out the correct figures. For example Article 243T specifically reserves the right of the State Legislative for making provisions for reservation of seats in favour of backward classes of citizens. This reservation has been made by the State Legislature of U.P. for ensuring that the backward class people are adequately represented in the local bodies. Section 7 of the U.P. Act specifically provides for reservation of seats of backward classes and empowers the State Government that if the figures of backward classes were not available, their population may be determined by carrying out a survey in the manner prescribed by the rules.

33. In our view, the argument advanced on behalf of the State must be upheld. It is true that Article 243-P (g) has defined population to mean " population as ascertained by the last preceding census of which the relevant figures have been published." The delimitation of constituencies and also preparation of electoral rolls will have to be done on the basis of the figures available from the last census which was taken in 1991. Reservation of seats for scheduled castes and scheduled tribes is mandator has made it permissible for the State Government to reserve seats for other backward classes. The census of 1991 has not enumerated the number of persons belonging to backward classes. Therefore, in order to reserve seats for citizens belonging to backward classes their number will have to be found out Clause (6) of Article 243T has impliedly empowered the State Government to ascertain the backward classes and the number of people belonging to such classes. Otherwise, the provisions of clause (6) of Article 243T will become otiose and meaningless. Merely because such an enumeration of people belonging to backward classes was made does not mean that the figures enumerated by the last census were discarded. The latest available census figures had to be the basis for delimitation of the constituencies, preparation of electoral rolls and also for reservation of seats for scheduled castes, scheduled tribes and

women. But census figures are not available for persons belonging to backward classes. The next census will be in the year 2001. There is no way to reserve seats for backward classes in the meantime except by making a survey of the number of persons belonging to such classes for the purpose of giving them assured representation in the municipal bodies. To do this exercise is not to do away with the last available census figures but to find out what was not to be found by the last census. Had such counting been done in the census, then it would not have been open to the State Government of embark upon a survey on its own. The State Government here had only two choices. It could say that there will be no reservation for people belonging to backward classes because the census figures of such people are not available or it could make a survey and count the number of people belonging to the backward classes and reserve seats for them in the municipal bodies. The State Government has taken the later course. This is in consonance with the provisions of clause (6) of Article 243T. Therefore, the survey made by the State Government for finding out the number of persons belonging of backward classes was not in any way contrary to or in conflict with any of the provisions of the Constitution.

34. Moreover, the U.P. Act of 1959 was amended to make it consistent with the provisions of Part IX-A of the Constitution. Population was defined in Section 2 (53-A) to mean "population as ascertained in the last preceding census of which the relevant figures have been published". This is identical to the definition given in Article 243P(g). Section 32 which deals with delimitation, inter alia, provides that the State Government shall by order determine the number of seats to be reserved for scheduled castes, scheduled tribes, backward classes and for women. Section 7 lays down that in every Corporation, seats shall be reserved for scheduled castes, scheduled tribes and backward classes. There is a second proviso to Section 7 which lays down that if the figures of backward classes are not available, their population may be determined by carrying out a survey in the manner prescribed by the rules. These provisions come within the ambit of the phrase "any law relating to the delimitation of the constituencies or allotment of seats to such constituencies". The validity of this law cannot be challenged because of the protection given by Article 243-ZG of the Constitution. Therefore, the question whether the survey made by the State Government to ascertain the figures of persons belonging to backward classes was lawful or not cannot be raised in any Court."

The operation portion of the order of the Supreme Court reads as follows:

"For the reasons given hereinabove, we are of the view that the impugned judgment was erroneous and improper. We allow this appeal. The judgment under appeal is set aside…."

9. It is therefore, clear that the judgment of the Division Bench of this Court in Mukesh Ram Chandani (supra) had been held to be erroneous and improper and same was set aside. Therefore, the contention of Sri Jain that the order regarding delimitation and reservation of wards is illegal as the direction given in the said case had not

been complied with by the State Government cannot be accepted. On the merits also, the view taken by us is in consonance with the observations made by the Apex Court wherein it has been held that the delimitation of constituencies and also preparation of electoral rolls will have to be done on the basis of the figures available from the last census. The same principle has to be applied for reservation of seats for Scheduled Castes and Backward Classes. It has been observed in paragraph 33 of the judgment that the next census is due to be conducted in the year 2001 and reservation of seats of backward classes which is mandatory under Article 243T of the Constitution, can be done by making survey and this will not mean that the figures available from the last census were to be discarded. In fact section 7 of the Act clearly provides that if the figures of backward classes are not available, their population shall be determined by taking out survey in the manner prescribed by rules.

10. The writ petition was filed in office on October 13, 2000 and till then the objections filed by the petitioner no. 1 on the draft of the order issued by the State Government under sub-section (2) of section 32 of the Act had not been decided. The writ petition was heard for admission on October 18,2000 when the State counsel was directed to obtain instructions whether the objections had been decided and the hearing was adjourned to October 20,2000. On the said date learned Chief Standing counsel made a statement that the objections had been decided by the State Government and consequently a direction was issued to supply copy of the order to the writ petitioners. The petitioners thereafter filed copy of the order passed by the State Government along with a supplementary affidavit and also moved an application praying that the said order be quashed and a direction be issued to the respondents to redetermine the delimitation of wards and reservation of seats for the ensuing election and not to hold the election of the Municipal Corporations unless the said exercise was done. Learned counsel has submitted that the order passed by the State Government is a non-speaking order which gives no reason and, therefore, the same deserves to be quashed. We have carefully gone through the order under challenge and we are unable to hold that the same is a non- speaking order. The order makes reference to the objection filed by petitioner no.1 Ratan Kumar Dixit, the grounds taken in the objection and the reasons for rejecting the same. The principal reason given therein is that in view of the constitutional provisions contained in Article 243P(g) 'population' would mean the population as ascertained at the last preceding census of which the relevant figures have been published and after taking note of section 2(53-A) of the Act it has been held that as the last survey had been done in the year 1991 and the figures of the said survey alone are available, the same had been taken into consideration. Besides that the figures obtained in the rapid survey done in the year 1994 were also considered. It has also been held that the delimitation and reservation of seats had been done in accordance with U.P. Municipal Corporations Adhiniyam, 1959 and U.P. Municipalities (Reservation and Allotment of seats and office) Rules, 1994, as amended from time to time reading of the order of the State Government clearly shows that the concerned authority has applied his mind

to the contention raised in the objection filed by petitioner no.1 and has thereafter passed the order after taking into consideration the relevant factors and also the constitutional and statutory provision governing the controversy in issue. Thus, the submission of the learned counsel that the order of the State Government dated 15th October, 2000 is a non speaking and arbitrary order, cannot be accepted.

11. It may be mentioned here that in State of U.P. and others vs. Pradhan Sangh Kshettra Samiti and others (AIR 1995 SC 1512) the apex Court while considering a similar question relating to delimitation and reservation for the purpose of holding election in the Panchayats, observed as follows:

"….If we read Articles 243-C, 243-K and 243-O in place of Article 327 and section 2(kk) of the Delimitatiation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said area and the allotments of seats to the constituencies could have been challenged or the Court could have entertained such challenge except on the ground that before the delimitation no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued…."

12. It is not the case of the petitioners that no objections were invited or they were not given any opportunity to file objection. The draft order was published by the State Government in accordance with sub-section (2) of section 32 of the Act and the petitioners were given opportunity to file objections. Thus the ground on which an order of delimitation and reservation of constituencies can be challenged, as observed by the Apex Court, is not available to the petitioners.

13. Sri Jain has also submitted that the impugned order dated October 15, 2000 of the State Government has been antedated and in fact it was not in existence till as late as October 22, 2000. This question is purely factual in nature. We have gone through the averments made in the supplementary affidavit and have also heard the learned Chief Standing Counsel on this point. On the basis of material placed before us it is not possible to hold that the impugned order dated October 15, 2000, deciding the objection filed by petitioner no. 1, has been antedated or that the same was not in existence till October 22, 2000.

14. For the reasons mentioned above, we find no merit in the writ petition and is hereby dismissed at the admission stage.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: 11.10.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE KRISHNA KUMAR, J.

First Appeal No. 392 of 1991

Indian Oil Corporation Ltd. ...Appellant
Versus
M/s Vidyawati Construction Company Ltd. ...Respondent

Counsel for the Appellant:
Sri Rudrashwari Prasad
Sri R.G. Padia
Counsel for the Respondent:
Sri Pradeep Kumar

Sri S.K. Garg
Sri Ravi Kant

Arbitration Act, 1940, Ss. 39 and 20 as amended by U.P. Civil Laws Amendment Act, 1976- Appeal against order directing appellant to file agreement and submit a penal of arbitrators- Maintainability.

Held-

After substitution of clause (4) by Amending Act, 1976 the appeal is maintainable only against an order making or refusing to make reference by the Court.

The Court by the impugned order dated 31.5.1991 has only directed the appellant to file the agreement and submit a penal of the Arbitrators. This is not an order making a reference to the Arbitrator hence the appeal is not maintainable and is, accordingly, dismissed. (Paras 5 and 6)

Cases referred.
AIR 1970 All. 31
1978 AWC 702

By the Court

1. This appeal is directed against the order dated 31.5.1991 passed by the Additional District Judge, Varanasi directing the appellant to furnish the original agreement and submit a panel of Arbitrators to choose an Arbitrator by the plaintiff-respondent to decide the dispute.

2. Briefly, stated the facts, are that the Indian Oil Corporation Ltd. invited the tenders for construction of office building, road etc. for LPG bottling plant at Varanasi near Babatpur. M/s Vidyawati Construction Company Ltd.- respondent submitted its tender, which was accepted by the appellant. The respondent is alleged to have sent the agreement to the appellant which was countersigned by it. The respondent started construction work and some of the work was completed.

3. The respondent alleged that the appellant did not provide the requisite drawings and details of the construction within the time as stipulated under the agreement with the result respondent had to suffer losses. The agreement contained arbitration clause. In pursuance to the said arbitration clause, respondent filed an application before the Court below for making reference to the Arbitrator under section 20 of the Arbitration Act. The appellant filed written statement and took various pleas opposing the appointment of the Arbitrator. On 31.5.1991 the Court directed the appellant to file the original agreement and to submit the names of the panel of Arbitrators to choose an Arbitrator by the respondent. The appellant has filed the instant appeal against this order.

4. The basic question is whether the appeal is maintainable against such an order after the amendment in Section 39 (4) of the Arbitration Act by U.P. Civil Laws (Reforms and Amendment) Act No. 57 of 1976 w.e.f. 30.12.1976 (in short 1976 Act). Section 18 of this Act amended sub-section (I) (iii) (iv) of Section 20 and clause (4) of Section 39 of the Arbitration Act, 1940. Sub-section (2) to (4) of Section 20 of the Act lays down the procedure to be followed by the Court when a party files an application for appointment of an Arbitrator. After the amendment of the provisions of this Act by 1976 Act, the Court is to refer the matter to an Arbitrator. Under Sub-section (3) of Section 20 of the Act prior to the amendment, the notice is to be given to the opposite party to show cause' why the agreement should not be filed" but after

the amendment the notice is given to show cause ' why a reference in accordance with the agreement should not be made'. In sub-section (4) of Section 20 of the Act by amendment the words added are," the Court shall make an order of reference to the Arbitrator appointed by the parties.'

5. Section 39 of the Arbitration Act, 1940 enumerates the appealable order which are covered by clauses (I) to (vi) of the Section. Unamended clause (iv) of sub-section (1) of Section 39 provided for filing appeal against the order 'filing or refusing to file an arbitration agreement'. This has been amended by 1976 Amendment Act and has been substituted by the words under section 20 by the words ' making or refusing to make a reference'. The appeal against the order of the Court directing to file the agreement or refusing to file the agreement was appealable as held in Fertilizer Corporation of India Ltd. Vs. M/s Domestic Engineering Installation, AIR 1970 Alld 31. After substitution of clause (4) by Amending Act, 1976 the appeal is maintainable only against an order making or refusing to make reference by the Court. This question was considered by a Division Bench of this Court in State of UP Vs. The Hindustan Construction Company Limited, Bombay, 1978 AWC 702 where the Court below had allowed the application filed by the plaintiff under section 20 of the Arbitration Act and directed both the parties to intimate the names of two Arbitrators, one to be nominated by each one of them and the Arbitrators so nominated, should select an Umpire, this Court held that after the Amending Act, 1976, the appeal was not maintainable as the Court had not made any reference to any Arbitrator. The reference can be made to the Arbitrator only after the Arbitrator is appointed by the Court

6. The Court by the impugned order dated 31.5.1991 has only directed the appellant to file the agreement and submit a panel of the Arbitrators. This is not an order making a reference to the Arbitrator hence the appeal is not maintainable and is, accordingly dismissed.

.....

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD, OCTOBER 13, 2000

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

Civil Misc. Writ Petition No.30267 of 1996

U.P. Financial Corporation & another ...Petitioners.
Versus
Neelam Sharma & others...Respondents.

Counsel for the Petitioners :
Shri V.B. Singh
Shri Chandra Prakash

Counsel for the Respondents:
Shri Krishna Mishra
Km. Suman Sirohi
S.C.

U.P. Industrial Dispute Act, 1947- Industry- Whether the U.P. Financial Corporation is within the meaning of Industry? Held 'Yes"

Held - Para 3

In Colr Board Ernakulsm, Kerala State Vs. Indira Deval the view taken by the Seven Judge Bench in Bangalore Water Supply and Sewerage Board (supra) has been reiterated and it has been held that there is no need for reference to a larger Bench. In Samistha Dubey Vs. City

Board, Etawah and another a Typist/Clerk in the administrative office of a Nagar Palika in U.P. was held to be a workman to whom the provisions of the U.P. Public (Tribunal) Act, 1976 would not apply. It is, therefore, not necessary to dilate much on this point which is concluded against the petitioners by pronouncements of the Supreme Court. I am inclined to the view that the petitioner Corporation is an 'industry' and the petitioner comes within the purview of 'workman' as defined in Section 2(2) of the State Act.

Case Law discussed

AIR 1978 SC 548
2000 (1) SCC-224
(1999) 3 SCC-14
(1989) 2 UPLBEC 144
(2000) 85 FLR 879
1995 (1) LLJ 262
1994 (69) FLR 297
1995-I-LLJ 750(All)
AIR 1992 SC 2070
1995(70) FLR 20
W.P.No.1910 of 1981(Lkw)
1994 (68) FLR 610
AIR 1928 Law 162
AIR 1967 A.P. 353
(1963) 2 S.C.R. 226
AIR 1996 SC 1001.

By the Court

1. This writ petition has been instituted by the employer against the award dated 19.7.1996 rendered by the Labour Court (IVth) U.P., Sarvoday Nagar, Kanpur in Adjudication Case No. 296 of 1955 in favour of the respondent no.2, Km. Neelam Sharma. The dispute referred to the Labour Court for adjudication under section 4-K of the U.P. Industrial Disputes Act (hereinafter referred to as the State Act) was as to whether the employers were justified in precluding Km. Neelam Sharma from, doing her duties as Steno/Typist w.e.f. 23.7.1994 and if not what relief/compensation was she entitled to get and with effect from which date.

2. On the facts found by the Labour Court and submissions made across the Bar, the questions that have come to the fore for consideration by this Court are three fold: firstly, whether respondent Km. Neelam Sharma came within the purview of 'workman' as defined in Section 2(z) of the State Act; secondly, whether termination of service by efflux of time would amount to 'retrenchment' as defined in Section 2(s) of the State Act; and thirdly, whether definition of the term 'retrenchment' as given in Section 2(oo) of the Industrial Disputes Act, 1947 (in short the Central Act), will prevail over the definition of the term as given in Section 2(s) of the State Act.

In re - the first question :

3. It has been contended by Sri V.B. Singh, Senior Advocate appearing for the petitioners that the U.P. Financial Corporation is not an 'industry' within the meaning of Section 2(k) of the State Act and; that the employees of the Corporation are 'public servants' within the meaning of Section 2(b) of the U.P. Public Services (Tribunal) Act, 1976 and, therefore, reference under Section 4-k of the State Act and was not maintainable and the Labour Court had no jurisdiction to entertain the dispute which fell within the exclusive jurisdiction of U.P. Public Services Tribunal under Section 4 of the U.P. Public Services Tribunal Act, 1976. Sri V.B. Singh placed reliance on certain judgments of the Supreme Court in which correctness of the seven Judge Bench decision of the Supreme Court in Banglore Water Supply & Sewerage

Board Vs. A. Rajappa[1] had been doubted and matter referred to larger Bench for consideration. The submission made by Sri V.B. Singh has no merits and, it seems, was advanced but to be rejected. In Colr Board Ernakulam, Kerala State Vs. Indira Deval[2] the view taken by the Seven Judge Bench in Bangalore Water Supply and Sewerage Board (Supra) has been reiterated and it has been held that there is no need for reference to a larger Bench. In Samistha Dubey Vs. City Board, Etawah and another[3] a Typist/Clerk in the administrative office of a Nagar Palika in U.P. was held to be a 'workman' to whom the provisions of the U.P. Public (Tribunal) Act, 1976 would not apply. It is, therefore, not necessary to dilate much on this point which is concluded against the petitioners by pronouncements of the Supreme Court. I am inclined to the view that the petitioner Corporation is an 'industry' and the petitioner comes within the purview of 'workman' as defined in Section 2(z) of the State Act.

In re - questions 2 & 3

4. The next contention of Sri V.B. Singh pertains to questions two and three formulated in the beginning of this judgment. It has been contended by Sri V.B. Singh that the respondent Km. Neelam Sharma was engaged as Steno/Typist from time to time for specified duration's and the last of such engagements came to an end by efflux of time on 6.7.1994 i.e., her engagement automatically came to an end by efflux of time on 6.7.1994. Such determination of engagement, proceeds the submission, does not come within the purview of 'retrenchment' in view of clause (bb)of Section 2(oo) of the Central Act which will prevail over Section 2(s) of the State Act and therefore compliance of Section 6-N of the State Act was not necessary. Shri K.P. Agarwal learned counsel appearing for the respondent, on the other hand, submits that Section 2(oo) (bb) of the Central Act has no application to the State of U.P. in view of Section 6-R of the State Act. The term 'retrenchment' as defined in Section 2(s) of the State Act is, according to Sri Agarwal, of wide amplitude encompassing within its sweep all types of termination of services of a workman for 'any reason whatsoever' otherwise than as punishment barring terminations due to reasons mentioned in the exclusionary clauses (i) and (ii).

Section 2 (s) of the State Act reads as under:

"(s) 'Retrenchment' means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as punishment inflicted by way of disciplinary action but does not include :
(i) Voluntary retirement of the workmen; or
(ii) Retirement of the workmen on reaching the age of supernnuation if the contract of employment between the employer and workman concerned contains a stipulation in that behalf."

But for the exclusionary clauses (i) and (ii), termination of the service of a workman even on the basis of voluntary retirement or retirement on reaching the age of superannuation would have come within the purview of 'retrenchment'. So

[1] AIR 1978 S.C. 548
[2] (2000) 1 S.C.C. 224
[3] (1999) 3 S.C.C. 14

far as the Central Act is concerned, the definition of the word 'retrenchment' in Section 2(oo) is identically worded except that it contains two more exceptions those contained in the State Act. In fact it contained three exclusionary clauses prior to its amendment by Act No.49 of 1984. These exclusionary clauses were : (a) voluntary retirement, (b) retirement on reaching the age of superannuation; and (c) termination of service on the ground of continued ill health. By Act No.49 of 1984, clause (bb) was added to the exclusionary clauses aforesaid. Clause (bb) of Section 2(oo) of the Central Act reads as under:

"(i) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry.
(ii) such contract being terminated under a stipulation in that behalf contained in contract of employment".

It cannot be gainsaid that but for clause (bb), termination of service of a workman as a result of non-renewal of the contract of employment between the employer and the workman concerned on its expiry would have come within the purview of 'retrenchment' notwithstanding the contract of employment being terminated under a stipulation in that behalf contained in the contract of employment itself. The question is whether the restricted meaning given to the word 'retrenchment' by Section 2(oo) of the Central Act, as it stands amended by Act No. 49 of 1984 is applicable to the State of U.P. This Court has expressed divergent opinions on this issue. A Division Bench of this Court in Jai Kishun and others Vs. U.P. Co-operative Bank Limited, Lucknow and others[4] has held as under :

"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 U.P., in the matters relating to rights and liabilities of employees and workmen, in a case of retrenchment, Section 6-N of the U.P. Act will be applicable.

And further :

"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 word 'retrenchment' as given in the U.P. Act will be applicable……."

Relying upon the said decision, a learned Single Judge, in U.P. State Sugar Corporation Limited Vs. Presiding Officer, Labour Court, Gorakhpur and another[5], has held that Section 2(oo) of the Central Act does not apply in respect of the proceeding under the State Act.

In Laxmi Raj Singh and another Vs. State of U.P. and others[6], I had an occasion to examine the question. It has been held therein that although the term 'retrenchment' as defined in Section 2(s) of State Act is of wide amplitude and comprehends even an automatic

[4] (1989) 2 U.P.L.B.E.C. 144
[5] 2000 (85) F.L.R. 879
[6] 1995(1) L.L.J. 262

termination of service in terms of contract of service but 'retrenchment' as defined in clause Section 2(bb) of Section 2(oo) of the Central Act, as it stands amended by Industrial Disputes (Amendment) Act, 1984 excludes termination of service of a workman as a result of non-renewal of contract of employment. The definition of the 'retrenchment' as given in the Central Act as it stands amended by the Act No.49 of 1984 , it was held therein would prevail over the definition of the term 'retrenchment' as given in Section 2(s) of the U.P. Industrial Disputes Act, 1947 by virtue of Article 254 of the Constitution of India inasmuch as the definition of 'retrenchment' as given in Section 2(s) of the U.P. Industrial Disputes Act, 1947 has now become repugnant to the definition of the term as given in Central Act in view of its amendment by virtue of Act No. 49 of 1984 and therefore to the extent of repugnancy, the Central Legislation would prevail over the State Legislation by virtue of Article 254 (1) of the Constitution. Similar was the view taken by me in Akhilesh Kumar Vs. Director of Training and Employment, Lucknw and others[7]. In Arvind Kumar vs. Deputy Director (Admn) , Rajkiya Krishi Utpadan Mandi Samiti[8] , a Division Bench of this Court expressed the same view. Reliance in that case was placed by the Division Bench on a decision of the Supreme Court in Director, Institution of Management Development U.P. vs. Smt. Pushpa Srivastava[9] wherein it has been held that where appointment is purely on ad-hoc basis and comes to an end by efflux of time on the basis of contract of employment, the person holding such post can have no right to continue on such post even if such post person has continued from time to time on ad-hoc basis for more than a year. In Smt. Pushpa Agarwal vs. Regional Inspectress of Girls School, Meerut and another [10] , another Division Bench of this Court has laid down that :

"A Full Bench Decision of this Court in the case of M/s. Hindustan Sugar Mills Limited vs. State of U.P.[11] has laid down that both the State and Central Act deal with the matter enumerated in the concurrent list of the 7th Schedule of the Constitution and, as such, in view of the provisions of 'Article 254 of the Constitution of India, if amendment in Central Act has been made after the law was enacted by the State, it will prevail over the State Act, with the result that the State law to the extent of inconsistency has to give way to permit the newly added provision in the Central Act to govern the situation. Therefore, clause (bb) of Section 2 (oo) of Central Act will be applicable to every case whenever the question of validity of termination of service is raised on the ground of non-compliance of Section 6-N of the U.P. Act. This being the position, termination of service of the appellant cannot be said to be a case of 'retrenchment' as it falls in one of the exceptions, laid down in clause (bb) of Section 2 (oo) of the Central Act."

Another Division Bench in Life Insurance Corporation and another vs. Rajeev Kumar Srivastava[12] has also held that, termination of service as a result of non-renewal of contract would not come under the definition of retrenchment in

[7] 1994 (69) FLR 297
[8] 1995-I-L.L.J. 750 Alld.
[9] AIR 1992 SC 2070
[10] 1995 (70) F.L.R. 20
[11] W.P.No.1910 of 1981 - LKO
[12] 1994 (68) F.L.R. 610

view of Section 2(oo) (bb) of the Central Act. Jai Kishun, does not hold the field in view of the Full Bench decision. However, it brooks no dispute that exceptions contained clauses (i) and (ii) of Section 2(s) of the State Act and those contemplated by clauses (a),(b),(bb) and (c) of Section 2(oo) of the Central Act being exceptions to the general rule, must be construed most strongly against the party for whose benefit they are Introduced[13] In other words these exceptions must be construed strictly against the employer. The principle in this regard has been stated by Craw Ford in his Statutory Constructions as under:

"unlike that of the proviso, however, it is apparent that the position of the exception in the statute is unimportant. But the exception is also subject to the rule of strict construction; that is any doubt will be resolved in favour of the general provision and against the exception, and anyone claiming to be relieved from the statue's operation must establish that he comes within the exception, Indeed, the liberal construction of a statute would, in many instances, seem to require that the exception, by which operation of the statute is limited or abridged, should receive a restricted construction. Where, however, criminal or penal statute is involved, the exception must receive a liberal construction in favour of the defendant, Similarly, an exception appearing in a statute which imposes a burden on the public must also be given a liberation construction in favour of the public".

General rule is that termination of service of workman for any reason whatsoever otherwise than by way of punishment is 'retrenchment' unless it is covered by any of the exceptions. Exception, it brooks no dispute cannot be so interpreted as to nullify or destroy the main provision[14] or swallow the general rule[15]. It would thus appear that the employer in order to get benefit of clause (bb) of Section 2 (oo) of the Central Act must establish that the contract of employment which visualises its termination in the event of non-renewal, is bonafide and the stipulation as to termination of service by efflux of time is not a device to circumvent the main provision and is not born of unfair labour practice. The circumstances and exigencies of administration, if any, necessitating such contractual appointment visualising termination of service in the event of non-renewal must be pleaded and proved by credible evidence. Otherwise any such stipulation in the contract of employment would be liable to be ignored in the eyes of law. In the instant case, Km. Neelam Sharma was initially appointed apprentice on 12.9.1988 for three months and thereafter she was appointed against a regular post of Steno/Typist on 12.12.1988 and she worked upto 22.7.1994 on the basis of contract appointment issued from time to time for three months. The Labour Court has recorded a categorical finding that Km. Neelam Sharma was engaged for a work of permanent nature and her appointment for stipulated period was not 'bonafide'. The circumstances and

[13] E.I. Rly. Vs. Jot Ram Chandra Bhan. AIR 1928 Lahore 162

[14] Desu Rayudu Vs. Andhra Pradesh Public Service Commission, AIR 1967 A.P.353

[15] Sree R.S. Swamiji vs. State of Mysore and others, (1963) 2 S.C.R.226.

exigencies of administration in which the respondent was given appointment for specified duration despite the fact that the work for which she was engaged was of permanent nature, were not disclosed and the employer, it has been held, has acted in arbitrary manner in giving appointment to the respondent, Km. Neelam Sharma, for a specified duration with a view to depriving her of statutory benefits. The conduct of the employer has been equated to 'unfair labour practice. In such view of the matter even if Jai Kishun (Supra) be taken to laying down correct law that termination of service of a workman by efflux of time does not amount to 'retrenchment' in the State of U.P., the petitioners would not get the benefit of clause (bb) of Section 2 (oo) of the Central Act. I am of the considered view that the Labour Courts/Industrial Tribunals can lift the veil and find out the real nature of appointment despite the fact that appointment of a workman purports to be of a specified duration and in case it is found that the power under clause (bb) of Section 2(oo) of the Central Act has been misused and appointment for a job of permanent nature is given the colour of fixed term appointment with a view to circumventing the provisions contained in Section 6-N of the State Act or Section 25-F of the Central Act or any other material provisions of the Industrial Law beneficial to the workman, then benefit of clause (bb) of Section 2(oo) of the Central Act will not be given to the employer. The view I am taking finds support from a decision of the Supreme Court in state of Rajasthan and others Vs. Rameshwar Lal Gahlot[16]. It has been held therein that, "when the appointment is for a fixed period, unless there is finding that power under clause (bb) of Section 2(oo) was misused or vitiated by its malafide exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the service in terms of the letter of appointment unless it is a colourable exercise of power. It must be established in each case that the power was misused by the management or the appointment for a fixed period was a colourable exercise of power ." (Emphasis supplied).

If the exception carved out in the above case of State of Rajasthan (Supra) is applied to the facts of the present case as found by the Labour Court, termination of the service of Km. Neelam Sharma would come within the purview of 'retrenchment' notwithstanding the provisions of clause (bb) of (oo) of Section 2 of the Central Act for the application of clause (bb) of Section 2 (oo) to the facts of the present case would be nothing but a fraud on the statute. A construction placed upon the exception clause (bb) of Section 2(oo) of the Central Act that brings it into general harmony with the enacting clause, should prevail over the one which tends to nullify or destroy the main provision or swallow up the general rule.

In the result, the petition fails and is dismissed. The parties are, however, directed to bear their own costs.

---

[16] AIR 1996 SC 1001

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12TH OCTOBER, 2000

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

Civil Misc. Writ Petition No. 25831 of 1992

Vaishnav Talkies, Budhnapur, Azamgarh ...Petitioner
Versus
State of U.P. & others ...Opp. Parties

Counsel for the Petitioner:
Shri Govind Krishna

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

U.P. Cinamatograph Rules 1951, Rule 3(3) Grant in Aid Scheme- entire formalities completed- provisional permission already granted- condition imposed by the authorities held totally uncalled for.

Held- Para 9

In view of the foregoing discussions we hold that the District Entertainment Officer, Respondent no. 3 was not justified in imposing the condition of not giving the benefit of grant in aid scheme while issuing the letter dated 6th July, 1992 and the said condition is hereby quashed. The violation of Rule 3(3) is compoundable and the composition fee leviable is Rs.50,000/- under Rule 44 of the Rules. The Petitioner has already been granted a provisional licence for exhibiting the cinematograph film under the grant in aid scheme on 18th July,1989. Therefore, it will be subject to the orders which may be passed by the State Government for granting exemption for violation of Rule 3(3) of the Rules.

By the Court

1. The petitioner Vaishnav Talkies, Budhnapur Azamgarh, through its partner Shri Subedar Singh has filed the present petition seeking a writ of certiorari quashing the order dated 6th July, 1992 passed by the District Entertainment Tax Officer respondent no.3 on behalf of the District Magistrate, Azamgarh filed as Annexure 22 to the writ petition and also a writ of mandamus commanding the respondents to grant the licence to the petitioner under the grant-inaid scheme dated 18th July, 1989 and to grant the facilities under the said grant in aid scheme.

The petitioner claims itself to be a newly constructed cinema hall. According to the petitioner, on 20th July, 1991 the petitioner submitted an application seeking permission for the construction of a permanent cinema building under Rule 3 of U.P. Cinematograph Rules 1951, hereinafter referred to as the Rules, before the District Magistrate, Azamgarh respondent no. 2. The Respondent no. 2 asked for reports from the various authorities i.e. S.D.O. Budhnapur, Tehsildar Budnapur, Superintendent of Police, Azamgarh, Executive Engineer P.W.D. Temporary Division, Azamgarh, and Entertainment Tax Officer, Azamgarh all of whom submitted their reports. The petitioner has set up a case that the A.D.M. (Administration) who was at the relevant time Officer Incharge of Entertainment Tax himself made a spot inspection and after being duty satisfied vide order dated 24th September, 1991 had asked the respondent no. 2 for the counter signing on the site plan and also strongly recommended for grant of permission for raising the construction of the new cinema

hall on the proposed land of the petitioner. According to the grounds taken by the petitioner in this petition it was under a bonafide impression that the permission for raising the construction has been granted by the A.D.M. (Admn.) who was the Officer Incharge on behalf of the Licensing authority and started construction of the permanent cinema hall. The petitioner vide letter dated 30th September, 1991 informed the respondent no.2 about the start of construction of the cinema building. After having constructed the cinema building, the petitioner made an application for grant of licence on 6.4.1992 before respondent no.2 i.e. the licensing authority on which the respondent no. 2 called for reports from the concerned authorities.

2. It appears that since no formal permission under Rule 3(3) of the Rules had been granted to the petitioner by the District Magistrate/Licensing Authority, the District Entertainment Tax Officer on behalf of the District Magistrate/ Licensing Authority Azamgarh informed the petitioner vide letter/ order dated 6.4.1992 that the petitioner would not be entitled for the benefit of grant in aid scheme under the G.O. dated 18th July, 1989. The petitioner was further informed that further action on the application for grant of licence can be taken if the petitioner is prepared to take a licence without grant in aid. The letter/order dated 6th July, 1992 is under challenge in the present petition.

We have heard Shri Govind Krishna, learned counsel for the petitioner and Shri C.S. Singh, learned standing counsel who represented all the respondents.

3. The learned counsel for the petitioner submitted that the petitioner fulfilled all the requirements for grant of permission under Rule 3(3) of the Rules for construction of permanent cinema building and was under bonafide impression that the Addl. District Magistrate (Admn.)/Executive who had recommended for the counter signing of the site plan and for giving permission for construction of the Cinema building according to the site plan had in fact granted permission to the petitioner to start construction of the cinema building and therefore the condition in the impugned letter/order dated 6th July, 1992 that Rule 3(3) of the Rules have been violated is not correct. He further submitted that in the present case since all the formalities have been completed, the grant of permission for starting construction of a permanent cinema building in terms of Rule 3(3) was only a mere formality which could not adversely affect the grant of licence under the grant in aid scheme to the petitioner Shri Govind Krishna further invited the attention of the Court to the G.O. dated 27th August, 1998, copy of which has been filed as Annexure 1 to the supplementary affidavit of Shri Subedar Singh sworn on 14th November, 1999, in which the State Government has taken a decision that where the cinema owners have started construction of the cinema building after making an application to the licensing authority and there was a delay in grant of permission, the benefit of grant in aid scheme should be given after imposing the compounding fee and he therefore submitted that in view of the G.O. dated 27th August, 1998, at best the petitioner is liable to pay compounding fee for the violation of Rule 3(3) of the

Rules, but the benefit of grant in aid scheme cannot be denied.

4. Shri C.S. Singh, learned standing counsel on the other hand submitted that admittedly in the present case the licensing authority had not given the permission as required under Rule 3(3) of the Rules and therefore the construction made by the petitioner would be treated as violative of Rule 3(3) of the Rules. In this view of the matter the benefit of grant in aid scheme cannot be given to the petitioner as the same has been specifically excluded under Clause 4 of G.O. dated 18th July, 1989. In support of the aforesaid plea the learned standing counsel relied upon a decision of this Court in Civil Misc. Writ Petition No.83 of 1996, Chhanga Prasad Sahu and another Versus State of U.P. and others decided on 8th May, 1996 wherein this Court has held as follows:-

"As far as licence is concerned, no doubt, licence cannot be refused and that is why the order be passed for compounding the same. But for granting permission in paying entertainment tax, observance of Rule 3 of the Rules is a condition precedent as given vide clause 3 in G.O. dated 18.7.1989 (Annexure-2). Since the petitioner has not complied with and the authorities have reached to the conclusion that it has not been complied with, therefore, the petitioner is not entitled to seek any concession under the government Order dated 18.7.1989 (Annexure-2)."

5. The learned standing counsel further relied upon a decision of this Court in the case of Shitla Prasad Dubey and another Versus State of U.P. and others reported in A.I.R. 1999 Allahabad page 260 and submitted that non payment of composition charge is a valid ground for not granting the licence and certificate under Rule 3(3). He further submitted in paragraph 31 of the reports, this Court had held that the benefit of the subsequent clarification of the grant in aid scheme can be given even where there is no violation of Rule 3(3), but this can be done only if the composition charge was paid before 31.3.1999 which has not been done in the present case.

6. Having heard the learned counsel for the parties we find that it is not in dispute that the petitioner had made an application for grant of permission to construct permanent cinema building as far back as on 20.7.1991 in accordance with Rule 3 of the Rules. The licensing authority had asked for reports from the various authorities on the said application which was also submitted. The Additional District Magistrate had also recommended for the counter signing of the site plan as also for permission to start construction of the permanent cinema building vide recommendation made on 24.9.91. Only thereafter the petitioner had started construction of the permanent cinema building and had applied for grant of licence to exhibit the cinematograph films on 6.4.1992. No doubt a formal order/permission under Rule 3(30 of the Rules has not been passed/granted by the Licensing authority and the petitioner has completed the construction of the cinema building without there being any order under Rule 3(3) of the Rules. Under section 10 of the U.P. Cinema (Regulation) Act 1055 hereinafter referred to as the Act. The State Government has been empowered to grant exemption subject to such condition and restrictions as it may impose from any of the

provisions of this Act or any Rules made thereunder. Under Rule 44 of the Rules the composition charge prescribed for granting exemption as per Rule 3(3) is Rs.50,000/-. The respondent no.3 while passing the impugned order on 6th July, 1992 had found the violation of Rule 3(3) of the Rules. This Court while entertaining the writ petition on 29th July, 1992 had issued an interim mandamus in the following terms :-

"The standing counsel prays for and is granted six weeks time to file C.A., R.A., if any, shall be filed within two weeks thereafter. List for admission on 30th August, 1992.

Let an interim mandamus go to the respondent No.2 to grant licence to the petitioner for exhibiting films under the Grant-in-aid scheme dated 18.7.1989 during the pendency of the writ petition within a period of six weeks or show cause by filing counter affidavit within one month. List on 30.8.1992.

Sd./- M.L. Bhatt, J.
Sd./- R.B. Mehrotra, J.
29.7.1992.

The writ petition was admitted on 9th November, 1992 when the Court had further passed the following interim order on 9.11.1992 which is quoted below:-

"Issue notice.
The respondents are directed to issue provisional licence to the petitioner under the grant-in-aid scheme dated 18.7.1989.

Sd./- A. Singh, J.
Sd/- D.P.S. Chauhan, J.
9.11.1992

7. The stay matter came up for consideration before the Court on 2nd December, 1996 when the Court had confirmed the interim order dated 9.11.1992 alongwith the order dated 12.1.1993. The order dated 2nd December, 1996 is reproduced below:-

"In this writ petition an interim order was passed on 9.11.1992 after the counter-affidavit was filed by the respondents in September,1992 and after hearing the learned counsel for both the sides. At this stage nothing has been shown on behalf of the respondents as to why the said interim order is not to continue. In that view of the matter, the interim order dated 9.11.92 alongwith the order dated 12.1.93 is hereby confirmed.

Sd/- A. Chakraborti
2.12.96"

It appears that the petitioner have been granted a provisional licence under the grant in aid scheme dated 18.7.1989 and has been exhibiting cinematograph films.

8. The learned standing counsel has not denied the issuance of the G.O. dated 27th August, 1998 in which benefit of grant in aid scheme has been allowed to these cinema owners who have constructed the permanent cinema building after making application under Rule 3 of the Rules but without there being any order under Rule 3(3) of the Rules which violation is compoundable. Thus the petitioner is entitled for the benefit of grant in aid scheme as he had already made an application under Rule 3 for permission to construct the cinema building before starting construction. The decision of this Court in the case of Chhanga Sahu (supra) would not be

applicable to the facts of the present case in view of the subsequent G.O. dated 27th August, 1998 which has in effect modified the rigours of clause 4 of G.O. dated 18th July, 1989. So far as the decisions in the case of Shitla Prasad Dubey (supra) is concerned it will also not apply to the facts of the present case in as much as the State Government is yet to pass an order levying composition fee for violation of Rule 3(3) of the Rules.

9. In view of the foregoing discussions we hold that the District Entertainment Officer, Respondent no.3 was not justified in imposing the condition of not giving the benefit of grant in aid scheme while issuing the letter dated 6th July,1992 and the said condition is hereby quashed. The violation of Rule 3(3) is compoundable and the composition fee livable is Rs.50,000/- under Rule 44 of the Rules. The petitioner has already been granted a provisional licenc for exhibiting the cinematograph film under the grant in aid scheme on 18th July, 1989. Therefore, It will be subject to the orders which may be passed by the State Government for granting exemption for violation of Rule 3(3) of the Rules.

In the result the writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2000

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

Civil Misc. Writ Petition No. 29879 of 1992

Committee of Management
& another ...Petitioner
Versus
Joint Director of Education & another
...Opposite Parties

Counsel for the Petitioners:
Shri Rajiv Misra
Shri Ram Prakash Misra
Shri R.C. Srivastava

Counsel for the Respondents:
Shri V.N. Agarwal
Shri Sanjay Kumar
S.C.

U.P. Secondary Services Commission and Selection Boards Act 1982- Section 21- Suspension of Principal- Management passed the order of suspension- send for approval to RIGS- approval granted on 7.5.85 while the provisions of Section 21 came into existence 1.4.81- only the commission was empowered- held – approval granted by the RIGS without jurisdiction.

Held – Para 4

It is necessary to mention that Uttar Pradesh Secondary Services Commission and Selection Boards Act, 1982 came into force on 14.7.1981 except section 21 which was to come into force on the date to be notified by the government, Section 21 was similar to section 16- of the act. It came into force on 1.4.1981. The effect of notification dated 27.12.1983 was that the RIGS ceased to have jurisdiction to grant approval to resolution of termination. The RIGS granted approval on 7.5.85 to the

resolution dated 30.4.81 sent by the management terminating the service of the respondent no. 2 on 7.5.85 the jurisdiction of approval vested in the commission. The RIGS did not have any power on 7.5.85 to grant approval to the resolution of the petitioner. The approval granted by RIGS was without jurisdiction.

By the Court

1. Km. Avinash Gupta/respondent no.2 was appointed as Principal on 25.3.1975 on probation of one year in Vaidya Bhagwan Din Balika Vidyalaya Higher Secondary School, Nanpara, District Bahraich (in brief institution). She was suspended on 6.2.77, 4.4.77 and 11.7.77 but these suspension orders were not approved by the Regional Inspectress of Girls School (in brief RIGS) She was again suspended on 16.4.81. This order was approved by RIGS. The charge sheet was issued to her on 17.2.81. It was replied on 23.3.81. The petitioner passed a resolution on 30.4.81 for terminating the services of respondent no.2. This resolution was sent to RIGS for approval, as provided by section 16-G (3) of the U.P. Intermediate Education Act 1921 (in brief the act). It remained pending with the RIGS for about four years. The approval was granted on 7th May, 1985. The respondent no.2 filed an appeal before the Joint Director of Education. This appeal was allowed on 18.7.87. The appellate order was challenged by petitioners by way of civil misc. writ petition no. 5562 of 1987 which was allowed on 16.7.91. with direction to the Joint Director of Education to decide the appeal afresh, in accordance with law after giving an opportunity of hearing to both the management and the principal, The Joint Director of Education again allowed the appeal on 10.7.1992 and set aside the order dated 7.5.85 granting approval. He held that RIGS had no power of approval on 7.5.85 as under the U.P. Secondary Education Service Selection Boards Acts, 1982 the power vested in the commission/board. It is this order, which has been challenged by the petitioners in this writ petition.

2. Sri Rajiv Misra, learned counsel for the petitioner has urged that RIGS had power to grant approval to the resolution of the management terminating the service of the petitioner. He placed reliance on Section 3 of the Uttar Pradesh Secondary Education Service Commission and Selection Board (Amendment) Act, 1985 by which proviso was inserted in Section 21 of the Uttar Pradesh Secondary Services Commission and Selection Boards Act 1982. The learned counsel has urged that the Joint Director of Education has not complied with the direction in writ petition no. 5562 of 1987 and has not decided the appeal considering all the contentions raised on behalf of the petitioner. He lastly urged that once appellate authority held that the appeal before him was not maintainable he could not decide the appeal.

3. The respondent no.2 Km. Avinash Gupta has appeared in person. She and Sri V.N. Agarwal the learned standing counsel both have supported the order passed by the Joint Director Education. The learned standing counsel placed the notification dated 27.12.1983 notifying 1.1.1984 as the date for enforcement of section 21 of Uttar Pradesh Secondary Service Commission and Selection Boards Act, 1982. The notification is extracted below.

धारा 21 का प्रवृत्ति आदेश
उत्तर प्रदेश सरकार
शिक्षा अनुभाग-7
संख्याः6895/15-7-2 (25)83
लखनऊः दिनाँक, दिसम्बर 27,1983

अधिसूचना

उत्तर प्रदेश माध्यमिक शिक्षा सेवा आयोग और चयन बोर्ड अधिनियम, 1982 (उत्तर प्रदेश अधिनियम संख्या 5 सन 1982) की धारा-1 की उपधारा (2) के अधीन शिक्त का प्रयोग करके राज्यपाल जनवरी 1, 1984 को ऐसा दिनांक नियत करते हैं जब से उक्त अधिनियम की धारा 21 की उपधारा (1) और (3) प्रवृत्त होंगी ।

आज्ञा से,
ह0 रमेश चन्द्र त्रिपाठी,
सचिव

4. It is necessary to mention that Uttar Pradesh Secondary Services Commission and Selection Boards Act, 1982 came into force on 14.7.1981 except section 21 which was to come into force on the date to be notified by the government Section 21 was similar to section 16-G of the act. It came into force on 1.4.1981. The effect of notification dated 27.12.1983 was that the RIGS ceased to have jurisdiction to grant approval to resolution of termination. The RIGS ceased to have jurisdiction to grant approval to resolution of termination. The RIGS granted approval on 7.5.85 to the resolution dated 30.4.81 sent by the management terminating the service of the respondent no. 2. On 7.5.85 the jurisdiction of approval vested in the commission. The RIGS did not have any power on 7.5.85. to grant approval to the resolution of the petitioner. The approval granted by RIGS was without jurisdiction.

5. Counsel for the petitioner has vehemently urged that RIGS could grant approval to the resolution of the management. He relied on proviso to sub-section (1) inserted by Section 3 of the amending act (U.P. Act No.19 of 1985). It is extracted below :-

3. Amendment of Section 21-In Section 21 of the principal Act;

(a) in sub-section (1), the following proviso shall be inserted at the end, namely :-

" Provided that, where reference for prior approval of the Inspector was made in accordance with sub-section (3) of Section 16-G of the Intermediate Education Act, 1921, before January 1, 1984, no prior approval of the Commission shall be necessary and such reference shall be dealt with in accordance with the provisos of that Act as if this Act had not come into force"

Amending Act 1985 by which proviso to Section 21 was inserted came into force on 12.6.1985. Therefore, when RIGS granted the approval on 7.5.85 the proviso was not in existence. The claim of the petitioner is that since the petitioner had referred the resolution for approval prior to 1.1.84 the RIGS had the jurisdiction to exercise power under section 16-G and the appellate authority erroneously held that the order passed by her on 7.5.85 was beyond section 16-G. The argument does not appear to be correct. Proviso added to section 21 has already been extracted. A literal reading of the proviso would make the section unworkable. For instance what would happen to the orders passed by the commission between 1.1.84 till 11.6.85. To avoid any anomaly the legislature did not make the amendment retrospective. The proviso would, therefore, apply to those references, which were made prior

to 1.1.84 and had not been disposed of till 12.6.1985. Since in this case the reference made to RIGS prior to 1.1.84 was disposed of by her on 7.5.85, the amended provision was not attracted to it. The jurisdiction and power of RIGS has to be seen, in law, as it stood on the date i.e. 7.5.85 when she granted approval. And on that date the RIGS could not have exercised jurisdiction under section 16-G. Therefore, the appellate authority did not commit any error in deciding and allowing the appeal of respondent no. 2.

6. As regards the argument that the appellate authority committed an error of law in not deciding the appeal on merits as this court has specifically directed to decide all questions raised by the parties it is sufficient to say that the submission is devoid of any merits as the appellate authority did hold that the order on merits was not correct. In any case since the appellate authority held that the RIGS did not have any jurisdiction to exercise power under section 16-G he did not commit any error in not adjudicating on other points in detail.

7. The learned counsel for the petitioner has lastly urged that the Joint Director of Education having held that the appeal filed by the respondent no.2 was not maintainable, therefore, he should have refrained from deciding the appeal. I am not inclined to accept this argument as respondent no.2 has challenged the order dated 7.5.85 passed by the RIGS to be without jurisdiction. It could not have been challenged in any other forum. She had no other option except to challenge the order passed by the RIGS by way of appeal before Joint Director of Education, who has rightly allowed the appeal. Further even if there would have been some merit in this argument the order of RIGS being without jurisdiction the petitioner is not entitled to any relief.

8. For the reasons given above, this writ petition is dismissed. But it is necessary to issue directions about payment of salary and determination of post retiral benefits between the parties. The respondent no.2 has pointed out that she has attained the age of superannuation on 30.6.2000, therefore, she is entitled for her entire arrears of salary and pension and other post retiral benefits of the post of principal. Since the services of the respondent no. 2 were terminated by the petitioners and approval granted to the resolution for termination was without jurisdiction, the respondent no.2 is entitled for her salary. Therefore, she shall be paid salary from the date of suspension till she retired as principal of the institution. The petitioners shall calculate her salary with increases, if any, and the dearness allowance and other allowances payable to her and the amount so calculated shall be paid to her within three months. The petitioners shall fix her pension on the salary which would have been payable to her on the date of retirement. The respondent no.2 shall be deemed to be in continuous service till she superannuated. The respondent no.1 shall ensure compliance of this order and issue necessary directions to the petitioners and educational authorities for paying salary and pension and other post retiral benefits of respondent no.2 within a further period of three months.

Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2000

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

Civil Misc. Writ Petition No. 46009 of 2000

Committee of Management ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.M. Tripathi

Counsel for the Respondents:
Sri U.R. Pandey
S.C.

Constitution of India, Article 226- Payment of salary to the teaching and non teaching staff- institution upgraded from Junior High School w.e.f. March, 2000- the Government refused to pay the salary- state cannot shrink its responsibility to ensure the proper education- direction issued to give month by month salary to the validly appointed teaching and non teaching staff in accordance with the provisions of U.P. Junior High School (Payment of salaries of the teachers and other employees) Act 1978, till the institution is brought on grant in aid.

Held - para 10

In view of the above, the Respondents are being jointly and severely directed to ensure payment of salary to the validly appointed staff of the Petitioner's College inasmuch as promotion to upgrade the College was granted by the State Government and its authorities and denial of payment of salary to the validly appointed staff of the College cannot be justified. The concerned authorities are directed to pay to the validly appointed teaching and non-teaching staff of the College with effect from March 2000 within a period of two months to be computed from the date of filing of a certified copy of this judgement before the concerned authority. The Respondents and all other authorities are ;further directed to make payment to the validly appointed teaching and non-teaching staff of the petitioner's college regularly month by month with effect from 1 December,2000 in accordance with law as contemplated under U.P. Junior High School (Payment of salaries of the teachers and other employees) Act, 1978 (U.P. Act 6 of 1979)till college is brought on grant-in-aid list under U.P. Intermediate Education Act read with payment of salaries Act, 1971.
Case law discussed.
1998(1) LBESR 471
2000 (2) SCC 42

By the Court

1. All the Respondents are represented by the Standing Counsel and the petition is being disposed of in accordance with Rules of Court.

2. Committee of Management, Saheed Bhawani Dutt Joshi (Ashok Chakra) Higher Secondary School, Chaprun Tharali, Chamoli through its Manager (for short called the College) by means of this petition under Article 226, Constitution of India prays for issuing a writ of mandamus commanding the Respondents to pay salary to its teaching and non-teaching staff with effect from March 2000 (i.e. entire arrears of salary) and further continue to pay their salary month by month in accordance with law.

3. Petitioner manages the College, which was initially a Junior High School governed by the provisions of U.P. Basic Education Act which was on the grant-in-aid list to ensure regular payment of salary to the staff of the said College at

the Junior High School level. The College was upgraded on 28 January 1999 (Annesure-9 to the Writ Petition). In the petition details have been given to indicate that the staff of the College (teaching and non teaching) was duly recognised and was getting salary while the College was up to Junior High School level.

4. The grievance of the Petitioner/Committee of Management is that its staff is being denied grant-in-aid ever since it has been recognised up to High School level apparently on the ground that the said College up to High School level has not been brought on grant-in-aid list and consequently the State is denying its liability to reimburse the salary.

5. This question has crept several times. In the case of Dev Murti Shukla versus State of U.P. and others- Writ Petition no. 21602 of 1987 a Division Bench of this Court, considering request of the Petitioner under similar circumstances, observed that there was no dispute about duly appointed teachers and other staff of the College and further that the only controversy raised in that case was that since the grant-in-aid was not being given to the said college as it was not brought on grant-in-aid list of High School and Inter Colleges and hence no salary was payable to the staff of the said college under the provisions of U.P. High Schools and Intermediate College (Payment of salaries of Teachers and other Employees) Act, 1971. After considering respective contentions of the parties in the Case of Deo Murtin Shukla (supra) the Division Bench directed the concerned authorities to pay salary and other emoluments to the duly appointed staff of the College within specified period. The operative portion of the said judgement reads:

" we direct the respondents no. 1 to 5 to pay to each of the petitioners their salary and other emoluments with effect from 1.6.1988, this shall be done within a period of two months from today. The payment shall include the salary till 30 November, 1989. The respondents shall pay to each of the petitioners their salary and other emoluments regularly with effect from 1.12.1989 and onwards the payments shall be made under the provisions of the Act. We also make it clear that if and when the institution is given the grants in aid applicable to a High School it will be open to the petitioners, if the situation so calls for, to claim the arrears of salary on the footing that they were the employees in a High School and the provisions of the U.P. High Schools and Intermediate College (Payment of Salaries of Teachers and other Employees) Act, 11971 K were applicable to them"

6. The aforesaid decision in the case of Deo Murti Shukla again came up for consideration before another Division Bench of this Court in the case of Ramesh Chandra Yadav versus State of U.P. and others- Civil Miscellaneous Writ Petition No. 9412 of 1989, reported in 1989(1) LBESR 471 and their Lordships, agreeing with the decision of Deo Murti Shukla (supra) issued a similar direction for payment of salary against the State Government and concerned authorities. Paras 5 and 6 of the said judgement read:

"5. After hearing the learned counsel for the parties and upon examination of the averments made in the petition, the

Court is of the opinion that the facts and circumstances of the instant case are almost identical to the facts and circumstances of the case of Sri Deo Murti Shukla v. State of UP (supra) Sri O.P.Singh, learned Standing Counsel representing respondents no. 1 to 5 also very fairly concedes this position. Therefore, he does not dispute that this petition has got to be allowed and the petitioners ought to be granted reliefs claimed by them.

6. Accordingly, the petition succeeds and is allowed. The impugned order dated 12 April, 1989 (Annesure-3 to the petition) is quashed and the respondents no. 1 to 5 are directed to pay to each of the petitioners their salary and other emoluments with effect from 1 March, 1989 with a period of two months, to be computed from today. The payment shall also include the salary till 31 December, 1979. The respondents shall pay to each of the petitioners their salary and other emoluments regularly with effect from 1 January, 1998 K and onwards. The payment shall be made under the provisions of the Act (UP Act no. 6 of 1979). There is no order as to costs."

7. In the case of Chandigarh Administration and others versus Rajni Vali (Mrs.) and others- (2000) 2 SCC 42, briefly stated, the facts of the case were that Dev Samaj Girls Senior Secondary School, Chandigarh, which was a private educational institution duly recognised and receiving grant-in-aid from the Union Territory of Chandigarh Administration since 1.12.1967, was allowed to start class beyond Tenth Standard (i.e. upgraded up to Senior Secondary Level). This permission to run 11 and 12 Classes was with the condition that no grant-in-aid will be provided for additional staff. The Classes of Senior Secondary Level, which were run under Dev Samaj Degree College, Chandigarh, were closed down on the direction of the authorities and were allowed to continue as part of Dev Samaj Senior Secondary School. Some of the lecturers, who were teaching different subjects in 11 and 12 Classes of the school, claimed salary at par with their counter-parts working in private recognised institution Chandigarh. No heed was paid by the institution and they approached the High Court by filing Writ Petition. Claim of such teachers was refuted by the authorities on the ground that permission to open 11 and 12 classes was subject to the condition that no grant-in-aid will be provided for additional staff and, therefore, the claim of such teachers for parity of salary with their counter-part was not acceptable to the authorities. High Court allowed the petition and granted relief to such Petitioners (teachers). Administration challenged the same by filing appeal before the Supreme Court. The Apex Court found that continuance of such teachers was essential for running the classes in question. In other words, such Petitioners were not surplus in the institution. In Para 6 of the judgement Supreme Court observed:

"6. The position has to be accepted as well settled that imparting primary and secondary education to students is the bounden duly of the State Administration. It is a constitutional mandate that the State shall ensure proper education to the students on whom the future of the society depends. In line with this principle, the State has enacted statutes and framed rules and regulations to control/regulate establishment and

running of private schools at different levels. The State Government provides grant -in-aid to private schools with a view to ensure smooth running of the institution and to ensure that the standard of teaching does not suffer on account of paucity of funds. It needs no emphasis that appointment of qualified and efficient teachers is a sine quo non for maintaining high standards of teaching in any education institution. Keeping in mind these and other relevant factors this Court in a number of cases has intervened for setting right any discriminatory treatment meted out to teaching and non-teaching staff of a particular institution or a class of institutions. To notice a few such decisions of the point, we may refer to the case of Haryana State Adhyapak Sangh v. State of Haryana. a Bench of three learned Judges 1 of this Court clarifying the judgement in Haryana State Adhyapak Sangh vs. State of Haryana issued a direction, inter alia, that the parity in the pay scales and dearness allowance of teachers employed in aided schools and those employed in government schools shall be revised and brought on a par with the aided schools and dearness allowance payable to the teachers employed in government schools with effect from 1.1.1986

Again in Para 10 the Supreme Court observed:

"Coming to the contention of the appellants that the Chandigarh Administration will find it difficult to bear the additional financial burden if the claim of Respondents 1 to 12 is accepted, we need only say that such a contention raised in different cases of similar nature has been rejected by this Court. The State Administration cannot shirk its responsibility of ensuring proper education in schools and colleges on the plea of lack of resources. It is for the authorities running the Administration to find out the ways and means of securing funds for the purpose. We do not deem it necessary to consider this question in further detail. The contention raised by the appellants in this regard is rejected….."

Heard learned counsel for the petitioner and the learned Standing Counsel Mr. U.K. Pandey.

8. Upon examination of the contentions made in the petition and hearing learned counsels for the parties I am of the opinion that the fact and circumstances of the instant case are almost similar to the facts and circumstances of the case of Dev Murti Shukla (supra). The learned Standing Counsel has fairly conceded this position.

9. The learned Standing Counsel, however, pointed out with reference to Para 1 of the petition that probably salary has not been paid because copy of some order being dated 27 January,2000 is not before the concerned authorities. If that be so, this is merely apology for excuse. Copy of the order must be with the concerned education authorities. Department of Basic Education and Secondary Education are Departments of State Government. The concerned authorities ought to have obtained copy of that order or in case any factual position is to be ascertained regarding validity of appointment of the teaching staff of the erstwhile Junior High school (Basic Education) the authority shall collect material and pass order exposing its mind

for deciding to pay salary to the validly appointed staff of the Petitioner College.

10. In view of the above, the Respondents are being jointly and severely directed to ensure payment of salary to the validly appointed staff of the Petitioner's College inasmuch as promotion to upgrade the College cannot be justified. The concerned authorities are directed to pay to the validly appointed teaching and non-teaching staff of the College with effect from March 2000 within a period of two months to be computed from the date of filing of a certified copy of this judgement before the concerned authority. The Respondents and all other authorities are further directed to make payment to the validly appointed teaching and non teaching staff of the petitioner's college regularly month by month with effect from 01st December 2000 in accordance with law as contemplated under U.P. Junior High School (Payment of Salaries of the Teachers and other Employees) Act, 1978 (U.P. Act 6 of 1979) till College is brought on grant-in-aid list under U.P. Intermediate Education Act read with payment of Salaries Act, 1971.

Writ Petition is allowed accordingly.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: OCTOBER 11,2000

BEFORE
THE HON'BLE R.K. AGRAWAL, J.

Sales Tax Revision No. 520 of 1991

M/s The Kisan Sahkari Chini Mills Ltd. Sheikhpur, Budaun ...Applicant
Versus
The Commissioner of Sales Tax, U.P., Lucknow ...Respondent

Counsel for the Applicant:
Sri Rajesh Kumar

Counsel for the Respondent:
Sri S.D. Singh
S.C.

Central Sales Tax Act, 1956, Ss. 7(1), 8(3) (b) and 8-A read with Central Sales Tax (Registration and Turnover) Rules, 1957, R.13- Registration of dealer- Whether term 'Stores' is included in R.13- Claim to benefit of S.8-A-Scope.

Held- Paras 22 and 23

From the various decisions referred to above the principle which emerges is that if a process of activity is so integrally related to the ultimate manufacture of goods so that without that process or activity, manufacture may, if the oretically possible be commercially inexpedient, goods intended for use in the process or activity as specified in rule 13 will qualify for special treatment. This is not to say that every category of goods in connection with manufacture or in relation to manufacture or which facilitates the conduct of the business of manufacture will be included within Rule 13.

Applying the aforementioned principles, I find that the cement which is required by the applicant for use in the construction of factory building and/or foundation, as held by the Hon'ble Supreme Court in the case of J.K. Cotton spinning and weaving Mills Co. Ltd. (supra), which has been followed by the Hon'ble Karnatka High Court in the case of Ballarpur straw Board Mills Ltd. and this Court in the case of M/s Sivalik Collulose Ltd. cannot be said that it is used either directly or even remotely in the manufacture of finished goods. Similar is the case of steel and paints, which too is required only in the repairs of boiler and protection of machineries. They cannot be said to be used even

indirectly in the manufacture or processing of goods for sale. Thus, all the three items would not fail under the description of the word 'Stores', which are used in the manufacture of finished goods.

Case law discussed.

(1965) Vol. 16 STC 259 (SC)
(1965)Vol.16 STC 563 (SC)
1989 (43) ELT 201 (SC)
(1990) UPTC 157 (SC)
(1978)Vol.42 STC 401 (Kant.)
(1992) UPTC 1 All.
(1965)5SCC 515
(2000) 117 STC 12 (SC)
AIR 1965 SC 1310

By the Court

1. The Kisan Sahkari Chini Mills Ltd. Budaun has filed the present revision against the order dated 16.3.1991 passed by the Sales Tax Tribunal, Haldwani Bench, Haldwani, in Second Appeal No. 621 of 1990 (Assessment Year 1986-87)).

2. The facts of the case in brief are that the applicant is a registered dealer under the provisions of the Central Sales Tax Act, 1956 (hereinafter referred to as the Act) and is engaged in the business of manufacture and sale of sugar, bye product and its waste products etc. It had applied for grant of registration certificate in respect of various items including steel, cement and paints, which were to be used by the applicant in the manufacture of sugar and other products. The assessing authority vide order dated 7.12.1987 disallowed the registration in respect of steel, cement and paints. The applicant preferred an appeal under section 9 of the Act before the Assistant Commissioner (Judicial), Sales Tax, Haldwani, who vide order dated 15.9.89 had rejected the appeal.

3. Feeling aggrieved by the said order, the applicant preferred an appeal under section 10 of the Act before the Tribunal, which too has been dismissed by the Tribunal by the impugned order.

4. I have heard Sri Rajesh Kumar, learned counsel for the applicant and Sri S.D. Singh, learned Standing Counsel appearing on behalf of respondent.

5. The learned Counsel for the applicant submitted that cement was required by the applicant for fixing the machinery, whereas steel was required for use in the boiler and paints were required for the protection of the machinery. He submitted that all the aforesaid three items are connected with the manufacturing. According to the learned counsel for the applicant, the Tribunal had accepted that all the three items play some role in the manufacturing but did not allow the benefit on the ground that they are not directly used in the manufacturing process. He submitted that the benefit of section 8-A of the Central Sales Tax Act, is not confined to those items, which are directly required for the manufacturing, but the benefit is also available to those goods which are required for the manufacturing purposes play some role. He submitted that under Rule 13 of the Central Sales Tax (Registration and Turnover) Rules 1957 (hereinafter referred to as the Rules) stores is also included, and, therefore, the aforesaid three items being stores is liable to be included in the list of goods, which the applicant can purchase against declaration Form-C.

6. Sri S.D. Singh, learned standing counsel on the other hand submitted that by no stretch of imagination, steel, cement

and paints can be said to be goods, which are used in the manufacture of sugar and, therefore, they have rightly been disallowed.

7. For appreciation of the rival contention raised by the learned counsel for the parties, it is necessary to reproduce Section 7 (1),8(1),8(3) (b)j of the Act and Rule 13 of the Rules which read as follows:

"7. Registration of dealer

(I) Every dealer liable to pay tax under this Act shall, within such time as may be prescribed for the purpose, make an application for registration under this Act to such authority in the appropriate State as the Central Government may by general or special order, specify, and every such application shall contain such particulars as may, be prescribed.

8. Rates of tax on sales in the course of inter-State trade or commerce:-

(1) Every dealer, who in the course of inter-State trade or Commerce-
a] sells to the Government any goods, or
b] sells to a registered dealer other than the Government goods of the description referred to in sub-section(3),
(2)
(2A)
[3] The goods referred to in clause (b) of sub-section (1)-

(a) Omitted,

(b)….are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by ;the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power.

Rule 13

The goods referred to in clause (b) of sub-section (3)j of section 8 which a registered dealer may purchase, shall be goods intended for use by him as raw materials, machinery, plant, equipment, tools stores, spare parts, accessories, fuel, or lubricants, in the manufacture or processing of goods for sale, or in mining, or in the generation or distribution of electricity or any other form of ;power..'

8. On a conjoint reading of the aforesaid provisions, it will be seen that the goods specified in the certificate of registration is to be used by the person in the manufacture or processing of goods for sale. Admittedly, all the items in question viz. Steel, cement and paint cannot be included in the description of raw-materials, processing materials, machinery, plant, tools, spare parts, accessories, fuel or lubricants as mentioned in Rule 13 of the Rules.

9. Learned counsel for the applicant contended that they would fall under the description of the word 'Stores' as mentioned in Rule 13. In support of his aforesaid plea he relied on the following decisions of the Hon'ble Supreme Court:

[1] India Copper Corporation Ltd. v. Commissioner of Commercial Taxes, Bihar and others, reported in (1965) Vol. 16 STC-259 (SC).

[2] J.K. Cotton Spinning and Weaving Mills Ltd. v. Sales Tax Officer, Kanpur and another, reported in (1965)k 16 STC-563 (SC).

[3] Collector of Central Excise Eastend Paper Industries Ltd. reported in 1989 (43) Excise Law Times-201 (SC),

[4] Collector of Central Excise, New Delhi v. M/s Balarpur Industries Ltd. , reportedf in 1990 UPTC-157 (SC).

Sri S.D. Singh, learned standing counsel has relied upon the following decisions:

(1) Ballarpur straw Board Mills Ltd. (now known as Balapur- Industries Ltd.) v. State of Karnataka reported in (1978) Vol. 42 STC-401 (Karnataka);

(2) M/s Sivalik Cellulose Ltd. and another vs. State of U.P. and others, reported in 1992 UPTC-1 (Alld.);

(3) Commissioner of Sales Tax v. Rewa Coal Fields Ltd. and another, reported in (1995) 5 SCC- 715;

(4) Coastal Chemicals Ltd. v. Commercial Tax Officer, A.P. and others, reported in (2000) 117 STC- 12 (SC).

10. In the case of Indian Copper Corporation Ltd. (supra) the Hon'ble Supreme Court has held as follows:

"The expression "goods intended for use in the manufacturing or processing of goods for sale" may ordinarily include such vehicles as are intended to be used for removal of processed goods from the factory to the place of storage."

At another place it has held that-

"The statutes relating to factories and mines impose upon the owner of the factory and the mine obligation to maintain effective health services for the benefit of the workmen. But it cannot on that account be said that the goods purchased for the hospital such as equipment, furnishings and fittings are intended for use in the manufacture or processing of goods for sale or in the mining operations. The mere fact that there is a statutory obligation imposed upon the owner of the factory or the mine to maintain hospital facilities would not supply a connection between the goods and the manufacturing or processing of goods or the mining operations so as to make them goods intended for use in those operations".

" Stationery" also is not intended for use in the manufacture or processing of goods for sale or for mining operations. Use of stationery undoubtedly facilitates the carrying on of a business of manufacturing goods or of processing goods or even mining operations, but the expression "intended to be used" cannot be equated with "likely to facilitate" the conduct of the business of manufacturing or of processing goods or of mining."

11. In the case of J.K. Cotton Spinning and Weaving Co. Ltd.(supra) the Hon'ble Supreme Court has held as follows:

"Section 8(3) (b) authorises the Sales Tax Officer to specify, subject to any rules made by the Central Government, goods intended for use by the dealer in the manufacture or processing of goods for sale or in mining, or in the generation or

distribution of electricity or any other form of power. By rule 13 the Central Government has prescribed the goods referred to in section 8(3)(b) such goods must be intended for use in the manufacture or processing of goods for sale or in mining or generation or distribution of power, and the intended use of the goods must be as specified in rule 13. It is true that under rule 13, read with section 8(3)(b), mere intention to use the goods in the manufacture or processing of goods for sale, will not be a sufficient ground for specification: the intention must be to use the goods as raw materials, as processing materials, as machinery, as plant, as equipment, as tools, as stores, as spare parts, as accessories, as fuel or as lubricants. A bare survey of the diverse uses to which the goods may be intended to be put in the manufacture of processing of goods, clearly shows that the restricted interpretation placed by the High Court is not warranted. The expression" in the manufacture of goods" should normally encompass the entire process carried on by the dealer of converting raw materials into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that but for that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would, in our judgement, fall within the expression "in the manufacture of goods." For instance , in the case of a cotton textile manufacturing concern, raw cotton undergoes various processes before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendered and pressed. All these processes would be regarded as integrated processes and included "in the manufacture" of cloth. It would be difficult to regard goods used only in the process of weaving cloth and not goods used in the anterior processes as goods used in the manufacture of cloth. To read the expression "in the manufacture" of cloth in that restricted sense, would raise many anomalies. Raw cotton and machinery for weaving cotton and even vehicles for transporting raw and finished goods would qualify under rule 13, but not spinning machinery, without which the business cannot be carried on. In our judgment, rule 13 does not justify the importation of restrictions which are not clearly expressed, nor imperatively intended. Goods used as equipment, as tools, as stores, as spare parts, or as accessories in the manufacture of processing of goods in mining, and in the generation and distribution of power used not, to qualify for special treatment under section 8(1), be ingredients or commodities used in the processes, nor must they be directly and actually needed for " turning out or the creation of goods."

In our judgement if a process or activity is so integrally related to the ultimate manufacture of goods so that without that process or activity manufacture may, even if theoretically possible, be commercially inexpedient, goods intended for use in the process or activity as specified in rule 13 will qualify for special treatment. This is not to say that every category of goods" in connection with" manufacture of, or "in relation to" manufacture, or which facilitates the conduct of the business of manufacture will be included within rule 13. Attention in this connection may be invited to a judgment of this Court in which it was held that vehicles used by a company (which mined ore and turned out copper in carrying on activities as a miner

and as a manufacturer) fell within rule 13, even if the vehicles were used merely for removing ore from the mine to the factory, and finished goods from the factory to the place of storage. Spare parts and accessories required for the effective operation of those vehicles were also held to fall within rule 13. See: Indian Copper Corporation Ltd. v. Commissioner of Commercial Taxes, Bihar and others."

At another place the Hon'ble Supreme Court has held that:

" Building materials including lime and cement not required in the manufacture of tiles for sale cannot, however, be regarded within the meaning of rule 13, as raw materials in the manufacture or processing of goods or even as "plant". It is true that buildings must be constructed for housing the factory in which machinery is installed. Whether a building is a "plant" within the meaning of rule 13, is a difficult question on which no opinion need be expressed. But to qualify for specification under section 8(3)(b) goods must be intended for use of the nature mentioned in rule 13, in the manufacture of goods. Building materials used as raw materials for construction of 'plant' cannot be said to be used as plant in the manufacture of goods. The Legislature has contemplated that the goods to qualify under section 8(3)(b) must be intended for use as raw materials or as plant, or as equipment in the manufacture or processing of goods, and it cannot be said that building materials fall within this description. The High Court was, therefore, right in rejecting the claim of the company in that behalf."

12. In the case of Eastend Paper Industries Ltd. (supra), the Hon'ble Supreme Court while following its earlier decision in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. (supra) had held that processes incidental or ancillary to wrapping are to be included in the process of manufacture, manufacture in the sense of bringing the goods into existence as these are known in the market is not complete until these are wrapped in wrapping paper. It held wrapping paper to be the component part of the raw-material used and consumed in the finish products.

13. In the case of Ballarpur Straw Board Mills Ltd. (supra), the Hon'ble Supreme Court has held as follows:

"The question, in the ultimate analysis, is whether the input of Sodium Sulphate in the manufacture of papers would cease to be "Raw-Material" by reason alone of the fact that in the course of the chemical reactions this ingredient is consumed and burnt-up. The expression "Raw-material" is not a defined term. The meaning to be given to it is the ordinary and well-accepted connotation in the common parlance of those who deal with the matter.

The ingredients used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those who which may retain their dominant individual identity and character throughout the process and also in the end-product, those which as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product: those which, like catalytic

agents, while influencing and accelerating the chemical reactions, however may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw-Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product that having regard to its importance in and indispensability for the process, it could be said that its very consumption on burning up is its quality and value as raw material. In such a case, the relevant test is not its absence in the end product, but the dependence of the end-product for its essential presence at the delivery end of the process. The ingredient goes into the making of the end-product in the sense that without its absence the presence of the end-product, as such is rendered impossible. This equality should coalesce with the requirement that its utilisation is in the manufacturing processes as distinct from the manufacturing apparatus"

The Hon'ble Supreme Court has further held that:

On a consideration of the matter, we are persuaded to the view that the Tribunal was right in its conclusion that Sodium Sulphate was used in the manufacture of paper as "Raw-Material" within the meaning of the Notification No. 105/82-CE, dated 28.2.1982."

14. Now coming to the decisions relied upon by the learned standing counsel in the case of M/s Ballarpur Straw Board Mills Ltd. (supra) the Hon'ble Karnataka High Court after referring to the two decisions of the Hon'ble Supreme Court in the case of Indian Copper Corporation Ltd. (supra) and J.K. Cotton Spinning and Weaving Mills Co. Ltd. (supra) had held that timber of all kinds for using it in the construction or maintenance of building within the precincts of the factory, paints and varnishes for using them in painting the factory building and fire bricks, fire, cement, cement compound and china clay for using them in the construction cannot be allowed in view of the observations of the Hon'ble Supreme Court in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd.

15. In the case of Sivalik Cellulose Ltd. (supra) this Court while following the decision of Hon'ble Supreme Court in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. has held as follows:

"In the present case the petitioners have mentioned in column 16 of Form –A the disputed goods to be used for building construction and office equipment under the heading "raw material/packing material". In fact, such goods which are required for the purposes of construction or office equipment for starting or running the business cannot by any stretch of imagination be said to be raw material/packing material. Apart from wrong declaration made in Column 16 by the petitioners such goods cannot come within the boundary of "goods" as referred under Section 8(3)(b)j of the said Act. Registration, therefore, was wrongly

granted. Rule 13 further provides that "the goods referred to in clause (b) of sub-section (3) of Section 8 which a registered dealer may purchase shall be goods intended for use by him as raw material, processing materials, machinery, plants, equipment, tools, stores, spare parts, accessories, fuel or lubricants in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power." Admittedly, the goods which are used for the construction of buildings or as office equipment would not be covered under it.

16. In the case of M/s J.K. Cotton Spinning and Weaving Mills Co. Ltd. v. The State Sales Tax Officer, Kanpur and another, AIR 1965 SC-1310, it was held:

" Section 8(3)(b) authorises the Sales Tax Officer to specify subject to any rules made by the Central Government, goods intended for use by the dealer in the manufacture or processing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power. By Rule 13 the Central Government has prescribed the goods referred to in Section 8(3)(b), such goods must be intended for use in the manufacture or processing of goods for sale or in mining or generation or distribution of power and the intended use of the goods must be as specified in Rule 13. It is true that under Rule 13 read with Section 8(3)(b) mere intention to use the goods in the manufacture or processing of goods for sale, will not be a sufficient ground for specification, the intention must be to use the goods as raw materials, as processing materials, as machinery, as plant, as equipment, lubricants. A bare survey of the diverse uses to which the goods may be intended to be put in the manufacture or processing of goods, clearly shows that the restricted interpretation placed by High Court is not warranted. The expression 'in the manufacture of goods' should normally encompass the entire process carried on by the dealer or converting raw materials into finished goods.

In para 11 of this judgement the Supreme Court further held:

" Building materials including lime and cement not required in the manufacture of tiles for sale cannot, however, be regarded within the meaning of Rule 13, as raw materials in the manufacture or processing of goods or even as plant ."

Similar would be the position in the present case, petitioners are manufacturing for sale writing and printing papers and by no stretch of imagination building materials or even equipment could be treated as raw material in the manufacture or processing of goods or even as plant in the manufacture of writing and printing papers."

17. In the case of Rewa Coal fields Ltd. (supra) the Hon'ble Supreme Court was considering the definition of word 'raw material' as given in section 2(1) of M.P. General Sales Tax Act, and has held as follows:

"The respondent assessee operates a coal mine, which is a manufacturing activity for the purposes of the said Act. It sought registration for the purpose of Section 8 of the Act, which deals with the set-off or refund of tax in respect of tax

paid goods in certain circumstances, of the following on the ground that they were raw materials consumed in the course of manufacture, covered by therefore-quoted definition. Timber, kerosene oil, drilling bits, hewing implements of all kinds, dry cells, torches, cement and lime and electrical bulbs. The Sales Tax Officer and the Commissioner of Sales Tax declined to register these as raw materials. The Commissioner found that the timber was used in the mine to prop up its walls. It was only a supporting device and it was not consumed but remained within the mine. It could not, therefore, be treated as a raw material, and it was of no consequence that it was not salvaged by the respondent after the mine was closed. Kerosene oil was required for lanterns for ill umnination purposes and not as a fuel to power any machine. Hence, it would not be treated as a raw material. Drilling bits were neither instantaneously consumed nor did they form part of the finished goods in any manner. Hewing implements were used to cut down large pieces of the mine walls and surface and their life was perhaps the longest out of the list. Dry cells, torches and cells and electrical bulbs were used only for illuminating the inside of the mine. Cement and lime were used to seal leakage's and plaster holes in the mine. It was more in the nature of a building material. The High Court took the contrary view. It said the Commissioner had interpreted the definition of raw material too narrowly. We cannot agree, given that the definition requires that the raw material should be (1)-consumed (2) in the process of manufacture."

The Hon'ble Supreme Court has further held that:

" It seems to us clear that, drilling bits apart, none of the articles aforementioned can qualify to be articles "consumed in the process of manufacture" or, to put it in different way, consumed in the mining of the coal. They may be used for purposes incidental to the mining, but are not integral thereto.

So, far as drilling bits are concerned, they are used to bore holes in the walls of the mine; the holes are stuffed with explosives and the detonation thereof yields the coal. Their utility is quickly exhausted. It can, therefore, be said that they are consumed in the mining of the coal. To that extent alone can the assessee succeed."

18. In the case of Coastal Chemicals Ltd. the Hon'ble Supreme Court was considering the word 'consumables' as mentioned in Section 5 (b) (1) of the Andhra Pradesh General Sales Tax Act, 1957 and it has held as follows:

"The word "consumables" in the said provision takes colour from and must be read in the light of the words that are its neighbours, namely, "raw material', 'component part' 'sub-assembly part, and 'Intermediate part': So read it is clear that the word 'consumables' therein refers only to material which is utilised as an input in the manufacturing process but is not identifiable in the final product by reason of the fact that it has got consumed therein. It is for this reason that 'consumables' have been expressly referred to in the said provision, though they would fall within the broader scope of the words' raw material'.

In the case of 'Thomas Stephen & Co. (1988) 69 STC-320 (SC) relied upon

in the impugned judgement. It was held that cashew shall used as fuel did not get consumed in the manufacture of other goods and that ' consumption must be in the manufacture as raw material."

To use the words of ' Thomas Stephen & Co. (1988)69 STC-320 (SC) the natural gas used by the appellant does ' not tend to the making of the end-product'. It is not a 'consumable."

19. Though, the Hon'ble Supreme Court in the cases of Rewa Coalfields Ltd. (supra) and Coastal Chemicals Ltd. supra, has considered the question of raw material and consumables respectively, but it has held that it should be consumed in the process of manufacture or tend to the making of the end-product.

20. It is not the case of the applicant that the three items mentioned above are either raw-material or consumables. On the other hand it is the specific case taken by the applicant that they fall under the description of the word 'stores'. The word 'store' has not been defined under the Act or the Rules framed thereunder. In Webster's Third New International Dictionary of the English Language Unabridged, 1971 Edition, the word 'stores' has been defined as under:

"articles (as of food) accumulated for some specific object and issued or drawn upon as needed the raw or unworked material supplies of a manufacturing concern."

21. Thus, the dictionary meaning of the word 'stores' is material supplies of a manufacturing concern or articles accumulated for some specific object and issued or drawn upon as needed.

22. From the various decisions referred to above, the principle which emerges is that if a process of activity is so integrally related to the ultimate manufacture of goods so that without that process or activity manufacture may, if theoretically possible be commercially inexpedient goods intended for use in the process or activity as specified in rule 13 will qualify for special treatment. This is not to say that every category of goods in connection with manufacture or in relation to manufacture or which facilitates the conduct of the business of manufacture will be included within Rule 13.

23. Applying the aforementioned principles, I find that the cement which is required by the applicant for use in the construction of factory building and/or foundation, as held by the Hon'ble Supreme Court in the case of J.K. Cotton Spinning and Weaving Mills Co. Ltd. (supra), which has been followed by the Hon'ble Karnatka High Court in the case of Ballarpur Straw Board Mills Ltd. and this Court in the case of M/s Sivalaik Collulose Ltd. cannot be said that it is used either directly or even remotely in the manufacture of finished goods. Similar is the case of steel and paints, which too is required only in the repairs of boiler and protection of machineries. They cannot be said to be used even indirectly in the manufacture or processing of goods for sale. Thus, all the three items would not fall under the description of the word 'stores', which are used in the manufacture of finished goods.

24. In view of the foregoing discussions, I do not find any force in the revision. The revision lacks merit and is

dismissed. However, the parties shall bear their own costs.
