ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: MAY 9, 2001

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

Civil Misc. Writ Petition No. 35686 of 1999

Kashi Ram Ahirwar ...Petitioner
Versus
State of U.P. through Collector/Distt. Deputy Director of Consolidation, Lalitpur and others ...Respondents

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

Counsel for the Respondents
S.C.

Financial Hand Book Volume II-Part-II Fundamental Rule – 56(C) – Compulsory Retirement – Special Adverse entry – regarding financial irregularities – whether can be relied on without any communication to the employee ?
Held - No.

Held – Para 11
In my opinion, in order to reach a correct conclusion, version of the petitioner with regard to the entry as also in respect of the alleged financial irregularity' regarding G.P.F. accounts of the alleged employees was necessary particularly when soon before the special adverse entry and alleged financial irregularity, the petitioner was promoted to the post of Senior Clerk.

Case Law discussed;
1992 (2) SCC – 299
1998 (7) SCC – 310
(1980) 4 SCC – 321
(1987) 2 SCC – 188

By the Court

1. This writ Petition under Article 226 of the Constitution seeks quashing of the order dated 29.07.1999 passed by respondent no. 2 thereby compulsorily retiring the petitioner with immediate effect from service by giving him pay in lieu of three months notice.

2. I have heard Dr. R. Dwivedi, Senior Advocate representing the petitioner and Standing Counsel appearing for State.

3. The petitioner was appointed Junior Clerk in the Consolidation Department in the year 1977. By order dated 31.03.1997 he was promoted to the post of Senior Clerk. A screening committee was constituted by the Joint Director of Consolidation, Jhansi pursuant to the order dated 21.07.1998 of the Consolidation Commissioner, Uttar Pradesh to evaluate efficiencies of employees with a view to screen out the dead wood by compulsorily retiring such employees in public interest. The Screening Committee prepared a précis of the A.C.Rs. in respect of various employees including the petitioner and recommended that the petitioner be compulsorily retired.

4. The précis of A.C.R.'s, in so far as the petitioner is concerned, would indicate that the entries in the year 1988-89, 1989-90, 1990-91 and 1991-92 were satisfactory; Sri R.B. Bhaskar, Consolidation Commissioner Uttar Pradesh is, however, said to have made certain adverse entry in March, 1992; in 1992-93 and adverse entry is said to have been made by Deputy Director of Consolidation and integrity was also not certified; entry in the year 1993-94 was satisfactory and entries for the year 1994-95, 1995-96 and 1996-97 was reported to be missing; entry in the year 1997-98

were satisfactory but by order dated 29.5.1998, Sri R.D. Tripathi, the Assistant Settlement Officer, Lalitpur (c) gave a special adverse entry categorising the petitioner as inefficient, irresponsible and careless to duty. It is also mentioned therein that while the petitioner was working as Reader, complaints were received from the public in respect of corruption on the basis of which he was removed from the post of Reader and the petitioner was found to be indulging in corruption, his integrity was not certified. Category of work was found to be poor. In the year 1998-99 also Sri R.D. Tripathi, Settlement Officer Consolidation, Lalitpur described the petitioner as most corrupt employee.

5. On the basis of the above evaluation and recommendation, the petitioner was compulsorily retired with immediate effect vide impugned order. The question is whether the impugned order is sustainable? Clause (c) of Fundamental Rules 56 of the Financial Hand Book Vol. II Parts II to IV provides that the 'appointing authority' may at any time by notice to any Government servant (whether permanent or temporary), without assigning any reason, require him to retire after he attains the age of fifty years or such Government servant may by notice to the appointing authority' voluntarily retire at any time after attaining the age of forty five years or after he has completed qualifying service of twenty years. The period of such notice shall be three months. Fundamental Rule 56 in so far as it is relevant for the purpose of this case is quoted below:

"56 (a) xx xx xx

(b) xx xx xx

(c) Notwithstanding anything contained in clause (a) or clause (b) the appointing authority may, at any time, by notice to any Government servant (whether permanent or temporary) without assigning any reason, require him to retire after he attains the age of 50 years, or such Government servant may, by notice to the appointing authority, voluntary retire at any time after attaining the age of 45 years or after he has completed qualifying service of 20 years.

(d) The period of such notice shall be three months:

Provided that –

(i) any such Government servant may, by order of the appointing authority, without such notice or by a shorter notice, be retired forthwith at any time after attaining the age of 50 years, and on such retirement the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or, as the case may be, for the period by which such notice falls short of three months, at any rates at which he was drawing them immediately before his retirement;

(ii) it shall be open to the appointing authority to allow a Government servant to retire without any notice or by a shorter notice without requiring the Government servant to pay any penalty in lieu of notice:

Provided further that xx xx xx

Provided also that xx xx xx

(e) xx xx xx

Explanation – (1) <u>The decision of the appointing authority under clause (c) to</u>

require the Government servant to retire as specified therein shall be taken if it appears to the said authority to be in the public interest, but nothing herein contained shall be construed to require any recital, in the order, of such decision having been taken in the public interest.

(2) In order to be satisfied whether it will be in the public interest to require a Government servant to retire under clause (c) the appointing authority may take into consideration any material relating to the Government servant and nothing herein contained shall be construed to exclude form consideration –

(a) any entries relating to any period before such Government servant was allowed to cross any efficiency bar or before he was promoted to any post in an officiating or substantive capacity or on ad-hoc basis; or

(b) any entry against which a representation is pending, provided that the representation is also taken into consideration along with the entry; or

(c) any report of the Vigilance Establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965.

(2-A) Every such decision shall be deemed to have been taken in the public interest.

(3) The expression "appointing authority" means the authority which for the time being has the power to make substantive appointments to the post or service from which the Government is required or wants to retire, and the expression "qualifying service" shall have the same meaning as in the relevant rules relating to retiring pension.

(4) xx xx xx"

6. Though the power of appointing authority under the Fundamental Rule 56(1)(c) to require a government servant to retire after he attains the age of 50 years is couched in absolute language, the Explanation (1) provides in no uncertain words, and it is settled by a catena of decisions, the decision to compulsorily retire a Government servant under Fundamental Rule 56(c) shall be taken on forming an opinion that it would be in the 'public interest' to retire such government servant compulsorily. The order of premature retirement is passed on subjective satisfaction of the appointing authority and principles of natural justice have no application in the context of an order of compulsory retirement. Judicial review of such an order under Article 226 of the Constitution is permissible only on limited grounds of malafide or absence of any evidence on which the necessary opinion could be formed or arbitrariness in the sense that no reasonable person could have formed the requisite opinion on the given material[1]. Explanation (2) of the Fundamental Rule 56 as it stands amended by U.P. Act No. 24 of 1975 provides that in order to satisfy whether it will be in public interest to require a Government servant to retire under clause (c), the appointing authority may take into consideration any material relating to the government servant and nothing therein contained shall be construed to exclude from consideration –

(a) any entry relating to any period before such Government servant was allowed to cross any efficiency bar or before he was promoted to any post in

[1] Baikuntha Nath Das & another Vs. Chief District Medical Officer, (1992) 2 SCC 299

officiating capacity or substantive capacity or on ad-hoc basis; or

(b) any entry against which a representation is pending, provide that the representation is also taking into consideration along with the entry; or

(c) any report of vigilance establishment constituted under the Uttar Pradesh Vigilance Establishment Act, 1965

Clause (2-A) inserted by U.P. Fundamental Rule 56 (Amendment) Act, 1976 provides that every decision requiring a Government servant to retire under clause (c) shall be deemed to have been taken in public interest.

7. In Baikunkuntha Nath Das the Hon'ble Supreme Court has laid down the following principles touching the question of compulsory retirement:

"(i) An order of compulsory retirement is not a punishment. It implied no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary – in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter – of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential record/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

8. The observation that principles of natural justice have no place in the context of compulsory retirement made in Baikuntha Nath Das case "**does not mean that if the version of the delinquent officer is necessary to reach the correct conclusion the same can be obviated on the assumptions that other materials alone need be looked into**"[2]. Similarly though an order of compulsory retirement 'implies no stigma nor any suggestion of misbehaviour' but where an order of premature retirement in the guise of

[2] M.S. Bindra Vs. Union of Inida (1998) 7 SCC 310.

"**public interest**" is found to be a "**disguised dismissal**"[3], it cannot be allowed to stand. Further the observation that an order of compulsory retirement is not a punishment should not be construed to mean that is no case an order of compulsory retirement can be termed as punitive. In my opinion Baikunth Nath Das does not put any embargo on the power of the Court to lift the veil and find out the true nature of the order. It depends on the facts and circumstances of each case. The language in which the impugned order in the instant case if formulated clearly shows that the order of compulsory retirement is in fact a 'disguised dismissal' on the charge of 'financial irregularity' referred to in the order impugned herein. The order impugned herein has been passed not only on the basis of general evaluation of the ACRs but also on account of financial irregularity in the matter of G.P.F. accounts of the employees which aspect was not considered even by the Screening Committee. The impugned order being punitive and stigmatic, the petitioner was entitled to be heard at least about the alleged misconduct involving financial irregularity in respect of G.P.F. accounts of the employees. The impugned order is ex-facie punitive and having been passed sans any opportunity of hearing is liable to be quashed.

9. Apart from the fact that the impugned order of compulsory retirement in the instant case is punitive in nature, the decision to compulsory retire the petitioner is vitiated by malice in law. It may be pertinent to observe that special adverse entry for the year 1998-99 was given to the petitioner vide order dated 29.05.1998 by Sri R.D. Tripathi, Settlement Officer Consolidation, Lalitpur who acted as Chairman of the Screening Committee. The report of the Settlement Officer Consolidation, Jalaun at Orai given to the Settlement Officer Consolidation, Lalitpur vide letter dated 18.12.1998 being annexure no. 1 to the supplementary rejoinder affidavit does not appear to have been taken into account by the appointing authority. In the said report it had been stated that though the entry for the year 1995-96, 1996-97 are not available, a perusal of the personal file of the petitioner would indicate that no departmental proceeding was initiated against him during the year 1995-96 and 1996-97 in which period the work of the petitioner was good. In the report of the screening committee it has been mentioned that the character roll entry of 1994-95 too was missing. In fact the character roll entry for the year 1994-95 was sent by the Settlement Officer Consolidation, Jalaun at Orai to the Settlement Officer Consolidation, Lalitpur vide letter dated 18.12.1998 (annexure no.1 to the supplementary affidavit). Sri R.D. Tripathi, the then Settlement Officer Consolidation, Lalitpur presided over the meeting of the screening committee and it was he who gave the special adverse entry for the year 1998-99 vide order dated 29.5.1998 and ultimately it is he who passed the impugned order compulsorily retiring the petitioner being of the view that the petitioner's retention in government service would be contrary to the 'government in interests' (INKO SARKARI SEVA MEIN RAKHNA RAJYA SARKAR KE HITON KE VIRUDDH HAI). It may be observed that 'public interest' is not synonymous to government interest. Albeit recital of

[3] Baldev Raj Cjadha vs. Union of India, (1980) 4 SCC 321

'public interest' in the order of compulsory retirement is not necessary but the recital of 'government interest' in the impugned order clearly shows that the appointing authority passed the impugned order on a wrong perception of the vital issue on which it was required to form its opinion in order to pass an order of premature retirement. The correct legal position is that albeit the appointing authority is not obliged to record reason for its decision to prematurely retire a government servant under Fundamental Rule 56 (C) and it is not permissible to infer on that ground alone that the premature retirement was is not in public interest, but if the grounds or reasons stated in the order 'disclose a clearly erroneous legal approach, the decision will be quashed"[4]. In the fact situation of the case it is clear that the impugned order suffers also from malice in law. The officer who passed the impugned order of compulsory retirement had himself awarded the special adverse entry and presided the screening committee. This is contrary to principles of fairness. That apart the allegation made in para 16 of the writ Petition that 2nd respondent had ill-will and caste bias against the petitioner has not been denied by the 2nd respondent even though he has been impleaded eonomine a party to the writ Petition.

10. Next question that requires consideration is whether in the fact situation of the case the special adverse entry ought to have been communicated to the petitioner. Admittedly, the special adverse entry recorded vide order dated 29.05.1998 was not communicated to the petitioner. In Baikunth Nath Das though it has been held that an order of compulsory retirement will not be rendered illegal merely because uncommunicated adverse entries have been relied on but this holding preceeds the following observation:

"……We may reiterate that not only the Review Committee is generally composed of high and responsible officers a, the power is vested in government alone and not in a minor official, it is unlikely that adverse remarks over a number of years remain uncommunicated and yet they are made the primary basis of action. Such an unlikely situation, if indeed present, may be indicative of malice in law. We may mention in this connection that the remedy provided by Article 226 of the Constitution is no less an important safeguard. Even with its well known constraints, the remedy is an effective check against mala fide, perverse or arbitrary action."

11. Clause (b) of Explanation (2) to Fundamental Rule 56 clearly visualises that mere pendency of representation against the adverse entry is no ground to exclude from consideration such adverse entry provided that representation is also taken into consideration along with the entry. This necessarily enjoins a duty on the appointing authority to take into consideration the representation, if any filed by the Government servant against an adverse entry. This provision impliedly confers a right in the government servant to get his representation considered along with the adverse entry while taking decision under the Fundamental Rule 56 (c). A government servant will stand deprived of this right if the adverse entry is not communicated to him. Exposition

[4] De Smith's Judicial Review of Administrative Action (4th Edn.) By Evans P. 406

of law laid down in Brij Mohan Singh Chopra Versus State of Punjab[5] that unless adverse report is communicated and representation, if any made by employee is considered, it should not be acted upon in retiring an employee prematurely from service under Fundamental Rule 56 (c) is in tune with clause (b) of Explanation (2) to Fundamental rule 56. The aforesaid decision was no doubt noticed by the Supreme Court in Baikuntha Nath Das wherein it has held that mere circumstance that uncommunicated entry was taken into account while passing and order of compulsory retirement cannot be a basis for interference. But there is nothing to show that the rule therein contained any provision like the one contained in clause (b) of Explanation (2) to Fundamental Rule 56. In my opinion, in order to reach a correct conclusion, version of the petitioner with regard to the entry regarding his alleged indulgence in corruption as also in respect of the alleged 'financial irregularity' regarding G.P.F. accounts of the employees was necessary particularly when soon before the special adverse entry and alleged financial irregularity, the petitioner was promoted to the post of Senior Clerk.

In view of the above discussion the petition succeeds and is allowed. The impugned order is quashed.

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[5] (1987) 2 SCC 188

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 18.04.2001

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

Civil Misc. Writ Petition No. 1802 of 2001

Mohd. Salim alias Salim Uddin
...Petitioner
Versus
4th Addl. District Judge, Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Brij Bhushan Paul

Counsel for the Respondents:
S.C.
Shri S.F.A. Naqvi
Shri Jafar Imam Naqvi

Date of First Hearing – Explained – the date on which the Tenant pulten appearance as per date specified in summons accomplained with a copy of plaint.

Held – Para 14

The first date of hearing as indicated in the summons was 21.10.1994 but since the summons was not accomplained with the copy of plaint, the petitioner was given time to file the same and 21.11.1994 was fixed for hearing. The courts below have rightly come to the conclusion that 21.11.1994 was the first date of hearing for the purpose of Section 20 (4) of the Act as by that date the petitioner after due service had been supplied the copy of the plaint.

Case Law Discussed
1999 (UP) RCC – 697
1982 (1) ARC – 371
1982 UP ARC – 665
1984 LRJ –69 (6B)
SC DC FBRC 1993-419
1995 ARC 563

By the Court

1. The dispute relates to the tenanted accommodation House No. 149/160 Sadiyabad, Allahabad. This house was purchased by respondent no. 3 Ghalib Hussain on 10.5.1993 from the previous owners. On 20.05.1994 respondent no. 3 served a composite notice of demand and to quit. Arrears of rent for the period 10.05.1993 to 09.06.1994 were demanded. The present petitioner sent reply to the notice. The respondent no. 3 filed SCC Suit no. 118 of 1994 on 10.08.1994 for ejectment of the petitioner and for recovery of arrears of rent amounting to Rs.2350/- and mense profits. After the suit was registered, the trail court issued summons to the petitioner for his appearance and to file written statement on 21.10.1994. Summons was served and the petitioner appeared before the trail court on dated fixed i.e. 20.10.1994 and move a an application that he may be provided a copy of the plaint. An order was passed to furnish a copy of the plaint to the petitioner and 21.11.1994 was fixed for filing of the written statement and hearing. On that date, the petitioner moved an application for adjournment, which was allowed, and 10.01.1995 was fixed for final hearing. On that date, the petitioner moved an application for adjournment, which too was allowed and 08.02.1995 was fixed for final hearing. Again on that date, the petitioner sought adjournment which was allowed and 15.03.1995 was fixed. The case was fixed for hearing on 02.05.1995 on which date again the petitioner sought adjournment in a causal manner. The trail court showed indulgence by adjourning the case to 12.05.1995. On that date, the lawyers abstained to work and consequently 03.08.1995 was fixed for final hearing. It was on that date that the petitioner moved an application for depositing the money with a view to avail benefit of the provision of Section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act 1972 (U.P. Act No. XIII of 1972) (hereinafter referred to as 'the Act'), which runs as follows:

"20(4): In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays or 28 [tenders to the landlord or deposits in court] the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annuam and the landlord's costs of the suit in respect thereof, after deducting there from any amount already deposited by the tenant under sub-section (1) of Section 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground:

Provided that nothing in this sub-section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.

[Explanation – For the purposes of this sub-section –

(a) the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant:

(b) the expression "cost of the suit" includes one-half of the amount of counsel's fee taxable for a contested suit.]"

2. A sum of Rs.5600/- was deposited by the petitioner on 15.08.1995. The next date of hearing on the move of the petitioner was fixed on 22.08.1995. The suit was ultimately decided against the petitioner on 29.09.1996. It was held that he committed default in payment of arrears of rent. The petitioner preferred a Revision No. 1248 of 1998 under section 25 of the Provincial Small Causes court Act which was dismissed on 20.12.2000. It is in these circumstances that the petitioner tenant has come before this Court to challenge the finding that he is liable to be evicted on the ground of having committed default in payment of arrears of rent.

Counter, Rejoinder and Supplementary affidavits have been brought on record.

Heard Sri B.B. Paul, learned counsel for the petitioner and Sri S.F.A. Naqvi as well as Sri Jafar Imam Naqvi for respondent no. 3.

3. The only legal point canvassed by Sri B.B. Paul, learned counsel for the petitioner before this Court is that the two courts below have erred in not relieving the petitioner from the liability of ejectment inspite of the fact that the petitioner has deposited the entire amount or more than the amount required under Section 20(4) of the Act well before 22.08.1995 which was the first date proposed for hearing. Sri Naqvi repelled the above submission and urged that for the purposes of getting benefit under Section 20(4) of the Act, the petitioner was required to deposit the entire amount of rent, interest, costs, lawyers fee etc. well on or before 21.11.1994 which was the 'first date of proposed hearing' it was pointed out that the petitioner himself has brought about the situation to his detriment by seeking numerous adjournments on the one ground or the other and deposited a sum of Rs.5600/- after a number of dates for proposed hearing had elapsed.

4. The learned counsel for both the parties have placed reliance on the observations made by the Apex Court in the case of **Sudarshan Devi and another** vs. **Sushila Devi and another** – 1999 (U.P.) R.C.C. 697.

5. The parties would swim or sink with the determination of the 'first date of proposed hearing' as it is crucial to deposit the amount as contemplated under Section 20(4) of the Act by the tenant to relieve himself of the liability from ejectment.

6. The expression 'at the first hearing of the suit' is also to be found in Order X, rule 1, Order XIV, Rule 1 (5) and Order XV Rule 1 of the Code of Civil Procedure. These provisions indicate that ' the first hearing of the suit' can never be earlier than the date fixed for the preliminary examination of the parties.

7. The date of the first hearing within the meaning or Order 15, Rule 5 means the date mentioned in the summons and that the ordinary notion as to whom the date of the first hearing in a civil suit governed by the Code of Civil Procedure arrives, cannot be imported into or applied in the application or Order 15,

rule 5. Once it is found that the summons had been duly served it is the date mentioned in the summons, which would be relevant for the application in Order 15, rule 5.

8. The insertion of the explanation with regard to the expression 'first hearing' by the State Legislature has given an artificial meaning to the said expression which was not the meaning given by the courts earlier also different from the meaning given to the expression occurring in Order VIII Rule 1 in Order X, rule 1 or in Order XV, Rule 1 of the Code of Civil Procedure.

9. The language of the Explanation appended to Section 20(4) of the Act is plain enough and a bare reading of it indicates that save in cases where the Court itself is unable to take up the case or proceed with the hearing of the same in consequence of the absence of the presiding office or of the inability of the Court or like nature to take up the case, the date mentioned in the summons shall be the date of the first hearing, provided of course if the summons has been duly served on the defendant.

10. After the amendment in the form of incorporation of explanation added by Act No.28 of 1976 to Section 20(4), it has been held in various decisions that for the purposes of Section 20(4), it is only the date mentioned in the summons and not any adjourned date that would be treated as the date of 'first hearing'. The decisions of this Court in **Rafiq Ahmad** vs. **III Additional District Judge** 1982(1) ARC 371, **Champa Ram** Vs. **Ist Additional District Judge**, 1982 UPRCC 608 and **Jagannath** Vs. **Ram Chandra Srivastava (D.B.)** –1982(1)ARC 665 were affirmed by a Full Bench decision of Lucknow Bench of this Court in the case **Sia Ram vs. District Judge, Kheri and other**, 1984 Lucknow Rent Journal, 69 (FB)(Lucknow).

11. In the case of **Siraj Ahmad Siddiqui** vs. **Prem Nath Kapoor**, S.C. and Full & Bench Rent Cases, 1993 page 419, the expression 'first hearing' occurring in the explanation to section 20(4) came to be interpreted. The apex court held as follows:

"The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the Court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression 'first hearing' for the purpose of Section 20(4) mean something different? The 'step or proceedings mentioned in the summons' referred to in the definition should, we think, be construed to be a step or proceedings to be taken by the Court for it is, after all, a 'hearing' that is the subject matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression 'first date for any step or proceeding' to mean the step of filing the written statement, though the date for that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the Court takes up the case, since there is nothing in the said. Act which conflicts with the provisions of the Code in this behalf. We

are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the Court purposes to apply its mind to determine to points in controversy between the parties to the suit and to frame issues, if necessary."

12. Relying upon the aforesaid observation in the case of **Siraj Ahmad Siddiqui** (Supra), the apex court in the case of **Adyaitanand Vs. Judge Small Cause Court, Meerut and others**, 1995 ARC 563 has taken the view that the date of 'first hearing' as defined in the said Act is the date on which the Court proposed to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary.

13. Now let us examine the observations made by apex court in **Sudarshan Devi's case (Supra)** on which reliance has been placed by the counsel for the both the parties. Sri B.B. Paul referred to the observations made by the apex court in paragraph 28 of the report which read as follows:

"28: Thus both in Siraj Ahmad Siddiqui and Advaita Anand this Court construed Section 20(4) and the Explanation to say that the date of first hearing of the suit would not be the date fixed for filing the written statement but would be the date proposed for the hearing i.e. the date proposed for applying the Court's mind to determine the points in controversy and to frame issues, if necessary. These decisions are binding on us. Point 1 is decided accordingly"

Sri S.F.A. Naqvi had drawn the attention of this Court to paragraphs 32 and 33 of the report. They run as follows:

"32. In our view, the use of the word "proposing to apply its mind" and the word 'for" final hearing used in *Siraj Ahmad Siddiqui's* case and in *Advaita anand's* case are significant. In fact, though Section 20(4) uses the word "at" the Explanation uses the word 'for'. Therefore, we cannot accept the contention of the learned counsel for the tenant-appellants that the due date is the actual date when the final hearing taken place. The due date is the date fixed in the summons for final hearing as explained above in point 1.

"33. In the present case before us the case being one tried by the Small Causes Court, the summons initially stated that the date for first hearing, i.e. the date fixed for final hearing, would be, 22.2.1990. All the three courts below, therefore, held that the crucial date was 22.2.1990 and there was clear default by 22.2.1990. But in our opinion 22.2.1990 would not be the due date. The summons was served in this case by the method of substituted service and it was common ground that the summons were not accompanied by the plaint. The tenant therefore filed an IA seeking a copy of the plaint. That application was allowed and a fresh date for filing written statement and a fresh date for 'first hearing' were given the fresh date for final hearing was 12.4.1990. But the arrears were not deposited even by that date."

14. The decision is **Sudershan Devi's** case (Supra) is not in opposition to what has been laid down in the case of **Siraj Ahmad Siddiqui** (Supra). The date of first hearing for all practical purposes shall be the date as has been indicated in the summons for the proposed hearing. In the case in hand the plaint was registered

on 10.08.1994 and summons was issued fixing 21.10.1994 for filing the written statement and hearing. After the service of the summons the petitioner did appear before the court below on 21.10.1994 and prayed for a copy of the plaint, which was supplied to him on 27.10.1994. The trail court has fixed 21.11.1994 for filing of written statement and hearing. On that date, the petitioner appeared but did not file the written statement and sough time. Thereafter a number of adjournments were sought by him. It was only on 15.08.1995 that the petitioner deposited the money. Sri Paul asserts that 03.08.1995 or for that matter 22.08.1995 was, in fact, the first date of proposed hearing for the purposes to avail the benefit of Section 20(4) of the Act. I find it difficult to agree with Sri Paul on the point. The first date of hearing as indicated in the summons was 21.10.1994 but since the summons was not accompanied with the copy of plaint, the petitioner was given time to file the same and 21.11.1994 was fixed for hearing. The courts below have rightly come to the conclusion that 21.11.1994 was the first date of hearing for the purpose of Section 20(4) of the Act as by that date the petitioner after due service had been supplied the copy of the plaint. The petitioner did not deposit the money on 21.11.1994 or thereafter for months together, which was the first date of hearing and allowed the matter to drag on for numerous dates. He deposited the money on 15.8.1995 and during the period 21.11.1994 to 15.08.1995 a number of dates of hearing had intervened. The observations made by the apex court in paragraph 28 of **Sudarshan Devi's** case (supra) as relied upon by Sri Paul are of no avail to the petitioner. They have to be confined to the particular facts of that case.

15. Section 20(4) of U.P. Act no. 13 of 1972, provides that in any suit for eviction on the ground of default in arrears of payment mentioned in Clause (a) sub-section (2) of Section 20, if at the first hearing of the suit the tenant unconditionally pays the entire amount of rent and damages for use and occupation of the building due from him together with interest thereon at the rate of nine percent, per annuam and the landlord's cost of the suit in respect thereof, the Court may, in lieu of passing a decree for eviction on that ground pass an order relieving the tenant against his liability for eviction on the ground. Since the petitioner did not deposit the amount on the first date of proposed hearing i.e. 21.11.1994, he has been rightly denied benefit of the provisions of Section 20(4) of the Act.

The writ petition turns out to be devoid of any merits and substance. It is accordingly dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 15.2.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ Petition No. 6684 of 2000

Om Prakash ...Petitioner
Versus
The State of U.P. through Maha Nideshak Chikitsa Evam Swasthya Sewaye, U.P. and others ...Respondents

Counsel for the Petitioner:
Shri S.P. Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure, 1973, S.197 (1) read with I.P.C., S. 409 and Constitution of India, Articles 311 and 226 Criminal Prosecution- Sanction Validity-Petitioner, a Senior Assistant in District Hospital, Charged with offence of Criminal misappropriation under S.409, I.P.C. Director (Admn.), Medical and Health by order dated 16.10.2000 granted sanction for Petitioner's prosecution Present writ filed for quashing the same.

Held – (Paras 14 and 15)

An order of sanction can be assailed only on two grounds viz. (1) it has been granted by an authority who was not competent to do so and (2) it has not been given in respect of the facts constituting the offence charges. However, if the challenge to sanction is based upon the ground that the facts constituting the offence do not appear on the face of the sanction, then such a plea cannot be entertained at the initial stage before the trial has commenced, as the prosecution can have no opportunity to lead evidence in order to show that the sanction had been granted after consideration of relevant material. Therefore, such a plea cannot be entertained and examined in any proceedings including a writ petition under Article 226 of the constitution before commencement of the trial. It is only after the trail has concluded and the prosecution has been given the opportunity to lead evidence that the validity of the sanction can be examined on this ground.

An order of sanction cannot be assailed or tested on the ground that the evidence does not establish the charge. This is the function of the court trying the case and not of the sanctioning authority. The sanctioning authority has merely to see whether the facts alleged against the accused constitute an offence and whether he should be tried by a competent court for the said offence. There is neither any pleading nor any ground in the writ petition that the sanctioning authority did not apply his mind to the fact constituting the offence. In the order of sanction it is recited that the authority had carefully examined all the papers and had, thereafter, come to the conclusion that the petitioner Om Prakash, Senior Assistant, should be prosecuted for the offence committed by him before a competent court. It is, further, recited that on being satisfied the authority was granting the sanction for prosecution of the petitioner before a competent court in case Crime No. 100 of 2000, under Section 409 IPC. The impugned order of sanction clearly shows that it has been granted with reference to the facts on which the proposed prosecution was to be based and, therefore, the same is perfectly valid. Similarly, there is neither any pleading nor any ground in the writ petition that Sri M.A. Farooqui, Director (Administration), medical and Health Services. U.P. Government, Lucknow, was not legally competent to grant sanction, and, therefore, the order of sanction cannot be assailed on the ground of competency of the sanctioning authority.

Case Law Discussed
D.C. 55F 2D 279
78 Corpus Juris secundum P.579
AIR 1948 PC 82
AIR 1954 SC 637
AIR 1971 SC 1910
AIR 1961 SC 387

By the Court

1. The petitioner Om Prakash was working as senior assistant in the District Hospital, Pilibhit. A FIR was lodged against him under Section 409 IPC on

24.03.1999 alleging that he committed misappropriation of Rs.1,78,504/- while discharging his duties. The case was investigated and, thereafter, papers were sent to the Directorate of Medical and health, Lucknow, for granting sanction for his prosecution. The Director (Administration), Medical and Health, by his order dated 16.10.2000 granted sanction for the prosecution of the petitioner under Section 409 IPC in Case Crime No. 100 of 2000. The present writ petition under Article 226 of the Constitution has been filed for quashing of the said order.

2. Shri S.P. Singh learned counsel for the petitioner has submitted that the petitioner Om Prakash did not himself misappropriate any public funds and on the contrary money was taken from him by the Chief Medical Officer on the pretext of official expenditure who did not give any receipt or voucher for the same and himself misappropriated the amount. In support of this submission reference has been made to certain letters which were allegedly written by the petitioner to the Chief Medical Officer, copies of which have been filed along with the petitioner. The main submission of Shri Singh is that the offence of criminal misappropriation is not at all established against the petitioner and he is wholly innocent and therefore the order granting sanction deserves to be quashed.

3. In the present writ petition the petitioner has challenged the order by which sanction has been granted for his prosecution under section 409 IPC as contemplated by Section 197 Cr. P.C. The proceedings have yet to commence before the court and no order passed by a court is subject-matter of challenge. The question which requires consideration is on what grounds an order granting sanction can be challenged at the very initial stage before the parties had any opportunity to lead evidence in support of their case.

4. Section 197 Cr. P.C. provides that when any person who is or was a public servant not removable from his office save by or with the sanction of the Central Government or State Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties, no court shall take cognizance of such offence, except with the previous sanction of the appropriate Government.

5. Sub-section (1) of Section 197 Cr.P.C. shows that sanction for prosecution is required where any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty. Article 311 of Constitution lays down that no person who is a member of a civil service of the Union or State or holds a civil post under the Union or State shall be removed by an authority subordinate to that by which he was appointed. It therefore, follows that protection of sub-section (1) of section 197 of Cr. P.C. is available only to such public servants whose appointing authority is the Central Government or the State Government and not to every public servant.

6. The word ‘sanction’ has not been defined in the Code of Criminal

Procedure. The dictionary meaning of the word 'sanction' is as under:

Webster's Third New Internal Dictionary –

Explicit permission or recognition by one in authority that gives validity to the act of another person or body; something that authorizes, confirms, or countenances.

The new Lexicon Webster's Dictionary –

Explicit permission given by some one in authority.

The Concise Oxford Dictionary –

Encouragement given to an action etc., by custom or tradition; expression permission, confirmation or ratification of a law etc; authroize, countenance, or agree to (an action etc.)

Stroud's Judicial Dictionary –

Sanction not only means prior approval; generally it also means ratification.

Words and Phrases –

The verb 'sanction' has a distinct shade of meaning from 'authorize' and means to assent, concur, confirm or ratify. The word conveys the idea of sacredness or of authority.

The Law Lexicon by Ramanath Iyer –

Prior approval or ratification.

7. In 78 Corpus Juris Secundum Page 579 different meanings have been given to the word as a noun and as a verb. As a noun it means penalty or punishment provided as a means of enforcing obedience to a law and in a wider sense an authorisation of any thing and it may convey the idea of authority. As a verb 'sanction' is defined as meaning to assent, concur, confirm or ratify. In US Vs. Tillinghast D.C. 55 F.2d 279 it was held that where legal rights are involved it is doubtful whether it should be construed as requiring less than an unmistakable expression of approval. In section 197 Cr. P.C. the word 'sanction' has been used as a verb and therefore it will mean to assent, to concur or approval.

8. The legislature has given great importance to sanction will be evident from the Scheme of Code of Criminal Procedure. Section 216 of the Code gives power to the court to alter or add to any charge at any time before judgement is pronounced but sub-section (5) there of provides that if the offence stated in the altered or added charges is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charges is founded. This was also emphasised by the Privy council in the leading case of Gokulchand Dwarka Das Morarka Vs. The King, AIR 1948 PC 82, where in para 9 it was observed as follows:

"….The sanction to prosecute in an important matter; it constitutes a condition precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not, as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted…."

In para 10 of the aforesaid judgement it was observed that the giving of sanction confers jurisdiction on the court to try the case. This case has been quoted with approval by the Supreme Court in Madan Mohan Vs. State of U.P., AIR 1954 SC 637 and Som Nath Versus Union of India, AIR 1971 SC 1910.

9. Clauses (a) and (b) of sub-section 197 Cr. P.C. show that the sanction in the case of a person who is or was employed at the time of commission of the alleged offence in connection with the affairs of the Union of India has to be granted by the Central Government, and, in the case of a person who is or was employed at the time of commission of the alleged offence in connection with the affairs of a State, by the State Government. This provision shows that the sanction can be granted only by the Central Government or the State Government, as the case may be. If the sanction is not accorded by the competent authority of the State Government or the Central Government as the case may be, the order of sanction would be invalid. It, therefore, follows that an order of sanction can be assailed on the ground that the same had been granted by a person who did not have the authority to grant sanction as contemplated by Section 197 Cr. P.C.

10. What would constitute a valid sanction was examined by the Privy Council in Gokul Chand Dwarka Das Morarka (Supra) with reference to clause 23 of Cotton Cloth and Yarn Control Order. 1943, which required that no prosecution for the contravention of any of the provisions of the control order shall be instituted without the previous sanction of the Provincial Government, and it was held as follows;

"A sanction which simply names the person to be prosecuted and specifies the provision of the Order which he is alleged to have contravened is not a sufficient compliance with Cl. 23. In order to comply with the provision of Cl.23, it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the fact should be referred to on the face of the sanction, but this is not essential since Cl.23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority……"

11. Section 6(1) of the Prevention of Corruption Act, 1947, provided that no court shall take cognizance of an offence alleged to have been committed by the public servant, except with the previous sanction of the authority specified in the sub-section. What would constitute a valid sanction with reference to the aforesaid provision, was examined in Madan Mohan Vs. State of Uttar Pradesh, AIR 1954 SC 637, and the Apex Court after relying upon the dictum of the Privy Council in Gokulchand Dwarka Das Morarka (supra) held as follows:

"The burden of proving that the requisite sanction has been obtained rests on the prosecution and such burden includes proof that the Sanctioning authority had given the sanction in reference to the facts on which the proposed prosecution was to be based; and these facts may appear on the face of the sanction or may be proved by extraneous evidence. Where the fact

constituting the offence do not appear on the face of the letter sanctioning prosecution, it is incumbent upon the prosecution to prove by other evidence that the material facts constituting the offence were placed before the sanctioning authority. Where this is not done, the sanction must be held to be defective and an invalid sanction cannot confer jurisdiction upon the Court to try the case."

Similar view was taken in Maj. Som Nath Vs. Union of India, AIR 1971 SC 1910.

12. Section 198-B(3) of code of Criminal Procedure, 1989, required filing of a complaint with the previous sanction granted by the authorities specified in that sub-section. In P.C. Joshi Vs. State of U.P., AIR 1961 SC 387, the apex Court while examining the same question as to what would constitute a valid sanction held as follows in paragraph 4 of the reports:

"Mere production of a document which sets out the names of the persons to be prosecuted and the provisions of the statute alleged to be contravened, and purporting to bear the signature of an officer competent to grant the sanction where such sanction is a condition precedent to the exercise of jurisdiction does not invest the court with jurisdiction to try the offence. If the facts which constitute the charge do not appear on the face of the sanction, it must be established by extraneous evidence that those facts were placed before the authority competent to grant the sanction and that the authority applied his mind to those facts before giving sanction."

13. It is, therefore, well settled that in order to constitute a valid sanction it must be established that the same was given in respect of the facts constituting the offence with which the accused is proposed to be charged. The facts may be stated in the order granting sanction or may be proved by extraneous evidence. If the facts do not appear on the face of the sanction, the prosecution must prove it by other evidence that the material facts constituting the offence were placed before the sanctioning authority and he had granted the same after consideration of the said facts. It follows as a corollary that where the facts constituting the offence do not appear on the face of the sanction, it will be open for the prosecution to lead evidence that the material facts were placed before the sanctioning authority before grant of sanction, and the occasion for leading the evidence can arise only during the course of trial.

14. The discussion shows that an order of sanction can be assailed only on two grounds viz. (1) it has been granted by an authority who was not competent to do so and (2) it has not been given in respect of the facts constituting the offence charged. However, if the challenge to sanction is based upon the ground that the facts constituting the offence do not appear on the face of the sanction, then such a plea cannot be entertained at the initial stage before the trail has commenced, as the prosecution can have no opportunity to lead evidence in order to show that the sanction had been granted after consideration of relevant material. Therefore, such a plea cannot be entertained and examined in any proceedings including a writ petition under Article 226 of the Constitution

before commencement of the trail. It is only after the trail has concluded and the prosecution has been given the opportunity to lead evidence that the validity of the sanction can be examined on this ground.

15. In the writ petition the entire effort of the petitioner has been to show that he has not misappropriated the funds and that the same had been utilised for official purpose. These are all questions which go to the merits of the case, namely, whether the charges against the petitioner that he misappropriated the public funds is established or not. These are matters to be seen in the trial after the prosecution and the accused had the opportunity to lead evidence in support of their case. An order of sanction cannot be assailed or tested on the ground that the evidence does not establish the charge. This is the function of the court trying the case and not of the sanctioning authority. The sanctioning authority has merely to see whether the facts alleged against the accused constitute an offence and whether he should be tried by a competent court for the said offence. There is neither any pleading nor any ground in the writ petition that the sanctioning authority did not apply his mind to the facts constituting the offence. In the order of sanction it is recited that the authority had carefully examined all the papers and had, thereafter, come to the conclusion that the petitioner Om Prakash, senior assistant, should be prosecuted for the offence committed by him before a competent court. It is, further, recited that on being satisfied the authority was granting the sanction for prosecution of the petitioner before a competent court in case Crime No. 100 of 2000, under Section 409 IPC. The impugned order of sanction clearly shows that it has been granted with reference to the facts on which the proposed prosecution was to be based and, therefore, the same is perfectly valid. Similarly, there is neither any pleading nor any ground in the writ petition that Sri M.A. Farooqui, Director (Administration), Medical and Health Services, U.P. Government, Lucknow, was not legally competent to grant sanction and, therefore, the order of sanction cannot be assailed on the ground of competency of the sanctioning authority.

16. For the reasons mentioned above, there is no merit in the writ petition which is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 04.04.2001

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

Special Appeal No. 378 of 2001

Dhirendra Kumar ...Petitioner
Versus
State of U.P. through the Secretary, Department of Home, Government of U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri Ram Autar Verma.

Counsel for the Respondents:
Shri Sandeep Mookerji
S.C.

Rules of Court, 1952, Chapter VIII R.5- Special Appeal against Single Judge Judgement under Article 226, Constitution of India- Appellant, member of U.P. Police, suspended pending disciplinary enquiry for his misconduct of

absence from duty without leave – In writ by appellant Single Judge directed disciplinary enquiry to proceed and suspension order to be kept in abeyance – Consequential reinstatement ordered – Special Appeal allowed- Held, no material, on record to show that order of suspension was malafide- Charge of absence from duty without leave admitted as such prima facie evidence on record connecting the appellant with the misconduct – Hence Single Judge Order for continuance of disciplinary enquiry, held to be perfect and legal – Since order keeping order of suspension in abeyance not challenged, the same was allowed to continue.

Held-Paras 6 and 9

In the instant case, there is no material on record to come to the conclusion that the impugned order of suspension was passed malafide. So far as the requirement of prima facie evidence on record connecting the appellant with the misconduct is concerned, the appellant has admitted the charge of being absent from duty without leave which is subject matter of disciplinary enquiry against him. Thus, there being no dispute that he remained absent from duty without leave, it cannot be concluded that it is a case of lack of prima facie evidence on record connecting the appellant with the alleged misconduct.

So far as the attack on the impugned order regarding direction to continue the enquiry and bring the same to its logical end in accordance with law is concerned, the court is of the opinion that the direction of the learned single Judge in the impugned order and judgement is perfect, specially in view of the fact that factum of absence from duty without leave is admitted by the appellant. It suffers from no infirmity, much less legal warranting interference in this intra – court appeal under Chapter VIII Rules 5 of the Rules of Court, 1952. Indeed, the appeal is frivolous vexatious and amounts of gross abuse of the process of law.

Case Law Referred

JT 1993 (2) SC 550

By the Court

1. Heard Sri Ram Autar Verma, the learned counsel appearing for the petitioner-appellant and Sri Sandeep Mookerji, the learned Standing Counsel of the State of U.P., representing the respondents No. 1, 2 and 4 at length and in great detail.

2. The appellant is a member of Uttar Pradesh Police. A disciplinary proceedings against his conduct is in contemplation and in the meantime he has been placed under suspension by the order dated 4th March, 2001.

3. Feeling aggrieved by the order of suspension and initiation of disciplinary enquiry, the appellant filed in this court the Civil Misc. Writ Petition No. 10317 of 2001, Dhirendra Kumar Vs. State of U.P. and others.

4. The writ petition has been finally disposed of by a learned single Judge of the court, vide his order dated 22nd march, 2001. The learned single Judge opined that considering the nature of the charge against him the disciplinary enquiry could go on without placing the appellant under suspension. Therefore, while disposing of the petition finally, the learned single Judge has directed that the disciplinary enquiry may be taken to its logical end in accordance with law and the order of suspension of the appellant be kept in abeyance. Consequential reinstatement of the appellant has also been directed by the learned single Judge.

5. The appellant is not satisfied with the magnanimity and mercy shown to him by the learned single judge by keeping the order of suspension in abeyance during the pendency of the disciplinary enquiry. The appellant demands more. To be precise, he urges that disciplinary enquiry against him should be knocked off. Hence, this intra-court appeal.

6. In its decision rendered in U.P. Rajya Krishi Utpadan Mandi Parishad & Ors. Vs. Sanjiv Rajan, reported in Judgement Today 1993 (2) S.C. at page 550, the Hon'ble Supreme Court has clearly and categorically ruled that "--- whether the employees should or should not continue in their office during the period of inquiry is a matter to be assessed by the concerned authority and ordinarily, the Court should not interfere with the orders of suspension unless they are passed *mala fide* and without there being even a *prima facie* evidence on record connecting the employees with the misconduct in question."

7. In the instant case, there is no material on record to come to the conclusion that the impugned order of suspension was passed *malafide*. So far as the requirement of *prima facie* evidence on record connecting the appellant with the misconduct is concerned, the appellant has admitted the charge of begin absent from duty without leave, it cannot be concluded that it is case of lack of *prima facie* evidence on record connecting the appellant with the alleged misconduct.

8. In these circumstances, there was no occasion for interference with the assessment of the relevant authority in the matter of placing the appellant under suspension during the period of inquiry against him. It would have been appropriate to allow the order of suspension of the appellant to operate during the pendency of disciplinary enquiry against him.

9. However, the magnanimity and mercy extended to the petitioner by the learned single Judge in exercise of the special and extraordinary jurisdiction under Article 226 of the Constitution of India need not be disturbed for the reason that the direction of the learned single Judge for keeping the suspension of the appellant in abeyance has not been challenged by the State and appears to have been acquiesced by it.

10. So far as the attack on the impugned order regarding direction to continue the enquiry and bring the same to its logical end in accordance with law is concerned, the Court is of the opinion that the direction of the learned single Judge in the impugned order and judgement is perfect, specially in view of the fact that factum of absence from duty without leave is admitted by the appellant. It suffers from no infirmity, muchless legal, warranting interference in this intra-court appeal under Chapter VIII Rule 5 of the Rules of Court, 1952. Indeed, the appeal is frivolous, vexatious and amounts to gross abuse of the process of law.

11. Thus, the appeal is dismissed with costs, which is quantified at Rs.1500/-. The costs shall be deposited by the appellant with the Superintendent of Police, Auraiya within a month, failing which the costs may be realised from the petitioner from his salary.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 17.04.2001

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

Civil Misc. Writ Petition No. 6901 of 2001

Dr. Gaurav Khanna ...Petitioner
Versus
Secretary, Kamla Nehru Memorial Hospital and others ...Respondents

Counsel for the Petitioner:
Sri Vishwa Ratan Dwivedi

Counsel for the Respondents:
Sri Vijay Ratan Agarwal

Constitution of India – Article 226 – Maximum Marks – Provision of 50% for Interview and 50% in written examination contained in guide line framed by K.N.M.H. – for selection to D.N.B. Course- held arbitrary and illegal.

Held – Para 10

From the aforesaid decisions, it is clear that so far as admission in educational institution is concerned, where there is a written test and interview both, in such cases marks for interview could not be fixed more than 15% where as in cases of public employment where there is both written test and interview, in such cases the marks of interview could be fixed above 15% depending upon the nature of public employment. The guidelines framed by KNMH that a candidate must obtain 50% marks in interview, gives a chance to the respondents to arbitrarily pick and choose or reject a candidate even where the candidate had obtained 100% in the written test and fails to secure 50% marks in the interview, then he is liable to be declared unsuccessful. Therefore, the guidelines framed by the KNMH that a candidate for selection to DNB course must obtain 50% marks in interview, is arbitrary, unreasonable and contrary to law laid down by the apex court and is struck down.

Case law discussed
AIR 1981 SC 487
AIR 1987 SC 454
1991 (1) SCC 662
1991 (3) SCC 368
JT 1993 (6) 168

By the Court

1. The petitioner passed his M.B.B.S. examination in 1998 from Moti Lal Nehru Medical College, Allahabad. After completing his internship, he was enrolled for house job at Kamla Nehru Memorial Hospital, Allahabad (in brief KNMH). He worked as House Surgeon in the Department of Radiation & Oncology from 06.01.2000 to 31.12.2000. He qualified in the primary examination conducted by the National Board of Examinations (Ministry of Health & Family Welfare, Government of India) New Delhi, the respondent no. 3 (in brief NBE) in July 2000. on 20.11.2000 an advertisement was published in newspaper Amar Ujala inviting applications for admission to Diplomate of National Board (DNB course) in Radiotherapy for the session 2001. Petitioner applied and appeared in the objective written test on 12.12.2000 and was successful. Thereafter, on 13.12.2000 he appeared in interview. There were two seats in DNB course in Radiotherapy and the petitioner was the only candidate who had applied for Radiotherapy DNB courses. According to the guidelines framed by KNMH on 9.12.2000 for selection of DNB candidate, a candidate must obtain 50% marks for qualifying in theory examination and he must secure 50% marks in clinical viva/interview. It

further provides that in interview, marks will be given by grades. Grade-A signifies "very good performance"(8-10 marks), Grade-B signifies "good performance" (5-7 marks) and Grade-signifies "unsatisfactory performance" (less than 5 marks). It further provides that past performance in the work and conduct of the internal candidates for DNB course, if any, will also be taken into account while assessing overall performance of the candidate. The result of the petitioner of written examination and interview was not declared, therefore, this petition was filed praying that the respondents (KNMH) be directed to declare the result of the petitioner.

2. In the counter affidavit filed by the respondents, it has been stated that NBE was established to evolve a pattern for the conduct of high and uniform standard of post graduate and post doctoral examination in medical sciences for the award of Diplomate of National Board which are equivalent to MD/MS/DM/M.Ch. of other Indian Universities of the country recognised by Government of India and the Medical Council of India. Their main stand is that passing of Primary Examination of NBE makes a candidate eligible for admission to test only for DNB seat. The candidate does not become entitled to seat automatically.

3. Sri Vishwa Ratan Dwivedi the learned counsel for the petitioner has urged that since the petitioner was the only candidate who applied for DNB course in Radio therapy and there being two seats available, he was entitled to be selected. He further urged that NBE information brochure provide for two examinations primary and final. Since he has been successful in primary examination, he was entitled for admission in KNMH. And after he received training in KNMH his final examination could be taken by NBE. The information brochure of NBE did not authorise KNMH to take any other examination. He has further urged that his past conduct is satisfactory and a certificate in this regard has been issued by the medical Superintendent, Dr. J.P. Gupta, which has been filed as Annexure-1 to the rejoinder affidavit.

4. On the other hand Sri Vijay Ratan Agarwal the learned counsel for respondents no. 1 and 2 has urged that since the petitioner was unsuccessful, therefore, there was no question of declaration of his result. He has placed before this court the marks awarded to the petitioner in the written examination and interview. He urged that a candidate must obtain 50% marks in theory (written test) and must obtain 50% marks in interview, only then he could be declared selected for DNB course. He urged that no doubt the petitioner obtained 50%marks in the written test but since he has secured less than 50% marks in the interview, therefore, he could not be declared to be selected for DNB course in Radiotherapy. He further urged that information brochure of NBE did not debar the KNMH from taking examination and interview, therefore, the respondents could frame guideline for taking admission in DNB course. Sri Agarwal has produced the entire record of Obstetrics and Gynaecology and Radiotherapy of written test and interview including the guidelines framed for selection by KNMH for admission to DNB course before this court.

5. NBE information brochure has been filed by the respondents along with the counter affidavit. It was established by Government of India in the Ministry of Health and Family Welfare in 1975. It became an independent autonomous organisation in 1982. Primary Examination is taken by NBE and the candidates who are declared successful in primary examination are sent by NBE to 156 accredited institutions for the intake of 570 candidates for various post graduate and post doctoral courses in the private and public sector hospitals/institutions. The brochure further provides that if a candidate has passed his primary examination, he has to pass final examination. The primary and final examinations are to be taken by NBE as extracted below:

Primary Examination:

-- MBBS Standard
-- 2 Papers and 3 hours duration each
-- each paper has 180 MCQs

Final Examination – Theory :

-- Board Specialities
-- 4 papers of 100 marks and 3 hours duration each
-- Pass – 50% in aggrigate

Clinical, Practical & Viva-voce

- After passing the theory examination (Final)
- Should obtain a minimum of 50% score in practical

Super Specialities

- 3 years training after recognised post graduate degree
- 3 papers of 100 marks and 3 hours duration each
- eligible for practical, clinical and viva-voce if
- secure 40% marks in aggrigate
- should obtain a minimum of 50% in practical

6. The information brochure of NBE does not provide that a candidate who has been declared successful in primary examination, has to appear again in any other examination or interview to be conducted by private or public sector hospital/institutions for taking admission of a candidate who has passed the primary examination conducted by NBE. The KNMH has been granted accreditation for purpose of NBE training. It is one of the DNB centre for imparting training in Obstetrics & Gynaecology and Radiotherapy. It can take admission of one candidate in Obstetrics & Gynaecology and two candidates in Radiotherapy for January 2000 to December 2002. The KNMH on 20.11.2000 advertised in various newspapers inviting applications for the aforesaid DNB courses and selection was to be made through an objective type written test followed by an interview. It is stated in paragraph 8 of the counter affidavit that a candidate who has been declared successful in primary examination conducted by NBE is not entitled for admission for DNB courses in KNMH as it is not provided in the information brochure. The petitioner appeared in the written test and interview and was found unsuccessful. As per the practice of KNMH and as per guidelines framed, the result of only one selected candidates in Obstetrics & Gynaecology was declared. It was not obligatory for KNMH to declare the result of unsuccessful candidate. In paragraph 12 it has been stated that the petitioner had been warned on number of occasions for his bad conduct and behaviour. It is not disputed that the two seats for DNB course in Radiotherapy are vacant and could not be filled as the petitioner was

the only candidate who had applied for selection, was unsuccessful.

7. The respondents have produced the guidelines for selection for DNB candidates framed by medical Superintendent of the KNMH on 09.12.2000 which is extracted as under:

"Guidelines for Selection of DNB Candidates"

The Guidelines for members of Selection Committee for assessing the suitability of prospective candidates for DNB in the Departments of Obst. & Gynaec. & Radiography will be as under:

1. The candidate must appear for the Theory Examination which will consist of subjective and or objective for DNB of questions set by the Head of the concerned Department.

2. The Candidate must secure 50% marks for qualifying the Theory Examination.

3. The eligible Candidate will then be called for Clinical Viva/Interview before the Selection Committee constituted by KNMH.

4. The Candidate must secure 50% marks in the Clinical Viva/Interview.

5. The Candidate will be considered ineligible for the Selection of DNB course if he/she fails to secure the minimum qualifying marks in any of the above examination i.e. Theory and Clinical Viva/Interview.

6. The Selection Committee will interview the candidate on the overall Clinical aspect to assess the suitability and competence of the candidates. The marks to be given for the interview will be as per following norms:

(i) Grade 'A' signifies- Very good performance (8-10 marks)

(ii) Grade 'B' signifies- Good performance (5-7 marks)

(iii) Grade 'C' signifies- unsatisfactory performance (less than 5 marks)

7. The past performances in the work and conduct of internal candidates for DNB course, if any, will also be taken into account while assessing the overall performance of the candidate(s).

(Dr. J.K. Gupta)
Medical Superintendent

8. According to the respondents, as per the guidelines, if any candidates had been declared successful by NBE in the primary examination, it does not confer any right on him to be admitted in DNB course in Radiotherapy in MNMH unless he is declared successful in the written test and interview as per the guidelines framed by the KNMH. The candidates must secure 50% marks for qualifying in the theory examination and if he is successful in theory examination, then he would be called for interview. He must secure 50% marks and if a candidate fails to secure 50% minimum qualifying marks in either theory or in interview, then he shall be ineligible for selection for DNB course in KNMH. The records of the respondents show that the petitioner in the written theory examination has secured 53 marks out of 76 marks which comes to 69.7%. he was called for interview, which was taken by Dr. Krishna Mukherjee,

Dr.B. Paul, Dr. I. Pehar and Dr. J.K. Gupta. The records of the interview reveal that the petitioner was awarded grade 'C' signifies unsatisfactory performance (less than 5 marks) which comes to less than 50%. Therefore, according to the learned counsel for the respondents, since the petitioner secured less than 50% minimum marks fixed for interview, he was unsuccessful and the seat in DNB course in Radiotherapy had to be kept vacant irrespective of the fact that the petitioner was the only candidate.

9. Two questions arise for consideration, one whether the guidelines framed by KNMH for determining selection for DNB course of NBE candidate is arbitrary and whether an accredited institution is entitled to hold further test for selection from amongst NBE candidate. The first question is settled by the apex court. A written examination assesses a candidate's knowledge and intellectual ability whereas an interview assesses a candidate over all intelligence and personal qualities. The Constitution Bench of the apex court in Ajay Hasia etc. v. Khalid Mujib Sehravardi and other AIR 1981 SC 487 in the matter of admission to professional colleges had the occasion to consider the question that where there is both written test and interview, what should be the percentage of marks for interview, It has held that oral interview test should not be relied upon as an exclusive test in the matter of admission of colleges but it may be resorted to only as an additional or supplementary test. It held in paragraph 19 that allocation of more than 15% of the total marks for the oral interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid. The apex court in another Constitution Bench decision in Ashok Kumar Yadav and others v. State of Harayana and others AIR 1987 SC 454. In paragraph 25 it has been held that written test and viva voce test both are accepted as essential features for proper selection. It further held that there cannot be any hard and fast rule regarding the precise weight to be given to the viva voce test as against the written examination. It may vary from service to service. It held that percentage of marks in the case of ex-service officers in viva voce test being 33.3% was unduly high and suffer from vice of arbitrariness. In Mohinder Sen Garg v. State of Punjab 1991 (1) SCC 662 and in Munindra Kumar and others v. Rajiv Govil and others 1991(3) SCC 368 the apex court held that where there is a written test and interview, 15% marks in all are to be kept for interview. The law with regard to the fixation of marks in interview in selection as held by the apex court in Anzar Ahmad v. State of Bihar and others JT 1993 (6) SC 168 is extracted below:

"……the decisions of this Court with regard to the fixation of marks for interview in a selection broadly fall in two categories:

(i) Selection for admission to educational institutions; and

(ii) Selection for employment in service.

The decisions of this Court in R. Chitralekha & Anr v. State of Mysore & Ors. (1964 (6) SCR 368), A. Peeriakaruppan, Etc. v. State of Tamil Nadu & Ors. (1971 (2) SCR 430), Nishi Mathu Etc. v. State of Jammu & Kashmir and Ors. (1980 (3)SCR 1253), Ajay Hasia Etc. v. Khalid Mujib Sheravardi & Ors. Etc. (1981 (2) SCR 79) and Koshal

Kumar Gupta & Ors. V. State of Jammu Kashmir and Ors. (1984 (3) SCR 407), relate to admission to educational institutions and fall in the first category. In Ajay Hasia's case (supra) it has been laid down that where selection is made on the basis of written test followed by interview, allocation of more than 15% of the marks for interview would be arbitrary and unreasonable and would be liable to be struck down as constitutionally invalid."

10. From the aforesaid decisions, it is clear that so far as admission in educational institution is concerned, where there is a written test and interview both, in such cases marks for interview could not be fixed more than 15% whereas in cases of public employment where there is both written test and interview, in such cases the marks of interview could be fixed above 15% depending upon the nature of public employment. The guidelines framed by the KNMH that a candidate must obtain 50% marks in interview, gives a chance to the respondents to arbitrarily pick and choose or reject a candidate even where the candidate had obtained 100% marks in the written test and fails to secure 50% marks in the interview, then he is liable to be declared unsuccessful. Therefore, the guidelines framed by the KNMH that a candidate for selection to DNB course must obtain 50% marks in interview, is arbitrary, unreasonable and contrary to law laid down by the apex court and is struck down.

11. Coming to the next question, the petitioner is entitled for admission because he being the only candidate for two seats in Radiotherapy, the KNMH in holding further test for determining his selection acted against the brochure issued by NBE. A bare perusal of brochure indicates that it contemplates two examinations one for admission and second after completion of course. The first is known as Primary Examination and the second as Final Examination. It does not empower the accredited institution to hold a further test for determining selection. If there would have been more candidates that the number of seats as was in Obstetrics & Gynaecology the KNMH may have been justified in resorting to some reasonable method including short listing for determining who was the best and most suitable. But it could not hold a test, which was not only arbitrary but even more rigorous than the NBE primary or final examination. Since the petitioner was the only candidate for DNB course in Radiotherapy, he was entitled to be admitted as a matter of right.

For the aforesaid reasons, the petitioner is entitled for admission in Diplomate of National Board, DNB course in Radiotherapy in KNMH.

12. In the result, this writ petition succeeds and is allowed. Writ of mandamus is issued directing the respondents to admit the petitioner in Diplomate of National Board, DNB course in Radiotherapy in Kamla Nehru memorial Hospital, Allahabad, within a period of one week from the date a certified copy of this order is produced before the respondent no. 1. The counsel for respondents Sri Vijay Ratan Agarwal is also directed to inform the order passed by this court to respondents nos. 1 and 2.

13. Office is directed to issue a certified copy of this order to the learned

counsel for the parties, within twenty four hours, on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 25.4.2001

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

Civil Misc. Writ Petition No. 4451 of 1980

State of U.P. through Secretary and another ...Petitioner
Versus
U.P. Public Service Tribunal-III, Lucknow and another ...Respondent

Counsel for the Petitioners:
Sri Vinay Malviya

Counsel for the Respondents:
Sri K.P. Agarwal

Constitution of India, Article 226- Service law-Termination of service- Temporary appointment – on six months probation – after expiry of probation period – employees remained continued in service- Termination order by giving one month notice – held – proper – after expiry of probation period if the Rules provides for extension of such probation- only there shall be deemed confirmation- in absence of Rule working even after expiry of probation period can not be claimed automatic confirmation.

Held – Para 16

From the observations made by Hon'ble Supreme Court in the aforesaid cases, it is clear that where the service rules or stipulation forbid or prohibit the extension of the period of probation beyond a specified period, the employee would be deemed to be confirmed if allowed to continue on the completion of specified period of probation. And, in cases where there are no such rules of stipulation, the employee cannot be deemed to be confirmed and be deemed to continue as a probationer only.

Case law discussed:
1998(3) S.C.C.-321
AIR 1968 SC – 1210
AIR 1986 SC- 1844
AIR 1988 SC – 286

By the Court

1. Heard Shri Vinay Malviya, the learned Standing Counsel representing the petitioners and Shri K.P. Agrawal, learned Senior Advocate representing respondent no. 2.

2. The petitioner – State of U.P. has filed the instant petition praying for issuing a writ, order or direction in the nature of certiorari quashing the order of the tribunal dated 4.2.1980, and has further prayed for issuing a writ, order or direction in the nature of mandamus directing the respondents not to give effect to the order dated 4.2.1980.

3. The respondent no. 2 was appointed on the post of Taqavi Accounts Clerk by an order dated 9th July, 1963, a copy whereof is Annexure '3' to the writ petition. The relevant portion of the said order runs as follows:

"The following candidates who appeared for the Competitive Test for the post of Taqavi Accounts Clerk, in the scale 60-3-72 EB-3-87-EB-3-90-4-110, are posted in the blocks noted against them. They should report for duty to the B.D.O.s concerned within 7 days. The appointment is purely temporary they will remain on probation for six months during which the services can be terminated at any time without notice ……."

4. It is admitted case of the parties that on the completion of the period of probation, no order either confirming the respondent no. 2 or terminating his services was passed and the respondent no. 2 was allowed to continue on the post of Taqavi Accounts Clerk, but his services were terminated after about four and a half years by an order dated 6thFebruary, 1968, a copy whereof is Annexure 'K'. It runs as follows:

"Shri Rama Kant Agnihotri Taqavi Accounts Clerk of Block Derapur is hereby given one month's notice for termination of his services with effect from the date of issue of this notice".

5. According to the petition, the respondent no. 2 challenged the said order of termination dated 6.2.1968 in the court of Munsif, Kanpur, being Suit No. 718 of 1971, but on the enforcement of the U.P. Public Service Tribunal Act, 1976, it was transferred to the U.P. Public Service Tribunal, III, Lucknow, being Reference Case No. 677 (T)/III/1978. The tribunal by its impugned judgement dated 4.2.1980 has allowed the claim petition, set aside the order of termination and declared that the claimant will be deemed to have continued in service and will be entitled to the benefit of continuous service. Aggrieved, the State of U.P. has filed the instant petition challenging the said judgement of the Tribunal.

6. A perusal of the impugned judgement shows that the Tribunal has allowed the claim petition holding that the claimant will be deemed to have been confirmed on his post after the expiry of the period of probation.

7. The learned counsel for the petitioner has contended that the respondent no. 2 could not be said to be confirmed on the expiry of the period of probation and the view taken to the contrary by the Tribunal is illegal and liable to be set aside. His contention is that the appointment of respondent no. 2 was purely temporary and he continued to be a temporary Government servant whose services could be terminated by giving one month's notice. He has placed reliance on the judgements of Hon'ble Supreme Court rendered in **Wasim Beg** vs. **State of U.P. and others,** reported in (1998) 3 Supreme Court Cases 321 and **State of Punjab** vs. **Dharam Singh** , reported in A.I.R. 1968 Supreme Court 1210.

8. On the other hand, the learned counsel for the respondent no. 2 has contended that the appointment of the respondent no. 2 was on probation and was not merely a temporary appointment and since there was no stipulation in the order of appointment that his services were liable to be terminated on giving one month's notice, the order of termination dated 6.2.1968 terminating his services on giving one month's notice was illegal and that the Tribunal has rightly set aside the same. His contention is that the view taken by the Tribunal that the claimant (respondent no. 2 herein) will be deemed to have been confirmed after the expiry of the period of probation is perfectly justified and needs no interference. In support of his contention the learned counsel has placed reliance on the judgement of the Hon'ble Supreme Court rendered in **State of Punjab** vs. **Dharam Singh** (A.I.R. 1968 Supreme Court 1210) **Om Prakash** vs. **U.P. Co-operative Sugar Factories Federation, Lucknow**

and others (A.I.R. 1986 Supreme Court 1844) and **M.K. Agarwal** vs. **Gurgaon Gramin Bank and others** (A.I.R. 1988 Supreme Court 286).

9. A perusal of the order of appointment dated 9.7.1963 shows that the respondent no. 2 was appointed on the post of Taqavi Accounts Clerk after the competitive test in the pay scale of Rs. 60-3-72-EB-3-87-EB-3-90-4-110 and it was mentioned therein that the appointment was purely temporary and they will remain on probation for six months during which the services could be terminated at any time without notice. Admittedly, no order either confirming him or terminating his services or extending the period of probation was passed during the period of probation or at the completion of the said period of probation.

10. The question to be determined is as to whether the respondent no. 2 would be deemed to have been confirmed after the expiry of the period of probation as no order whatsoever was passed on the completion of the period of probation. It is significant to point out here that the petitioner has not placed before the Court any statutory rule or executive instruction governing the service conditions of the post of Taqavi Accounts Clerk, rather it is admitted by the petitioner that there are no such rules. Therefore, in the absence of any statutory rule or executive instruction in that behalf, the service conditions of Taqavi Accounts Clerk shall be governed by the general Law of Contract and stipulations therein. Admittedly, as pointed out above, there is neither any statutory rule nor executive instruction governing the post of Taqavi Accounts Clerk. Thus, the contract emerging from the order of appointment which was accepted by the petitioner shows that the appointment was purely temporary; that the petitioner was to remain on probation for six months; and that during the period of probation his services could be terminated at any time without notice. No other agreement, apart from what has been mentioned in the said appointment letter has been placed on record by the parties.

11. A perusal of the order of appointment as quoted above, shows that the appointment of the candidates, whose names have been mentioned therein, was purely temporary. They were allowed to remain on probation for six months during which the services could be terminated at any time without notice. It is significant to note that there was no stipulation that on the completion of the period of probation the authority concerned may confirm them in the service or if the work and conduct during the period of probation was found to be unsatisfactory, their services may be dispensed with. It was also not mentioned therein that the period of probation may be extended by such period as may be deemed fit. There was also no stipulation forbidding extension of the period of probation beyond six months.

12. The Hon'ble Supreme Court in the judgement rendered in **State of Punjab** vs. **Dharam Singh** (A.I.R. 1968 Supreme Court 1210) has, in paragraph 3, observed as follows:

"(3). This Court has consistently held that when a first appointment or promotion is made on probation for a specific period and the employee is allowed to continue in the post after the expiry of the period without any specific

order of confirmation, he should be deemed to continue in his post as a probationer only, in the absence of any indication to the contrary in the original order of appointment or promotion or the service rules. In such a case, an express order of confirmation is necessary to give the employee a substantive right to the post, and from the mere fact that he is allowed to continue in the post after the expiry of the specified period of probation it is not possible to hold that he should be deemed to have been confirmed. This view was taken in Sukhbans Singh v. State of Punjab, 1963-I SCR 416 at pp. 424-426-(AIR 1962 SC 1711at pp. 1714-1715), G.S. Ramaswamy v. Inspector-General of Police, Mysore State, Bangalore, (1964) 6 SCR 279 at pp. 288-289=(AIR 1966 SC 175 at pp. 179-180), Accountant-General, Madhya Pradesh, Gwalior v. Beni Prasad Bhatnagar Civil Appeal No. 548 of 1962, D/-23-1-1964 (SC), D.A. Lyall v. Chief Conservator of Forests, U.P. Civil Appeal No. 259 of 1963, D/-24-2-1965 (SC) and State of U.P. v. Akbar Ali, (1966) 3 SCR 821 at pp. 825-826=(AIR 1966 SC 1842 at p. 1845). The reason for this conclusion is that where on the completion of the specified period of probation the employee is allowed to continue in the post without an order of confirmation the only possible view to take in the absence of anything to the contrary in the original order of appointment or promotion or the service rules, is that the initial period of probation has been extended by necessary implication. In all these cases, the conditions of services of the employee permitted extension of the probationary period for an indefinite time and there was no service rule forbidding its extension beyond a certain maximum period."

13. The Hon'ble Supreme Court, in the aforesaid case, while interpreting the relevant rules as applicable in that case, observed in paragraph 5 as follows:

"(5). In the present case, Rule 6(3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication."

14. In the judgement rendered in Wasim Beg vs. State of U.P. and others, reported in (1998) 3 Supreme Court Cases 321, the Hon'ble Supreme Court observed in paragraph 15 as follows:

"15. ….. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary ……."

15. In Paragraph 17, the Hon'ble Supreme Court observed as follows:

"17. The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period ------ ."

16. From the observations made by Hon'ble Supreme Court in the aforesaid cases, it is clear that where the service rules or stipulation forbid or prohibit the extension of the period of probation beyond a specified period, the employee would be deemed to be confirmed if allowed to continue on the completion of specified period of probation. And, in cases where there are no such rules or stipulation, the employee cannot be deemed to be confirmed and be deemed to continue as a probationer only.

17. In the instant case as mentioned above, there are no rules governing the appointment to the post of Taqavi Accounts Clerk and there was no stipulation prohibiting the extension of the period of probation beyond six months. In this view of the matter, the view taken by the Hon'ble Supreme Court in paragraph 3 of the case of **Dharam Singh** (Supra) will apply and it must be held that the respondent no. 2 could not be deemed to have been confirmed. The view expressed by the Hon'ble Supreme Court in paragraph 5 of the said case, will apply to cases where the rules provide otherwise.

18. In the judgement of the Hon'ble Supreme Court rendered in **Om Prakash Maurya** vs. **U.P. Co-operative Sugar Factories Federation** (A.I.R. 1986 Supreme Court 1844) and in **M.K. Agrawal** vs. **Gurgaon Gramin Bank and others** (A.I.R. 1988 Supreme Court 286), on which reliance has been placed by the learned counsel for the respondent no. 2, there were rules/regulations which provide for recruitment, probation and confirmation etc. in the case of **Om Prakash Maurya** (Supra), Regulation 17 provided that all persons on appointment against regular vacancies shall be placed on probation for a period of one year, and under the proviso to the said Regulation the appointing authority may, in individual cases, extend the period of probation in writing for further period not exceeding one year, as it may deem fit. The Hon'ble Supreme Court observed that the proviso to Regulation 17 restricted the power of the appointing authority in extending period of probation beyond the period of one year. Interpreting Regulation 17 and 18 and placing reliance on the cases of **State of Punjab** vs. **Dharam Singh** (Supra), the Hon'ble Supreme Court held in Paragraph 4 that on the expiry of the maximum probationary period of two years, the appellant could not be deemed to continue on probation, instead he stood confirmed in the post by implication.

19. Similarly, in the case of **M.K. Agarwal Vs. Gurgaon Gramin Bank and others** (Supra), the Hon'ble Supreme Court observed in Paragraph 4 as follows:

"(4). ----- The period of the probation was one year, in the first instance, the employer could extend it only for a further period of six more months. The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation. ---- ."

20. Thus, the judgement of the Hon'ble Supreme Court rendered in **Om Prakash Maurya** vs. **U.P. Co-operative Sugar Factories Federation** (Supra) and **M.K. Agrawal** vs. **Gurgaon Gramin Bank and others** (Supra) are distinguishable on facts and are of no help to the respondent no. 2.

21. Now comes the question whether the services of a temporary Government servant could be terminated by giving one month's notice. In this connection, it is relevant to refer to the 'General Rule regarding termination of services of a temporary Government Servant', which was made by the Governor of U.P. in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, and published with Notification No. 230/II-B-1953 dated January 30, 1953 it runs as follows:

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of U.P. is pleased to make the following general rule regulating the termination of services of temporary government servants:

1. Notwithstanding anything to the contrary in any existing rules and orders on the subject, the service of a government servant in temporary service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority, or by the appointing authority to the government servant.

2. The period of such notice shall be one month given either by the appointing authority to the government servant, or by the government servant to the appointing authority, provided that in the case of notice by the appointing authority, the latter may substitute for the whole or part of this period of notice, pay in lieu thereof; provided further that it shall be open to the appointing authority to relieve a government servant without any notice or accept notice for a shorter period, without requiring the government servant to pay any penalty in lieu of notice.

3. This rule shall take immediate effect and shall apply to all persons who are appointed hereafter in a civil post in connection with the affairs of Uttar Pradesh and who are under the rule-making control of the Governor, but who do not hold a lien on any permanent government post.

4. In this rule, "temporary service" means officiating and substantive service in a temporary post, and officiating service in a permanent post under the U.P. Government.

5. Nothing in this rule shall apply to –
(a) government servants engaged on contract;
(b) government servants not in whole-time employment;
(c) government servants paid out of contingencies; and
(d) persons employed in work-charged establishments."

22. The aforesaid Rule provides that the services of a Government servant in temporary service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority, or by the appointing authority to the Government servant. Under Paragraph 2 it is provided that the period of such notice shall be one month. This makes it clear that the services of a temporary Government servant could be terminated at any time by giving one month's notice to the Government servant.

23. In view of the discussions made above, it is clear that the petitioners could terminate the services of the respondent no. 2 by giving one month's notice and the order of termination dated 6th February, 1968 was perfectly valid and legal. The Tribunal has committed an error in allowing the claim petition filed by the respondent no. 2 and setting aside the said order of termination. Therefore, the impugned judgement dated 4.2.1980, passed by the Tribunal in liable to be quashed.

24. In the result, the petition succeeds and is allowed. The impugned judgement dated 4.2.1980 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 22.3.2001

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

Civil Misc. Writ Petition No. 8061 of 2001

Kamlesh Kumar Gupta ...Petitioner
Versus
Special Judge, Dacoity Affected Area, Banda and others ...Respondents

Counsel for the Petitioner:
Sri M.A. Qadeer

Counsel for the Respondents :
S.C.
Shri Rajesh Tandon
Shri Pankaj Srivastava

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972-Ss. 20 (2) (a), 2 (2) Explanation I (C) 1, 13 and 17 – Applicability – Substantial addition, 1- Effect.

Held – (Paras 10 and 16)

In the instant case concurrent finding of fact has been recorded by the two Courts below that the tenanted accommodation came into occupation of the petitioner after it was reconstructed in the year 1990. The petitioner was its first occupant. A firm finding of fact has been arrived at by the Trial Court after appraising the evidence on record led by the parties that all the walls of the tenanted accommodation are new ones, the original level was also changed by the side of the one of the walls a new staircase was put up. There has been a substantial addition in relation to the tenanted accommodation. In an, existing building the addition of the tenanted accommodation was completely new. The Revisional Court though was not required to reassess and reappraise the evidence, has also held that the tenanted

accommodation was the product of reconstruction.

In view of the concurrent funding of fact that the provisions of the Act are not applicable to the tenanted accommodation, reference to Nutan Kumar's case (Supra) is otiose. The suit has been filed within ten years of the construction of the tenanted accommodation after determining the tenancy under section 106 of the Transfer of Property Act. Since the relationship of land-lord and tenant subsists between the parties, the suit for ejectment could be maintained in the Court of Judge Small Causes Court and a regular suit for ejectment was not required to be filed.

Case Law:

1993 All C.J. 721
AIR 1953 Ajmer 54:1(Vol. 40 CN 59)
1984 (I) ARC 241
1978 (2) All India R.C.J. 195
1994 (23) ALR –19
1980 ALJ 229
1995 (2) ARC 549
C. Revision 861 of 1991 decided 23.5.1995

By the Court

1. The petitioner who admittedly is the tenant in a portion (shop) of premises no. 1856 situated in Mohalla-cantonment, Station Road, Banda has challenged the order dated 3.8.2000 passed by the Trial Court in S.C.C. suit no. 4 of 1998 and the order dated 19.1.2001 passed in Revision Application no. 48 of 2000 under section 25 of the Provincial Small Causes Courts Act. it is prayed that both the orders being illegal and without jurisdiction be quashed and the respondent no. 3 be commanded not to disturb with the possession of the petitioner over the tenanted accommodation.

2. At the initial stage of filing of the present petition, appearance was put in on behalf of the land-lord respondent no. 3 through Sri Rajesh Tandon, Senior Advocate assisted by Sri Pankaj Srivastava. He made a statement that the petition be finally disposed of on merits on the basis of the material available on record. Sri M.A. Qadeer, learned counsel for the petitioner did not have any objection to it and consequently I proceeded to dispose of the petition on merits at this stage.

3. Sri Qadeer took two distinct pleas to assail the decree passed in S.C.C. suit no. 4 of 1998 as affirmed in S.C.C. Revision no. 48 of 2000; firstly that the provisions of the U.P. Act no. 13 of 1972 (hereinafter called the Act of 1972) are applicable to the tenanted accommodation and since the petitioner has cleared all the dues, as demanded by the respondent no. 3 within the period stipulated in the composite notice of demand and to quit, no order of eviction could be passed, as the possession of the petitioner is statutorily protected under the provisions of Section 20(2)(a) of Act of 1972, and secondly that even if it be held that the Act of 1972 did not apply to the tenanted accommodation, the contract of tenancy being in contravention of the provisions of section 11, 13 and 17 of the Act of 1972, it cannot be enforced by the land-lord in view of the Full Bench decision of this Court in the case of **Nutan Kumar and others** versus **Second Additional District Judge, Banda and others** 1993 All. C.J. 721.

4. Both the above submissions were repelled by Sri Rajesh Tandon appearing on behalf of respondent no. 3.

5. After having heard learned counsel for the parties, I find that the

crucial question for determination in the present petition is whether the provisions of Act of 1972 are applicable to the tenanted accommodation or not? To begin with, it may be mentioned that it is a common case of the parties that the building bearing no. 1856 situated in mohalla-cantonment, Station Road, Banda has been in existence for more than 20 years prior to the commencement of the Act. The case of the land-lord respondent no. 3 is that the disputed tenanted portion has been constructed anew in the year 1990 and after the reconstruction of the new portion, it was let out to the petitioner on 1.5.1990.

6. Sri Qadeer took me in the historical retrospect of the litigation with regard to premises no. 1856 which was earlier under the tenancy of one Jhon Mal Dayal Das, against whom late Narendra Nath Mitra, father of respondent no. 3 had instituted S.C.C. suit no. 838 of 1969 for eviction. In that suit, controversy was raised whether the provisions of U.P. Act no. 3 of 1947 were applicable to the accommodation under the tenancy of Jhon Mal Dayal Das. It was held that the Act of 1947 did not apply and a decree of eviction was passed against Jhon Mal Dayal Das. Inspite of the decree of ejectment, Jhon Mal Dayal Das was successful in getting the tenanted accommodation allotted in his favour in the year 1976. After protracted litigation, the allotment order was cancelled on 1.1.1979 and the land-lord came in occupation of the portion which was in possession of Jhon Mal Dayal Das. In this manner it is well established that provisions of Act of 1972 apply to premises no. 1856 of which Jhon Mal Dayal Das was the tenant and against whom a decree for eviction was passed. In view of the above facts, Sri Qadeer maintained that since the tenanted accommodation in occupation of the petitioner is part of the old premises no. 1856, the provisions of Act of 1972 would be attracted. He, however, made a reference to the fact that the land-lord had taken permission for putting up a new slab on the existing walls and the permission was readily accorded by the Municipal Board on 27.7.1989, and since the tenanted accommodation has come into being by putting up the slab on the old walls, the provisions of the Act of 1972 would be applicable as it was only a minor part of the addition to the existing building. Sri Qadeer founded his submission on the provisions of section 2(2) Explanation I (c) of the Act of 1972 which reads as follows:

"2. Exemption from operation of Act of 1972: (1) Nothing in this Act of 1972 shall apply to the following, namely:

(a)……(f) ……

(2) …….

Explanation I :

(a)……..

(b)……..

(c) where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition."

7. The attention of this Court was invited by Sri Qadeer to the Plan (annexure-2 to the petition) submitted by the petitioner for approval on 24-7-1989 in which a R.B. Slab was proposed to be put upon existing walls of ground floor. In support of his contention that putting up a slab on the existing walls would not take out the tenanted accommodation from the

operation of the Act of 1972, reliance was placed by Sri Qadeer on the decision in A.I.R. 1953 AJMER 54 (1) (Vol. 40 C.N. 59) in the case of **Durgah Khwaja Sahib** v. **Ram Gopal Mehra**. That was a case pertaining to the interpretation of the provisions of Section-7 of Delhi and Ajmer Merwara Rent Control Act. In that case previously there was one shop which caught fire, then the walls above a height of 4 ½ feet were demolished. The one shop previously existing was converted into three shops by erecting two partition walls. The foundation remained as it was. Up to a height of 4 ½ feet the walls remained as they were except for new plastering. In the background of these facts it was held that it was a case of improvement as the various additions, alterations or improvement were made on the previous existing structure and complete structure was not demolished or replaced. This case does not apply to the facts of the present case. The other case relied upon on behalf of the petitioner is Shyam and others vs. III Addl. District Judge Orai 1984 (1) A.R.C. 241, in which it was observed that certain changes made in the existing shop shall not exempt it from the operation of the Act , in the absence of further finding that the shop was got demolished and a fresh construction was made, or that the changes made in the shop were such as were contemplated by clause (c) of Explanation I.

8. In **Ashchraj Lal** versus **Laxmi Chand Sharma** 1978 (2) All India Rent Control Journal page 195 it was held that as the major portion of the demised premises was an old construction the tenant was entitled to the benefit of section 39 of Act of 1972. In another case Om Prakash and others versus The VII Addl. District Judge Aligarh and others 1994 (23) A.L.R. page 19 it was held that alteration made in garage and laying of new roof and affixing shutters would not amount to a new construction and shall continue to be governed under the provisions of Act of 1972.

9. I have waded through all the above decisions and find that for one reason or the other, observations made therein are not squarely applicable to the case in hand.

10. There is no doubt about the fact that the burden of proof lies heavily on the land-lord to show that a particular building stands exempted from the operation of the Act. In the instant case concurrent finding of fact has been recorded by the two Courts below that the tenanted accommodation came into occupation of the petitioner after it was reconstructed in the year 1990. The petitioner was its first occupant. A firm finding of fact has been arrived at by the Trial Court after appraising the evidence on record led by the parties that all the walls of the tenanted accommodation are new ones, the original level was also changed, by the side of the one of the walls a new staircase was put up. There has been a substantial addition in relation to the tenanted accommodation. In an existing building the addition of the tenanted accommodation was completely new. The Revisional Court though was not required to reassess and reappraise the evidence, has also held that the tenanted accommodation was the product of reconstruction.

11. The expression "substantial addition" occurring in section 2 (2) Explanation I (c) includes not merely the

addition of wholly a new construction, but where such substantial addition is made to an existing building that the existing building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

12. The above observation came to be made in the case of **Jagdish Prasad** vs. **District Judge Ghaziabad and others** 1980 All. L.J. 229. The matter also came up for consideration in a subsequent case of **Phool Chand versus III rd Addl. District Judge Agra and others** 1995 (2) A.R.C. page 549, in which it was observed that the word substantial addition as used in clause (c), Explanation (1) to Section 2 (2) of the U.P. Act no. 13 of 1972 will take within its ambit not merely the addition of wholly a new construction but also the alteration of an existing building into a new accommodation by remodelling it, which may include the use of some parts of the old structure.

13. Sri Qadeer placed reliance on the fact that the Plan (annexure-2 to the petition) indicates that the land-lord has proposed to put up a slab on the existing four walls and, therefore, the finding of fact recorded by the two Courts below was manifestly erroneous. It is true that the plan was got sanctioned for putting up a slab, but nevertheless the fact remains that the land-lord respondent no. 3 had lowered the floor, constructed the walls a new and put up a side stair case and capped them with a new slab. This part of the evidence of the landlord has been accepted as believable by the Trial Court as well as the Revisional Court. Sri Tandon pointed out that even if no plan was got sanctioned but as a fact the landlord has carried out the work of new construction provisions of Act of 1972 would not be applicable and in support of his submission he placed reliance on the unreported decision dated 23.5.1995 of this Court in Civil Revision no. 861 of 1991 **Abdul Gafoor** versus **Vakilur Rehman.**

14. In my quest to reach the truth I have scrutinised the evidence as well as the findings recorded by the Trial Court and as affirmed by the Revisional Court and find that they do not suffer from any infirmity or legal defect. On factual matrix it stands well established that the tenanted accommodation was constructed during the period 1989-90 and after the completion of the construction, the petitioner was let into possession as a tenant on 1.5.1990 and thus the provisions as Act of 1972 were not applicable to the tenanted accommodation.

15. Now it is the time to consider the plea taken by Sri Qadeer that the agreement of lease between the petitioner and the respondent no. 3 being void is in unenforceable in law. In support of his submission Sri Qadeer placed reliance on a Full Bench decision of this Court in the case of **Nutan Kumar and others** versus **Second Additional District Judge, Banda and others** 1993 All.C.J. 721. The provisions of sections 11,13 and 17 falling in Chapter III of the Act of 1972, were interpreted in the said decision and it was held that the agreement of lease between the land-lord and the tenant in contravention of the provisions of the Act, would be void and therefore unenforceable. The submission of Sri Qadeer that the petitioner cannot be evicted in view of the agreement which is

void, does not go too far. The ratio of **Nutan Kumar's case** (supra) is applicable only if the provisions of the Act are found applicable to the tenanted accommodation. In view of the concurrent finding of fact that the provisions of the Act are not applicable to the tenanted accommodation, reference to Nutan Kumar's case (supra) is otiose. The suit has been filed within ten years of the construction of the tenanted accommodation after determining the tenancy under section 106 of the Transfer of Property Act. Since the relationship of land-lord and tenant subsists between the parties, the suit for ejectment could be maintained in the Court of Judge Small Causes Court and a regular suit for ejectment was not required to be filed.

16. Both on legal and factual matrix the petition fails. It is devoid of any merits and substance. It is accordingly dismissed without any order as to costs.

17. After delivery of this judgement Sri M.A. Qadeer learned counsel for the petitioner prayed that some time may be allowed to the petitioner to vacate the accommodation in respect of which the order for ejectment has been made. Sri Rajesh Tandon learned counsel for the contesting respondent no. 3 states that he has no objection if some reasonable time is allowed to vacate the accommodation.

18. After having heard the learned counsel for the parties I find that it would be proper if the petitioner is permitted to vacate the disputed accommodation in respect of which the order of ejectment has been passed and has been affirmed in revision by 31st December, 2001. In case the petitioner does not deliver vacant possession on or before the said date, the decree shall become executable according to law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.2.2001

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

Civil Misc. Writ Petition No. 31465 of 2000

Siddheswar Shukla ...Petitioner
Versus
The Vice Chancellor, Banaras Hindu University Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Krishna Ji Shukla
Sri K.P. Shukla
Sri Ashim Kumar Rai

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

Constitution of India, Article 226- Cancellation of Candidature- Petitioner being second year B. Pharma student- appeared for P.M.T. Examination 2000 – mere anonymus complaint – in absence of any material Held- arrest of student just after examination-such action not warranted.

Held – Para 13

Merely on anonymous complaint in absence of any material, such action by the university was not warranted. At the best the university could have requested the police to make investigation in the matter but the university has directed the police to arrest the students at the time of the examination. Therefore, entire action of the respondents was illegal and was based on suspicion

without there being any cogent material against the petitioner.

Case Law discussed:

2000(3) S.C.C.–59

By the Court

In this petition filed by a candidate who appeared in Pre-Medical Test (in brief PMT) conducted by the Banaras Hindu University, from Nagpur centre, the short question that arises for consideration is whether there was any material on record from which the respondents could have concluded or even raise reasonable inference that the petitioner was guilty of breach of discipline or any other irregularity for which he could have been debarred from the PMT examination and deprived of the privileges of the university including withholding of his result of B. Pharma?

2. The petitioner, admittedly, had appeared in Pre-Medical Test/Pharmacy Admission Test (in brief PMT/PAT) conducted by Banaras Hindu University (in brief university) in 1999. He could not get admission in PMT but he was declared successful in PAT. He was admitted in B. Pharma course and declared successful in B. Pharma first semester held in December, 1999 and secured Grade point 7.78. The examination for second semester was held in April,2000. In June the petitioner appeared in PMT-2000. His candidature was cancelled by the Vice-Chancellor on 23.6.2000 and his privileges as a university student were suspended, the consequences of which was that his result of B. Pharma second semester was withheld. This order was communicated by Registrar on 24.6.2000. His result was not declared in July 2000. The petitioner, therefore, filed this petition for quashing of order dated 24.6.2000. The petitioner, therefore, filed this petition for quashing of order dated 24.6.2000 and for issuing direction to the respondent to declare his result of second semester.

3. The background in which all this happened may now be narrated in brief. On 6.5.2000 an anonymous complaint was received by the Controller of Examination that the petitioner had submitted 26 application forms for admission to MBBS courses on 15.3.2000 mentioning therein Nagpur centre for all candidates even though the candidates were of Haridwar, Meerut, Delhi and Muzaffarnagar. Allegation was made that out of 26 candidates only six were genuine and names and addresses of others were fake. It was alleged that a racket was operating and parents of six candidates were spending Rs. 6 to 10 lacs for getting admission in MBBS course. The said amount had been distributed amongst the rest including the petitioner. The complaint mentioned that except six candidates the applications of remaining were defective, namely, they had given names of different persons and they were aged 25 to 35 years. It was alleged that each detail in the applications was wrong. It was mentioned that entire information was available with the petitioner. The complaint was examined by the PMT in-charge examination who after scrutinising the application forms and making preliminary inquiry sent an official letter to Senior Superintendent of Police, Varanasi expressing his apprehension that some racket was operating, therefore, an inquiry be made as some mark sheets appeared to be fake and the candidates may not be genuine, therefore, they may be apprehended at the time of examination on 4.6.2000 at Nagpur centre

itself. On this letter a police case was registered on 29.5.2000 and the petitioner along with 19 others was arrested on 4.6.2000 at Nagpur after the examination was over. They were produced before the Chief Judicial Magistrate, Varanasi on 6.6.2000. Their bail application were rejected, but the District Judge released them on bail.

4. According to the counter affidavit filed by the respondents three candidates who were arrested were students of BHU. It is stated that Amrendra Kumar and Chandan Kumar are residents of Bihar whereas petitioner is resident of Ambedkarnagar. Chandan Kumar who was a student of B.Pharma was caught appearing in the examination in name of one Mukesh Choudary. It is also stated that the investigation made by the police demonstrates that 20 candidates arrested at Nagpur were impersonating for others and most of the candidates had submitted forged and fake mark sheets. The counter affidavit mentions that documents of eight candidates including that of the petitioner was of doubtful integrity. The respondents have alleged that petitioner, Amrendra Kumar and Chandan Kumar were B. Pharma students but they opted for Nagpur Centre and in all the forms Nagpur had been entered in same ink and handwriting. It is urged that from investigation and information revealed after arrest indicates that a racket was operating. The modus operandi was to get candidate impersonated by person who had already appeared earlier in PMT examination and other candidates were implanted at the centre to help the candidate in solving the papers. It is alleged that even though they were not aware of exact amount involved but from the unconfirmed information it has come to the knowledge of the university that the amount was more than one crore.

5. On 24.6.2000 the vice-chancellor on inquiry made by in-charge of the examination issued show cause to the petitioner mentioning therein that it was reported to him that 26 application forms for PMT-2000 was submitted by one person having number of irregularities to succeed in using unfair means. It was further mentioned that the university PMT Cell on screening found that relevant documents attached with the forms were fake. The notice stated that the vice-chancellor had further been informed that the petitioner and Amrendra Kumar were residing in the same room of Rajputana hostel and they managed to purchase form numbers 21930 and 21931 with clear intention of using unfair means. Further, the name of centre was written in one ink and same handwriting, which was contrary to instructions in Form-A for PMT. The notice mentioned that candidates from Bihar and U.P. opted for Nagpur centre instead of nearer examination centres at Varanasi and Delhi, therefore, ulterior motive was clear, to fraudulently and illegally use unfair means. The notice mentioned that from the facts it was clear that they were ineligible to appear in BHU PMT-2000 held on 4.6.2000. It was further stated that the petitioner being a student of B. Pharma he acted in an unbecoming manner for a student of the university, therefore, examination of petitioner for PMT-2000 was cancelled and he being a student of B. Pharma the privileges including hostel was suspended for which he may show cause. The petitioner was required to submit reply by 7.7.2000. The notice was replied by the petitioner on 7.7.2000 denying the allegations in the

show cause notice as incorrect and imaginary. He alleged that centre in his application were filled in his own handwriting and was signed by him. There was no irregularity or illegality in it. He mentioned that his roll number and roll number of Amrendra Kumar was 41510 and 41317 and the seats were in different rooms and floor, therefore, there was no relation between the two. The other allegations were also denied.

6. The vice-chancellor on receipt of reply appointed an Enquiry Committee of three university teachers, which submitted its report on 14.11.2000. The committee held that the claim of the petitioner that he opted for Nagpur centre as it was convenient was incorrect as in earlier year he had appeared from New Delhi. The centre Nagpur was written in the forms of petitioner, Amrendra Kumar and Chandan Kumar prima facie in one writing. Therefore, the committee inferred that the form submitted by the petitioner was not in order and application form was fake. The committee further found that change in column no. 5 was made out as the form number of Amrendra Kumar and petitioner were 21930 and 21931 which was submitted on the last date i.e. 15.3.2000.

7. The vice-chancellor Sri Y.C. Simhadri also filed a supplementary counter affidavit. In paragraph 8 it is stated that in all 32 applications including of petitioner was deposited by one person probably the petitioner. But it was admitted that there was no bar in one candidate depositing more than one application form. In paragraph 12 it is stated that even though roll numbers are allotted after the last date but there is a greater chance that forms submitted together may get consecutive roll numbers and the candidates may get a chance to sit in the same room which may give an opportunity to consult each other specially in toilets. In paragraph 16 it is stated that the vice-chancellor took the action under Ordinance relating to Powers to maintain Discipline and Condemnation of Acts of Indiscipline as also read with Executive Council Resolution No. 264 dated 9th June 1979. But the order cancelling the examination of petitioner and suspending him was an interim measure. He stated that the committee was appointed to assist him which submitted its report but no final order had been passed as in the meantime the petitioner approached the High Court.

8. Sri Krishna Ji Shukla the learned counsel for the petitioner has urged that except the fact that name of petitioner was mentioned in anonymous complaint there is no other material with the university to show that the petitioner used unfair means at the examination or was involved in any racket or indulged in impersonation. He urged that petitioner was successful in PMT/PAT 1999 and was admitted in B. Pharma Ist semester course. The university permits those candidates who have been successful in PAT to appear again in PMT and in case they are successful such candidates are admitted in MBBS course of the university. Learned counsel further urged that the order passed by the respondent cancelling PMT-2000 result of the petitioner and depriving him of all privileges of the university was passed without affording him any opportunity of hearing and he was illegally deprived of declaration of his result of B. Pharma IInd semester result and registration in B. Pharma III semester. He urged that the action of the

respondent against the petitioner was illegal and arbitrary and was based on no material. Therefore, the petitioner was entitled for declaration of his result of B. Pharma IInd semester and registration in B. Pharma IIIrd semester course and restoration of all privileges of the university.

9. On the other hand Sri V.K. Upadhyaya has produced 32 original application forms before the court and made statement on the basis of record that out of 32 candidates only 20 candidates appeared in PMT-2000 from Nagpur centre and 12 candidates were absent. He urged that in PMT/PAT-1999 the petitioner appeared from Delhi centre and in PMT-2000 examination he appeared from Nagpur centre which was far away from the residence of the petitioner. Therefore, the authorities correctly raised the presumption that the petitioner appeared from Nagpur centre in order to use unfair means at the examination. He urged that in anonymous complaint received by the university on 6.5.2000 the name of petitioner was mentioned and the petitioner was arrested at Nagpur on 4.6.2000, therefore, the university rightly cancelled PMT-2000 result of the petitioner and suspended all the privileges of the university including the hostel because First Information Report was lodged against the petitioner. Learned counsel urged that the enquiry committee appointed by the vice-chancellor in its report dated 14.11.2000 found the petitioner guilty of the charges levelled against him and the handwriting on the petitioner's application form where Nagpur centre was written was mentioned in the same handwriting as on other application forms which shows that the petitioner was involved in the racket as alleged in the anonymous complaint.

10. From the facts of this case it is clear that the petitioner's name was mentioned in the anonymous complaint received by the university on 6.5.2000. The in-charge PMT/PAT-2000, on instructions of the vice-chancellor, lodged a complaint with the Senior Superintendent of Police on 29.5.2000 and the First Information Report was registered at Varanasi on 2.6.2000. The proctors of the university along with police party went to Nagpur and with the help of Commissioner of Police, Nagpur arrested 20 candidate who appeared in the examination at Nagpur centre, brought them to Varanasi and thereafter the vice-chancellor passed an order on 23.6.2000 which was communicated by the Registrar to the petitioner on 24.6.2000 cancelling his examination and result of PMT-2000 and deprived him of all the privileges of the university including the hostel facilities. Show cause notice was issued to the petitioner to which he submitted reply on 7.7.2000 in which the petitioner categorically stated that his roll number was 41510 and roll number of Amrendra Kumar was 41317. The petitioner on 4.6.2000 appeared in the examination from room no. 24, which was on the first floor whereas Amrendra Kumar was in room no. 7 on the ground floor and both were allotted Room No. 122 at Rajputana Hostel by the university on which the petitioner had no control. The university made inquiries from CBSE and U.P. Board, A report had been submitted by CBSE that mark sheets and certificates submitted by 16 candidates were fake. This report was not with regard to the petitioner. No report has been submitted by U.P. Board against the

petitioner to the university. The petitioner was not found impersonating any candidate by the police party at Nagpur on 4.6.2000. The vice-chancellor appointed an enquiry committee, which has submitted its report on 14.11.2000. The enquiry committee has considered the explanation of the petitioner and has found that the candidates who have appeared from Nagpur centre were from Haridwar and nearby places. It recorded that as per 8.2.1 of PMT/PAT-2000 information booklet the petitioner has mentioned in his form about the fact that he is pursuing his study in university and he was a bonafide student of the university. This claim was false and not justified. In the application form of petitioner, Amrendra Kumar and Chandan Kumar, 'Nagpur' has been mentioned as centre with the same ink and handwriting. The petitioner was arrested on 4.6.2000 in Nagpur and the matter is under investigation of the police. The enquiry committee also scrutinised the application of the petitioner for PMT/PAT-1999 through which the petitioner was admitted to B. Pharma Ist semester course in the Institute of Technology during 1999-2000. On the aforesaid facts the enquiry committee was of the opinion that the petitioner had opted for Nagpur centre for his convenience was incorrect as he appeared earlier in 1999 examination from New Delhi centre and Nagpur was not given as second choice. It further found that in column no. 15 of form of PMT-2000 regarding the name of centre the committee had scrutinised the handwriting with respect to the name of the centre and was of the opinion that the word 'Nagpur'written in the relevant column of application form of petitioner, Amrendra Kumar and Chandan Kumar prima facie appear to be in one handwriting. It was of opinion that the form of petitioner was not in order. The form of Amrendra Kumar and petitioner was having number 21930 and 21931, therefore, the charge against the petitioner was correct and the application forms were submitted on the last date i.e. on 15.3.2000. From this report of the enquiry committee dated 14.11.2000 it is clear that the enquiry committee did not find the allegation of petitioner that he had appeared at Nagpur from room no. 24 at the first floor and Amrendra Kumar appeared in room no. 7 at the ground floor to be incorrect. The enquiry committee presumed that since petitioner had appeared from Delhi in 1999 examination but he opted for Nagpur centre in PMT-2000 therefore, he appeared in PMT examination with ulterior motive.

11. From the facts which have been averred in the writ petition, counter affidavit and supplementary counter affidavit filed by the vice-chancellor, it is clear that apart from the anonymous complaint there is no material to show that the petitioner was guilty of any act of indiscipline. Admittedly the university conducts examination from four centres. No rule or regulation was placed to show that the choice of centres for the examinees was to be made depending on distance. A candidate could appear from any of the four centres Varanasi, Delhi, Calcutta and Nagpur. There is no bar in the information brochure that a candidate has to appear or to give his option for centre which was nearby his home. It is open to a candidate to appear in the examination from any of the centres. Merely because the petitioner had opted to appear from Nagpur centre where his maternal grandfather resided cannot lead to an inference that the petitioner opted

Nagpur centre for using unfair means. The respondents did not produce or even allege that there was any report from Nagpur that petitioner was guilty of using unfair means. Even assuming that as many as 20 candidates residing in Uttar Pradesh and Bihar opted for Nagpur that alone could not furnish material for drawing any inference that it was done with ulterior motive. Similarly, the submission of number of forms deposited by one candidate, by itself, was insufficient to warrant any conclusion of unfair means. Even the vice-chancellor candidly stated in the supplementary counter affidavit that there was no such bar for one candidate to deposit more that one application.

12. Learned counsel for the respondent has placed original forms of all 32 candidates before this court From the perusal of the forms of 32 candidates it is clear that Nagpur centre has not been written in all the forms in one handwriting. I have also compared the forms of petitioner with Amrendra Kumar and other candidates. The petitioner has filled his entire form as well as column no. 15 opting for Nagpur centre in his own handwriting. The word Nagpur in column no. 15 written by the petitioner is not in the same handwriting and ink as is written in the application forms of Amrendra Kumar and others. There is neither any allegation nor material that the form of the petitioner or mark sheet or certificates filed by him was fake. The enquiry committee appointed by the vice-chancellor in its report has mentioned that Nagpur centre was written in the form of the petitioner, Amrendra Kumar and Chandan Kumar is one ink and same handwriting. This observation is factually incorrect. Chandan Kumar was not a candidate for PMT/PAT-2000. His name does not find place in the list of 32 forms produced before me. The conclusion of the enquiry committee is based on erroneous assumption of facts.

13. The other objection taken by the enquiry committee was that the petitioner in his application form in column no. 12 has stated that he is applying under the university student category. This column was required to be filled by the candidates who were appearing for MBBS course only. The petitioner has filled column no. 12 and has stated that he is a student of B. Pharma session 1999-2000. The enquiry committee has drawn a presumption that the petitioner has violated 8.2.1. of PMT/PAT-2000 information booklet and application form and his claim of being a bona fide university student is false and not justified. The view taken by the enquiry committee is erroneous as the application form itself in column no. 12 provided that the candidates must give an information whether he is applying against BHU student category for MBBS course only. Since the petitioner was a bonafide university student and was studying in B. Pharma course and was appearing for MBBS course only in PMT-2000, he rightly filled column no. 12 of the application form. Had the petitioner ignored to fill column no. 12 of the application form then the presumption would have been against the petitioner that he tried to conceal that he was a bona fide student of the university. Therefore, the view taken by the enquiry committee that his claim was fake and not justified is incorrect. The vice-chancellor in his supplementary counter affidavit has stated that in all probabilities the petitioner might have deposited all the application forms himself but apart from this

presumption there is no material or evidence with the university to show that in fact the petitioner had deposited all the forms on 15.3.2000. From the above facts it is clear that the entire proceedings were started on the basis of an anonymous complaint made on 6.5.2000, First Information Report was lodged on the direction of the vice-chancellor and the petitioner was arrested on 4.6.2000 though there was no material available with the university, except the anonymous complaint, that the petitioner is involved in any manner in use of unfair means at PMT-2000 at Nagpur centre. In absence of any material the university should not have proceeded to act against the petitioner to jeopardise his entire career. Merely on anonymous complaint in absence of any material, such action by the university was not warranted. At the best the university could have requested the police to make investigation in the matter but the university has directed the police to arrest the students at the time of the examination. Therefore, entire action of the respondent was illegal and was based on suspicion without there being any cogent material against the petitioner.

14. In the supplementary counter affidavit filed by the vice-chancellor the action has been justified under chapter Condemnation of Acts of Indiscipline. It mentions various categories of indiscipline. Out of these the vice-chancellor had stated in paragraph 15 that the petitioner had committed an act unbecoming of a student of university and also because he was involved in an offence involving moral turpitude. During arguments the learned counsel for the respondent relied on clause (c) and (e) that is an act punishable under any law for the time being in force and an act in breach of any undertaking. If any of these allegations are correct the action of the vice-chancellor may not be open to challenge. It is well settled by the apex court in **Chairman, J & K State Board of Education v. Feyaz Ahmed Malik and others (2000) 3 SCC 59** that the courts should not lightly interfere with campus matters or conduct of examination, as the primary jurisdiction in such matters rests with the university authorities. But the court has been categorical in holding that general principles would not apply and the court can interfere where there is breach of rule or regulation or where it would cause injustice. The latter observation made by the apex court applies squarely. The non-interference by this court would not only be unjust and inequitable but it would ruin the career of a young man for no fault except that he decided to appear in PMT-2000 from Nagpur centre. The facts, which could not be disputed, were that the petitioner a resident of Uttar Pradesh, chose Nagpur as the centre for his PMT test. He deposited more that one form at the university counter. In the form filled by petitioner and Amrendra Kumar, Nagpur centre is not written by same ink and handwriting. The form numbers of petitioner and Amrendra Kumar were 21931 and 21930 respectively, but their seats were in different rooms and floor. Mark sheets of some of the candidates whose name was mentioned in the complaint were fake. The petitioner and Amrendra Kumar were inmates of room no. 122 Rajputana hostel. They were arrested on 4.6.2000. None of these circumstances could give rise to inference that petitioner was guilty of using unfair means or he committed any indiscipline as mentioned in the Ordinance. The vice-chancellor has himself admitted that one

candidate could deposit more than one form, therefore, the deposit of more than one form by petitioner, even if accepted to be correct, could not amount to indiscipline. Nor writing of Nagpur centre in same ink or same handwriting could result in indiscipline. A form under the rules has to be filled by the candidate himself but if one of the entries, namely, centre is written by one person in more than one form it could not be described as indiscipline or violation of the rule. Even assuming it was improper the petitioner could not be penalised or held guilty of indiscipline unless the committee would have found that the writing on the petitioner's form was not his or at least he had written Nagpur in all the three forms. It was necessary because the petitioner in his reply had categorically stated that he filled his own form alone. The fact that the ink and handwriting in three forms were same is not borne out from record. Similarly, the vice-chancellor or the enquiry committee could not conclude or infer indiscipline because the petitioner instead of opting for Delhi from where he competed in 1999 opted from Nagpur in 2000. In absence of any restriction it was open to petitioner to appear from any centre. The mere fact that it would have been more convenient for petitioner to appear from Varanasi or Delhi could not lead to an inference that it was indiscipline or motivated with ulterior purpose. The committee or the vice-chancellor could not draw any inference of unfair means because petitioner and Amrendra Kumar purchased form one after the other, when it is not denied that both appeared in PMT-2000 and were in different rooms and floors. Therefore, none of the reasons mentioned in the show cause notice could lead to an inference that the petitioner was guilty of indiscipline.

15. The enquiry report submitted on 14.11.2000 is founded on incorrect facts. In paragraph 2 of the report it is mentioned that the petitioner wrongly mentioned in the form that he was entitled as BHU student to claim undue benefit. This aspect has been discussed earlier. The petitioner being a student of B. Pharma was a bona fide student of BHU. In paragraph 3 of the report it is mentioned that Nagpur centre in form of petitioner, Amrendra Kumar and Chandan Kumar was written in same ink and handwriting. This again was factually incorrect. It has been stated earlier that a comparison of the form of petitioner and Amrendra Kumar shows that Nagpur centre in these forms is not written in same ink and handwriting. The enquiry committee further was totally incorrect in mentioning that Nagpur centre was written in form of Chandan Kumar. The list of all 32 candidates was filed in Annexure-2 to the counter affidavit and Photostat copies of application forms of 32 candidates who filled their forms from Nagpur centre have been filed as Annexure-SCA-6 to the supplementary counter affidavit. All the original 32 forms were produced before me. Neither in the list nor the application forms name of Chandan Kumar finds place. Chandan Kumar was not a candidate for PMT/PAT-2000. He was caught impersonating for Mukesh Choudary. The enquiry committee, therefore, based its report more on surmises and rumours than on perusal of records. It cannot be relied. The conclusion of the committee that the ink and handwriting on the forms of petitioner, Amrendra Kumar and Chandan

Kumar were by same person is erroneous at the face of it.

16. The allegation that there was a racket operating could not be gone into these proceedings. The respondents themselves have admitted that even though there was allegation that huge amount was being spent by some parents to procure admission in MBBS but they could not get any material in support of it. The circumstances that some of the mark sheets were fake or Chandan Kumar was found impersonating do give rise to suspicion that the state of affairs were not proper. But that alone could not result in indicting every candidate who was of Uttar Pradesh and chose to appear from Nagpur. The petitioner was student of B. Pharma. There is no material to link him with the racket, if any, except the unsubstantiated allegation in the anonymous complaint. Mere suspicion howsoever strong cannot result in proving the allegations.

17. The order of the vice-chancellor cancelling the petitioner's examination PMT-2000 and suspending him from the privileges of the university including withholding of his result of B. Pharma is further contrary to the Ordinance framed by the university and principles of natural justice and fair play. From the extract of Ordinance filed in supplementary counter affidavit of the vice-chancellor it is clear that it enumerates indiscipline and empowers the authorities to take action against the student committing breach of it. But it is implicit that before taking action the candidate or the student has to be given an opportunity. In this case the vice-chancellor cancelled PMT-2000 examination of petitioner and suspended him first and issued show cause notice thereafter. This was illegal. The averment that it was by way of interim measure is of no consequence as from June 2000 it is now February 2001 and the vice-chancellor has not passed any final order, even though court had not granted any interim order. The result is that the petitioner is deprived of studying in B. Pharma even. His result for second semester has been withheld. He is not allowed to study for third semester. The course for PMT-2000 must have started. In other words by the time the final order is passed the petitioner's entire career would stand ruined. Cancellation and suspension should have taken place in consequence of final order and not before that.

18. The suspension is justified by the respondent under Executive Council Resolution No. 264 dated 9th June 1979 filed along with the supplementary counter affidavit. An act of indiscipline has been defined in chapter II-A of the Ordinance. It provides that no student of the university shall indulge in an act of indiscipline. For instance, misconduct, an act punishable under any law in force, an act in breach of undertaking etc. Paragraph 2 of the same chapter provides for disciplinary action for breach of discipline, such as, rustication, expulsion, suspension etc. But the action could be taken against the student on proof of any indiscipline and not on mere allegation or complaint. The vice-chancellor exercised the power, on suspicion, against the petitioner. The show cause notice in the circumstances was formality only. If some mark sheets were found to be fake or if someone was found impersonating for someone else it could not result in cancellation of the candidature of a

candidate against whom there was no material.

19. The vice-chancellor has justified the action under Resolution No. 264 dated 9th June 1979 for suspending the petitioner from privileges of the university. Clause-I of the resolution empowers the university to suspend privileges of the student if he " ….. is accused of or involved in a offence involving moral turpitude or heinous crime (including those involving violence or intimidation) and is wanted by the police or has been released on bail in connection with any such offence, or detained under any provision or against whom a Police investigation or criminal prosecution for any such offence is pending, of enquiry under U.P. Goonda Act is initiated …….". Therefore, the power could be exercised either for involvement in moral turpitude or wanted in heinous offence. The clause of heinous offence is not attracted. As regards moral turpitude the power of suspension could be invoked by the vice-chancellor under this clause either for involvement of petitioner in an offence of moral turpitude or heinous offence. On the facts narrated above there was no material from which either could be inferred against the petitioner. He was no doubt enlarged on bail. But for the applicability of this clause it was necessary that the petitioner should have been accused of any heinous offence in which bail should have been granted. The petitioner was arrested on mere suspicion, therefore, this clause was not attracted and he could not have been suspended from the privileges of the university under Resolution No. 264.

20. The vice-chancellor prejudged the issue and cancelled PMT-2000 examination and result of the petitioner and deprived him of all the privileges of the university. It is admitted by the vice-chancellor that he has not cancelled admission of the petitioner. Therefore, the university acted illegally in depriving the petitioner of declaration of his result of B. Pharma IInd semester and in not permitting the petitioner's registration in B. Pharma III semester course. Since there was nothing against the petitioner and no material was found against him, the vice-chancellor was also not justified in cancelling his candidature of PMT-2000, the entire action of the university was illegal and arbitrary and the order passed by the vice-chancellor dated 23.6.2000 communicated by the Registrar on 24.6.2000 cannot be upheld.

21. In the result, this writ petition succeeds and is allowed. The order passed by Vice-Chancellor/respondent no. 1 dated 23.6.2000 as communicated to the petitioner by the Registrar/respondent no.2, on 24.6.2000 Annexure-6 to the writ petition, is quashed. The respondents are directed to declare the result of petitioner of B. Pharma IInd semester and in case he is declared successful or is entitled for back paper he shall be granted registration in B. Pharma IIIrd semester course as per rules of the university. All the privileges of the university including hostel of the petitioner shall stand restored. The respondents are further directed to declare the petitioner's result of PMT-2000 and in case he is declared successful in the said examination and opts for M.B.B.S. course then he shall be admitted in MBBS course, which shall be subject to decision of the criminal case pending against the petitioner.

The respondents shall comply with the aforesaid directions within two weeks from the date a certified copy of this order is produced before respondent no. 2.

The parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 29.3.2001

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

Civil Misc. Writ Petition No. 36835 of 2000

Asma Parveen ...Petitioner
Versus
Aligarh Muslim University Aligarh and others ...Respondents

Counsel for the Petitioner:
Sri Shakeel Ahmad
Sri R.K. Awasthi
Sri Ravi Kiran Jain

Counsel for the Respondents :
S.C.
Sri Dileep Gupta

Constitution of India, Article 311 (2) Dismissal Order- Petition- Lecturer in Psyshology dismissed on the ground- she assisted to misused her position and made sexual advance towards the girl by looking the door from outside- During enquiry the said girl not produced- held- No violation of principle of Natural Justice.

Held- Para 29

In the present case, considering the entire facts and circumstances, the version of the complainant girl has been accepted and on the entire material placed before us we do not find there is any violation of principals of natural justice in conducting the enquiry against the petitioners.

Case law discussed
(1998) 8 S.C.C.-572
J.T. 1999(8) SC-418
(1996) 6 S.C.C.-415
1949-(.)All. E.R. 109
(1990)- 1 UPLBEC-270
1988- AWC-58

By the Court

1. The petitioner has challenged the order of the Vice-Chancellor dated 26.5.2000 dismissing the petitioner from service.

2. The petitioner was appointed to the post of Lecturer in Psychology in the Women's College on 13.4.1998. A serious allegation was made against her that while she was working as Lecturer in Psychology, women's college, Aligarh Muslim University, Aligarh (hereinafter referred to as AMU) and residing in a quarter in the premises of Abdullah Hall, she on 15th May 2000 had illegally confined in her residence a girl student of B.A. (Honours) III year course with the active connivance of a Ph.D. student in the Department of Psychology, AMU, Sheikh Abdul Barkat Masood Ahmad. The said girl was preparing for her examination which was in progress. She had offered Psychology as one of her subjects. Her allegation was that she used to take help of the petitioner. The petitioner on 15th May 2000 at 12 Noon asked her to come to her room, as she wanted to give her some important material relating with teaching. She went at the residence of the petitioner and when she reached her room at 12.30 P.M. on the said day she found the petitioner inside in company of a person named as Barkat to whom she had earlier been introduced by

the petitioner. Within a few minutes the petitioner left the room on the pretext of doing some important work with a promise to come back within a short while. Soon thereafter the said person, named as Barkat, started talking to her in indecent language and tried to outrage her modesty. The girl, whose name was not disclosed and indicated by letter 'Miss K', tried to flee from the room but found that the door was locked from outside and she had been put to illegal confinement. The said Barkat also threatened her. However, the said Barkat when went inside the bathroom, Miss K had presence of mind to lock the bathroom from outside. The petitioner returned to the room approximately after an hour. She opened the room and found that the bathroom was locked from outside by 'Miss K' the bathroom was opened by the petitioner and the said Barkat came out of the bathroom in a furious mood. Caught hold of the girl by her hair and tried to molest her in presence of the petitioner. Miss K then gave a slap to Barkat due to which the grip on her became lose and she ran out of the room. The matter was reported to the Vice-Chancellor.

3. The matter was probed by Suraiyya Rizvi, Provost, Adbullah Hall, AMU, Prof. Mansura Haider, Principal, Woman's College and Ms. Aziza Rizvi, Assistant Proctor. The petitioner was suspended by order dated 20th May 2000 and was further directed to vacate the accommodation provided to her in Abdullah Hall. The girl was also residing in Adbullah Hall premises.

4. On 21st May 2000 the Vice-Chancellor appointed Prof. Rahimullah Khan, Department of Physics, AMU, as Enquiry Authority to enquire into the charges against the petitioner. On the same day the petitioner was served with a charge sheet and she was asked to submit a reply to the Registrar, Departmental Enquiry Section, within 24 hours of the receipt of the charge sheet. Along with the charge sheet the petitioner was also served with the substance of imputation of misconduct as set out in Article of Charges as Annexure-1, Statement of imputation of misconduct in support of Article of Charges and list of documents and list of witness by whom Article of Charges were proposed to be sustained. The petitioner was also directed to submit her written statement along with the list of her defence witnesses and to produce such documents, which she wanted to rely upon. She was also asked to state whether she wanted to be heard in person. She was, however, directed not to reveal the name of the victim at any stage as she was well known to her and she was being referred to as 'Miss K' in the charge sheet.

5. On 23rd May 2000 the petitioner prayed that ten days time may be granted to her to file written statement. On the same day the Registrar permitted the petitioner to file written statement by 25th May 2000. The Enquiry Authority also gave a notice on 23rd May 2000 to the petitioner to attend the hearing on 25th May 2000 along with her defence assistant, if any, and submit to him her defence documents and also her defence witnesses at the sitting of the enquiry. The Presenting Officer appointed by the Vice-Chancellor was also directed to bring his prosecution witnesses for making their deposition before him.

6. The petitioner appeared before the Enquiry Authority on 25th May 2000. She

submitted her written statement alleged to be brief statement of her defence and reserved her right to submit a detailed statement of defence when she felt necessary. In the defence she denied that any event, as stated in charge sheet, had taken place. On behalf of the Presenting Officer three witnesses were produced, namely, Prof. Suraiyya Rizvi, Provost, Adbullah Hall as P.W. 1, Miss Aziza Rizvi, Assistant Proctor, Abdullah Hall, AMU as P.W. 2 and Prof. Mansura Haider Principal Women's College, AMU as P.W. 3. They narrated the facts as stated by the girl 'Miss K'. The petitioner was asked to cross-examine them but she refused to cross-examine. She was also asked to make her own statement and produce witnesses which she declined. The Enquiry Authority submitted its report to the Vice-Chancellor. The Vice-Chancellor passed the order on 26th May 2000 dismissing the petitioner from service on the material placed before him in the enquiry proceedings. The petitioner has challenged this order.

7. The order of the Vice-Chancellor has been attacked mainly on two grounds. Firstly, that the Vice-Chancellor had no jurisdiction to pass order of dismissal in exercise of power under sub-section (3) of Section 19 of the Aligarh Muslim University Act and secondly, that there was no fair enquiry and it was against the principles of natural justice.

8. The violation of principles of natural justice in conducting the enquiry against the petitioner is challenged, inter alia, on the following grounds:-

1. The name of the girl was not disclosed.

2. No reasonable time was granted to file written statement.

3. No material evidence to support the charges against the petitioner.

4. The complainant girl was not produced.

5. No reasonable time was granted to get a defence Assistant.

6. The enquiry report was not supplied to the petitioner.

9. To be precise we deal with all the points raised by the petitioner.

(1) The version of the petitioner in the petition is that the identity of the girl was not disclosed and in the Memorandum of Charges she was mentioned as 'Miss K'. It is contended that unless the name of the girl was disclosed it was difficult for her to submit her defence. The petitioner was given charge sheet and in Annexure-2 to the statement of imputation of misconduct, it was clearly stated that the girl is a student of B.A. (Honours) – III year course and was preparing for examination which was in progress. She had offered Psychology as a subject and used to take help of the petitioner who was living in a quarter in the campus of Abdullah Hall itself. The girl was also residing in Abdullah Hall. The petitioner was a Lecturer in Psychology. It cannot be said that the petitioner had not known the girl.

10. The petitioner appeared before the Enquiry Authority on 25th May 2000 and her statement in the order sheet had been recorded wherein she made the following statement:-

"I wanted to bring the girl concerned and Mr. Barkat as my defence witnesses but because I have been banned to visit

Adbullah Hall Campus and Mr. Barkat for whom the University campus has been banned, therefore, I could not contact them and produce them."

11. This order sheet has been duly signed by the petitioner. Her statement clearly indicated that she knew the girl concerned and had she not known the girl in question she could not have made statement that she wanted to bring the girl concerned but she could not bring her as she could not visit the campus where the girl was residing.

12. The respondent did not disclose the name of the girl to save the honour and dignity of the girl and the reputation of Abdullah Hall, AMU where many girls reside. In the Memorandum of Article of Charges she was also directed not to disclose her name. Paragraph 4 of the said Memorandum reads as under:-

"The aforesaid Miss Asma Parveen (petitioner) is directed not to reveal the name of victim at any stage while she was well known to her and she is being referred to as 'Miss K' in the charge sheet. She is also directed not to publicise the document to save the honour and dignity of Abdullah Hall, AMU."

13. The non-disclosure of the name of the girl did not prejudice the petitioner in any manner. She was aware of the name of the girl as stated in her own statement and from the relevant circumstances and the material on the record.

14. In Hira Nath Misra and other Vs. Principal Rajendra Medical College and others A.I.R. 1973 SC 1260, wherein inmates of the Girls Hostel of Medical College made complaint against the male students of that college about indecent behaviour with them in the Hostel campus itself in the odd hours of night, it was held that in such case of the rules of natural justice does not require that the statement of the girls students should be recorded in presence of the male students concerned. In this case the students were called one after the other in the room and to each of them the contents of the complaint were explained without disclosing the names of the girls who had made the complaint. It was held that the girls were neither required to give statements nor the names were to be disclosed.

15. We had asked the learned counsel for the University to produce the record relating to the enquiry proceedings. The record was produced. The sealed envelop was opened and it disclosed the name of the girl. In the facts and circumstances of the case we are satisfied that non-disclosure of the name of the girl in question did not prejudice the petitioner in the enquiry proceedings. The petitioner was aware of the identity of the girl.

(2) Much emphasis has been laid that the petitioner was not afforded reasonable opportunity of file written statement. What would be reasonable time to file written statement to reply the charges depends upon the nature of the charges and the attending circumstances. The petitioner was suspended on 20th May 2000. She was given a charge sheet on 21st May 2000 and was asked to submit reply within 24 hours. The petitioner prayed for ten days time on 23rd May 2000. She was given time to file written statement by 25th May 2000. The charge against the petitioner was that she abetted Barkat who attempted to criminally

assault the girl. The petitioner was residing in Abdullah Hall. The girl was also residing in Abdullah Hall. The petitioner was Lecturer of Psychology and the girl was also a student of Psychology. The examination was in progress. The petitioner while asking for the time did not give any reason not to submit written statement within time granted except that she was mentally perturbed on obtaining order of suspension of her service. The petitioner could have submitted written statement in accordance with the facts stated in the charge sheet. She very well knew the contents of charge sheet and could have denied it giving specific details but she further asked for time. On 25th May 2000 she had filed written statement alleging that it was a short written statement. She made general denial in the written statement. The relevant part of the written statement is:

"The so called reason for not revealing the name of the girl is unjustified and is bad in law since it deprives me of the identity of the complainant and therefore, hampers the preparation of my statement of defence.

I therefore in view of the above lack of evidence claim that the entire matter is concocted and reeks of malafides. I deny that any such event as claimed has taken place. Therefore, I categorically deny the charge."

16. The petitioner was afforded reasonable opportunity to file written statement and in fact she had also filed written statement though according to her it was a short written statement.

(3) The third attack on the validity of the proceedings is that there was no evidence against the petitioner to support the charge against her. This contention is based on the ground that three witnesses produced on behalf of the respondent had no personal knowledge and their statements were based on the statement alleged to have been made to them by the girl concerned and such statement in absence of appearance of the girl as witness was no evidence in law. This aspect has to be examined keeping in view the nature of the charge against the petitioner and the attending facts and circumstances involved in such enquiry. The three witnesses produced on behalf of the respondent were respectable persons. Miss Suraiyya Rizvi was provost Abdullah Hall, AMU. The girl concerned was residing in Abdullah Hall. The petitioner was also residing in Adbullah Hall. There was nothing to show that the statement of Provost was concocted. She narrated the entire events. The relevant part of her statement is produced here under:-

"In the evening of 16th May.2000 'Miss K' gave me a phone call that she wanted to talk with me urgently. I reached immediately Abdullah Hall within 15 minutes and near the P.C.O. (situated inside the Hall) I met the girl who rushed tome and tried to say something. Looking at her face I found that she was very anxious and she was also weeping. I took her away towards Library of Women's College where she disclosed to me that some mishandling was done to her in the room of a teacher Miss Asma Parveen, Lecturer in Psychology who lives at the campus, by a boy whom she stated as Mr. Barkat. I was taken aback and asked her to talk to me freely. She said that the teacher had called her at her room on 15th May 2000 at 12.30 Noon to give her some

material relating with teaching. She reached there and while entering the room she saw Mr. Barkat was also sitting there. He offered her some sweets, which he asked her to take as Miss Asma Parveen told her to take the sweets and congratulate Mr. Barkat, as he had submitted his Ph. D. thesis. The girl took the sweet and after eating she felt some giddiness. Meanwhile Miss Asma parveen said I am coming within a minute and went out of the room and latched the door from outside. After a few minutes the boy (Mr. Barkat) started mishandling the girl. She immediately rushed out but saw that the door was latched from outside. She started trembling and the boy threatened her to surrender because she had no other alternative. He also threatened that if you refuse it will go against you being a girl. Using her presence of mind and finding herself in a helpless position the poor girl asked Barkat to give her some time for being mentally prepared. When Barkat wanted to undress himself she asked him no to do it before her but to go into the bathroom to which Mr. Barkat agreed. Mr. Barkat went to the bathroom and the girl suddenly using her presence of mind to avoid the situation she latched the door and Mr. Barkat asked her to open it otherwise it would be very harmful for her. It was nearly about an hour when Miss Asma Parveen returned and opened the door. When Asma entered the room she opened the door of the bathroom where Mr. Barkat was standing in a shameful condition. The girl wanted to run away but Mr. Barkat being in a furious mood caught the girl by her hair and tried to molest her in the presence of Miss Asma Parveen. The girl when gave a slap due to which the grip on her became lose and she ran away. She reached her room in the Hostel and every thing was so unbearable for her that she could not control her and she started weeping due to the heinous activity. She could not get the courage to report the matter to me immediately. In the forenoon of 16th May 2000 she wanted to contact me in the office of the Provost, Abdullah Hall and then in the Principal's office of Women's College where myself and the principal were busy in the meeting with the teachers. Hence she could not manage to speak to any one of us. Hence in the evening she gave me a ring to which I immediately responded as stated above. I was so shocked to hear the statement of the girl that I was about to faint myself. Somehow I managed to reach the room of Miss Aziza Rizvi in the campus who is also Asstt. Proctor and I asked the girl to reach there from any other side in order to conceal the identity of the girl. At the room she again gave the details to Miss Aziza. Her condition was obviously so precarious and was self speaking the crime and the agony to which she had undergone during all that period. I consoled the girl and said that I will take all actions to save the girl from any problem because she was not less than my own daughter. The girl had also contacted the Principal, Women's College on 17.5.2000 and said that Asma has called me to come to a restaurant as Barkat wants to apologise her and that Asma herself will accompany her if she is not able to reach by herself. The girl remained with her and on inquiry we found that Asma was at the Gate anxiously waiting for her. The girl remained with us all this time.

17. As it was very serious thing hence in order to save the sanctity of the campus of the Abdullah Hall I myself started inquiry in the matter thoroughly. I

started collecting information about the entry of the said Mr. Barkat. Almost all the gatemen told me that Mr. Barkat was permanent visitor of Miss Asma Parveen and used to stay in her room for several hours. Even on 15.5.2000 the gateman deputed at the Marris Road Gate saw Mr. Barkat entering the campus and going to Asma Parveen's quarter and also when he was going back with Asma Parveen herself. After being convinced I reported the matter to the Vice-Chancellor, AMU on 19th May 2000 and also took the girl to the Vice-Chancellor. Miss Asma Parveen had visited the room of the girl in the night of 16.5.2000 and threatened the girl not to tell anything against her or Barkat as it will put the girl to defamation."

18. Miss Aziza Rizvi, Assistant Proctor, Abdullah Hall, appeared as P.W. 2. She had also met the girl concerned. She stated that Asma, the petitioner, was her colleague. There was nothing to show that she will make a false statement in the enquiry proceedings. Prof. Mansura Haider, Principal Women's College, AMU, appeared as P.W. 3. She had also called the girl to verify the report and thereafter she had made statement before the Enquiry Authority.

19. The petitioner was permitted to cross-examine these witnesses but she refused to cross-examine them purporting under protest. The petitioner could have cross-examined in regard to the details which they had stated before the Enquiry Authority. P.W. 1 had given details of the incident as narrated to her by the girl concerned.

20. There was thus material evidence to support the charges against the petitioner.

(4) It is further urged that the complainant girl should have been produced for examination and cross-examination. The University and the Presenting Officer, Considering the facts and circumstances of the case, did not thought it proper to produce the complainant girl. The petitioner was a Lecturer in Psychology and the girl was a student of Psychology. Both were residing in Abdullah Hall campus. The complainant girl had narrated in detail her allegations to the Provost of Abdullah Hall, the Principal of the College and the Assistant Proctor. They had made statement as narrated to them by the girl. They were not cross-examined by the petitioner. In Hira Nath Mishra vs. The Principal Rajendra Medical College, Ranchi, AIR 1973 SC 1260, wherein the girls, who had made complaints against the male students of the hostel, were not examined, the Supreme Court, on the facts of that case, held that it was wise that the girls should have not been produced and be identified. It was observed:

"However, unsavoury the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night could not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a Court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were capable of such indecencies. Under the circumstances the course followed by the Principal was a wise one. The committee whose integrity could not be impeached collected and sifted the evidence given by the girls."

21. In the East India Hotels vs. Their Workmen and others, AIR 1974 SC 696, a complaint was made against the employee that he was pouring whisky bottle into an empty gingerate bottle but the complainant was not produced by the employer and it was urged that non-examination of such witness was fatal but the Court repelled this contention holding that his absence may be due to the fact it was for the employer to take action on his complaint and to protect their prestige and reputation which was mainly their affair.

22. In Avinash Nagra v. Novodaya Vidyalay Samiti and others,(1997) 2 SCC 534, the service of the teacher was terminated on the ground of his improper conduct with a girl student. It was urged before the Supreme Court that the girl should have been produced for cross-examination. This contention was rejected. The allegation was that the appellant had misused his position and made sexual advance towards the girl and persuaded her to the room where she locked herself inside, he banged the door.

23. In Superintendent, Govt. T.B. Sanatorium and another v. J. Srinivasan, (1998) 8 Supreme Court 572, a hospital employee was removed from service on the charge of teasing a patient's wife. The wife did not appear for examination but the Court upheld the order to removal holding that there was evidence of co-worker and co-patient, which sufficiently established the guilt.

24. Learned counsel for the petitioner has relied upon the decision Hardwari Lal v. State of U.P. and others, JT 1999 (8) SC 418. In this case the appellant was a constable and he was dismissed on the charge that on the night he was under the influence of liquor and hurled abuses at the police Station on a constable Prakash Pandey. The complainant and the witnesses were not produced. It was held that the examination of those witnesses could have revealed as to whether the complaint made by Virendra Singh was correct or not and he was the best person to speak to its veracity. So also, Jagdish Ram, who had accompanied the complainant to the hospital, could have been an important witness to prove the state or the condition of the appellant. This case has no application to the facts of the present case. The girl in question had given complaint and had further narrated the incident to the important witnesses viz. the Provost, the Principal of the College and the Assistant Proctor and her examination was rightly avoided by the University.

25. It may be noted that the petitioner did not examine herself. Three witnesses had given details about her involvement in the incident. She had filed written statement and denied the allegations. She could have controverted the allegations but she deliberately avoided doing so. Had she appeared as a witness, she could have been cross-examined. She never took a defence that she did not know Barkat. On the other hand she made statement (as recorded in the daily order sheet of the proceedings) that she could produce Barkat as her defence witness because his visit had been banned in the University campus and therefore she could not contact him. A notice was given to her by the Enquiry Authority on 23rd May 2000 whereby he asked the petitioner to attend the sitting along with her defence documents and also bring her defence witnesses at the sitting of the enquiry on 25th May 2000.

The petitioner had not given list of witnesses indicating the name of Barkat to the Enquiry Authority and she did not complain that he was not permitted to enter the campus of University as a witness.

(5) One of the arguments raised is that the petitioner could not get assistance of Defence Assistant. The Enquiry Authority gave notice dated 23rd May 2000 to the petitioner asking her to appear for hearing along with her Defence Assistant. It is not a case that she was not given opportunity to engage a Defence Assistant. She wanted adjournment on 25th May 2000 on the ground that further time be granted to engage Defence Assistant to defend her case. This was rejected in the facts and circumstances of the case and this was noted in the daily order sheet of the Enquiry Authority. The complainant girl was under the constant threat and taking into consideration the entire circumstances it was advisable that the enquiry should be conducted expeditiously. She never asked that the University should provide her with Defence Assistant. The enquiry proceeding was not vitiated because the petitioner herself could not manage to get a Defence Assistant.

(6) Another challenge to the enquiry proceeding is based on the ground that the enquiry report submitted by the Enquiry Authority to the Vice-Chancellor was not supplied to the petitioner. Reliance has been placed upon the decision Managing Director, ECIL Vs. B. Karunakar, AIR 1994 SC 1074, wherein it was held that an incumbent has right to receive enquiry report to show that finding recorded by the enquiry officer is erroneous. Its reason was given as follows:-

"The reason why the right to receive the report of the Enquiry Officer is considered an essential part of the reasonable opportunity at the first stage and also principle of natural justice is that the findings recorded by the Enquiry Officer form an important material before the Disciplinary Authority which along with evidence is taken into consideration by it to come to its conclusion."

26. In Hira Nath Misra's case (Supra) one of the arguments raised on behalf of the appellant was that the copy of the enquiry report was not given to the students but the court did not accept the contention. It was held that the report was not given for the reason for which the girls were not examined in presence of the appellant, prevailed upon the authorities not to give a copy of the report to them and it would have been unwise if the copy of the report was given to them. This case was taken note in paragraph 25 of the judgement and held that if the circumstances so warrant the enquiry report is not necessary to be supplied.

27. Moreover, the petitioner has further to demonstrate that the prejudice has been caused by non-supply of the enquiry report. The evidence was only one way i.e. statements of the Provost, the Principal of the College and the Assistant Proctor who narrated the version of the complainant girl. The petitioner neither examined herself nor produced any witness. There was no other material document to take contrary view. If the petitioner had led any evidence, the Enquiry Officer was to assess the evidence and submit its own finding but where the evidence is led on behalf of the prosecution and the report along with the evidence is produced before the

disciplinary authority, such authority has to consider such evidence and the enquiry report becomes of no much significance. The petitioner has to show what prejudice has been caused due to non-supply of enquiry report vide Union Bank of India v. Vishwambhar, (1996) 6 SCC 415.

28. The supply of a copy of the enquiry report is considered one of the steps to be followed while observing the principles of natural justice. The principles of natural justice is not strait-jacket of a rigid formula and its application depends upon several factors. In Hari Nath (Supra) the Apex Court quoted with approval the observation in Russell v. Duke of Norfolk, (1949) 1 All ER 109 at p. 118, wherein Tucker, L.J. observe:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

29. In the present case, considering the entire facts and circumstances, the version of the complainant girl has been accepted and on the entire material placed before us we do not find there is any violation of principles of natural justice in conducting the enquiry against the petitioner.

30. The petitioner has also challenged the jurisdiction of the Vice-Chancellor to pass the impugned order under Section 19 (3) of the Aligarh Muslim University Act, 1920 which provides that the Vice-Chancellor may, if he is of the opinion that immediate action is necessary on any matter, exercise any power conferred on any authority of the University by or under the Act and shall report to such authority the action taken by him on such matter. The complainant girl was under constant threat and in the facts and circumstances of the present case the Vice-Chancellor wisely took prompt action. The reputation of the Aligarh Muslim University in regard to inmates of the Girl Hostel was also under publicity. The girl students from far of come and reside in the Hostel and if the sanctity of the hostel is affected, no girl would think herself safe in the hostel. The Vice-Chancellor, in these circumstances, was justified to take prompt action in the matter and he could have exercised the power of taking disciplinary proceedings against the petitioner who was involved in the incident.

In Sajid Zaheer Amani v. Visitor, Aligarh Muslim University, Aligarh and others, (1990) 1 UPLBEC 270, the services of the petitioner therein were terminated by the Vice-Chancellor relying on sub-section (3) of Section 19 of the Aligarh Muslim University Act. it was held that the Vice-Chancellor could pass such an order in regard to termination of service. In Moazziz Ali Beg v. Aligarh Muslim University, Aligarh and others, 1988 AWC 58, the Division Bench of this Court held that the Vice-Chancellor has

power to pass an appropriate order under Section 19(3) of the Aligarh Muslim University Act.

In view of the above discussion we do not find any merit in the writ petition. It is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE BHAGWAN DIN, J.

Special Appeal No. 804 of 2000

Shatrughna Tripathi and another
...Appellants
Versus
Hon'ble the Chief Justice of High Court of Judicature at Allahabad ..Opposite Parties

Counsel for the Appellants:
Shri S.P. Pandey

Counsel for the Opposite Parties:
Shri Sunil Ambwani

Allahabad High Court Officers and Staff (Condition of Service and Conduct) Rules 1976, Rule 8 – Appointment – Bench Secretary Post advertised, only those R.G.C. and L.D.A. can apply who has completed more than 10 years continuous service – appointment on the post of L.D.A. in the year 1989 – their claim about the period 1988 cannot be counted as those candidate below in Rank were S.C. candidate and secondly the appellant never claimed their seniority w.e.f. 88.

The appellants were working as Routine Grade Assistant and, thereafter, as Lower Division Assistant in the High Court, and it can be safely presumed that they have some knowledge of court proceedings. As against a common man, it was very easy and convenient for them to take appropriate legal proceedings for redress of their alleged grievance that they should have been appointed in 1988. But they chose to remain silent and contended. In these circumstances, there is absolutely no ground to entertain any challenge regarding their initial appointment in the present writ petition which has been filed after more than 10 years in the year 1999.

Case law discussed
AIR 1961 SC 1567
AIR 1992 SC 780
AIR 1974 SC 259
AIR 1992(2) SCC 594
AIR 1982 SC 101

By the Court

1. This special appeal has been preferred against the judgement and order dated 14.10.1999 of a learned single Judge by which the C.M. Writ Petition No. 109 of 1999 filed by the appellants was dismissed.

2. An office memorandum was issued by the Allahabad High Court on 24.11.1998 inviting applications for making recruitment to the post of Bench Secretary Grade II from such assistants of the Court who had put in not less than 10 years continuous service on 1.12.1998 in Class III cadre. The selection was to be made on the basis of a competitive examination and interview. The appellants, Shatrughan Tripathi and Kamlakar Dwivedi, who were working as Lower Division Assistants made applications for the post but their candidature was rejected on the ground that they had not put in 10 years continuous service in Class III cadre. The appellants then filed the writ petition giving rise to the present appeal in which an interim order was passed on

08.01.1999 that they should be allowed to appear in the examinations but their result shall not be declared. The petitioners appeared in the examination and thereafter, moved an application praying that their results be declared. The writ petition was thereafter heard and on the finding that their experience in Class III cadre fell short of the essential requirement of 10 years, and thus they were not eligible for appearing in the examination held for promotion to the post of Bench Secretary Grade II, it was dismissed.

3. The selection and appointment on the post of Bench Secretary Grade II is governed by the Allahabad High Court Officers and Staff (Conditions of Service and Conduct) Rules, 1976, (hereinafter referred to as the Rules). Rule 8 of the Rules lays down the source of recruitment to various Class III posts in the establishment and sub-rule (e), which relates to the post in question, reads as follows:

"(e) Bench Secretaries Grade II – By selection through competitive examination conducted by the appointing authority open to the assistants having not less than 10 years continuous service in class III posts. Preference shall be given to candidates possessing a Law Degree"

4. The office memorandum laid down the same condition viz. that the candidate should have put in not less than 10 years continuous service in Class III post on 1.12.1998. The petitioners were admittedly appointed in 1989 and had put in less than 10 years continuous service in Class III post by the date fixed. Consequently, they did not meet the essential qualification for being considered for appointment on the post of Bench Secretary Grade II.

5. The appellant no. 2 who argued in person for both the appellants, has submitted that the appellants appeared in the examination for making recruitment to the post of Routine Grade Assistants in the year 1988 and in the merit list their names figured at Sl. No. 71 and 75, respectively and though 100 selected candidates came to be appointed as Routine Grade Assistants in the year 1988 itself, but the appellants were given appointment in 1989 on the basis of the same merit list. It has been contended that if the appellants had been given appointments in 1988 along with other successful candidates who were much lower in the merit list, they would have completed 10 years continuous service in Class III post as on 01.12.1998. It has been further urged that the reservations rule were not properly followed and the rostering was wrongly done and as a consequence thereof the persons who had secured lower rank in merit like Sl. no. 239, 258 and 270 in the merit list prepared in the year 1988 were given appointment prior to the appellants. The contention is that the appellants ought to have been appointed in 1988 and therefore they should be treated to be eligible for the post in question.

6. In the counter affidavit filed on behalf of respondent no. 2 in the writ petition. It is averred that the candidates who had secured rank at Sl. No. 239, 258 and 270 in the merit list were Schedule Caste and on account of rostering they came to be appointed in the year 1988 itself. It is further pleaded that sub-rule (5) of rule 10 of the Rules as it existed in 1988 provided that in case of typists a

separate merit list shall be prepared on the basis of marks obtained by them in the written examination, interview and type test. The provision to rule 13(1) as it existed at the relevant time laid down that in case of Routine Grade Assistants and typists a combined list shall be prepared by taking candidates alternatively, the first name being from the list of Routine Grade Assistant and in accordance with the aforesaid rules, two separate lists were prepared is respect of recruitment held in the year 1988 and thereafter a combined list based on rostering of the selected candidates was prepared giving adequate representation to general categories and reserved categories. By an amendment dated 27.10.1989, sub-rule(5) of the rule 10 and proviso to rule 13(1) have been deleted. However, the appointment of the appellants had been made prior to 27.10.1989 in accordance with the proviso to rule 13(1) and as a result of rostering the name of the appellants did not find place in the first list of 100 candidates.

7. The question which requires consideration is whether the appellants can be treated to be eligible for the post in question. The dictionary meaning of the word 'continuous' is without break or interruption. However, in the service jurisprudence the expression 'continuous service' has acquired a slightly different connotation. In M/s Jeewan Lal Ltd. Calcutta Vs. Its Workmen, AIR 1961 SC 1567, a scheme of gratuity which provided for payment of gratuity on a certain rate on voluntary retirement or resignation of an employee after 15 years continuous service came up for consideration. In paragraph 6 of the Reports, meaning of the expression 'continuous service' was explained as under:

" "Continuous Service" in the context of the scheme of gratuity framed by the tribunal in the earlier reference postulates the continuance of the relationship of master and servant between the employer and his employees. If the servant resigns his employment service automatically comes to an end. If the employer terminates the service of the employee that again brings the continuity of service to an end. If the service of an employee is brought to an end by the operation of any law that again is another instance where the continuance is disrupted; but it is difficult to hold that merely because an employee is absent without obtaining leave that itself would bring to an end the continuity of service."

8. The same expression came up for consideration in Banaras Hindu University Vs. Dr. Indra Pratap Singh, AIR 1992 SC 780, with reference to paragraph 2(a) of Merit Promotion Scheme of University Grants Commission, which provided that a teacher in the university department engaged in advance teaching and research and whose contribution and achievements are such as to merit recommendation must be considered for merit promotion in the first instance after completing 8 years continuous service in the respective cadre, of which at least 4 years should be in the institution where he is being considered for such assessment of merit promotion. The meaning of the expression of "eight years of continuous service" was explained in paragraph 9 of the Reports as under:

"We agree with the learned counsel for the respondent that the expression "eight years of continuous service" in para 2(a) of the scheme should be understood in a reasonable manner having regard to the underlying aim and object. Para 2(a) itself expressly recognises that the eight years service may be in more than one institution, the only requirement being a minimum of four years' service in the institution where he is being considered for promotion under the scheme. In case of shift from one University to other – or from one institution to the other – it can reasonably be presumed that there is bound to be some interval. The interval may be of a day, a week or a month. What is relevant is not the length of the interval or break as it may be called but its nature. We do not mean to say that length of such interval is totally irrelevant; what we mean, however, is that one must take into consideration the reason for such breaks – or the circumstances in which such break – has occurred. Another factor to be taken into consideration in understanding and construing the said expression is the object underlying the said requirement. According to us, the object is to ensure eight years teaching experience…"

9. These authorities show that in service jurisprudence 'continuous service' would not mean a wholly uninterrupted service, in which there is no break at all. What it means is a continuance of the relationship of master and servant between the employer and his employees and a short break would not end the continuity of his service. The object of such a requirement is to ensure actual working experience for the period specified. However no notional or deemed appointment or promotion can be taken into consideration for counting the period of continuous service and the date from which an employee started actually working can not be pushed back to some notional date in order to determine the length of continuous service.

10. The appellants have next urged that the procedure adopted for making appointment in the year 1988 by bifurcating the list and making appointment in batches without regard to the number of posts of Routine Grade Assistants and typists was not warranted under the rules. They have also submitted that the rostering of the candidates for making appointment in 1988 was not correctly done. Sri Sunil Ambwani, learned counsel appearing for respondent no. 2, has submitted that the appointments made in 1988 and 1989 cannot be challenged in the writ petition filed in the year 1999, wherein the appellants have assailed the rejection of their candidature on the ground that they had not put in 10 years continuous service on the relevant date. Learned counsel has submitted that the claim of the appellants is highly belated and they are guilty of laches as they should have raised such a grievance in the year 1988 itself when they were not given appointments. He has further submitted that such a plea can not be raised and entertained by the Court in the present writ petition where the controversy is entirely different. The only explanation given by the appellants for the delay is that some other candidates, namely, Sharad Upadhyay, Sunil Kumar and J.K. Jaiswal had made a representation to the Hon'ble The Chief Justice on 15.09.1989 and that Sharad Upadhyaya and others had also filed Writ Petition No. 21928 of 1989 which is still pending. It is noteworthy that the

appellants themselves neither filed any representation nor any writ petition challenging the action of the respondents in not giving appointment to them in 1988. The appellants willingly accepted the appointment given to them in 1989 and never raised any grievance regarding alleged delay in appointment at any stage. Therefore, the explanation offered by them for not raising any grievance against the so called late appointments given to them is wholly untenable and cannot be accepted.

11. It is well-settled that this court would not examine stale claims under Article 226 of the Constitution, especially where there is no allegation of violation of fundamental rights. In Ramchandra Shankar Deodhar and others Vs. The state of Maharastra and others, AIR 1974 SC 259, it was held as under:

"The rule which says that a Court may not inquire into belated or stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay the Court must necessarily refuse to entertain the petition. The question is one of discretion to be followed on the facts of each case."

In M/s Delhi Rohtas Light Railway Company Limited Vs. District Board, Bhojpur and other AIR 1992(2) SCC 598, it was held as under:

"The rule which says that the Court may not enquire into belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. It will all depend on what the breach of the fundamental right and the remedy claimed are and how delay arose. The principle on which the relief to the party on the grounds of laches or delay is denied is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioners should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence. The test is not to physical running of time. Where the circumstances justifying the conduct exists, the illegality which is manifest cannot be sustained on the sole ground of laches".

12. In Makashi Vs Menon, AIR 1982 SC 101 a writ petition filed after a delay of 8 years was allowed by the High Court. The Apex Court reserved the judgement and dismissed the writ petition on the ground of delay and laches with the observation that it seeks to disrupt the vested rights regarding seniority, rank and promotions which had accrued to a large number of respondents during the period of 8 years which had intervened. In Bhoop Singh Vs. Union of India, AIR 1992 SC 1414, a stale claim of similarly placed constable who had been dismissed from service was rejected though the claim of another constable similarly dismissed had been allowed earlier. These authorities show that there is no absolute bar in entertaining a claim after a long gap, but there should be a reasonable explanation for the delay. If some rights have been created in favour of others during the period which has intervened, then such rights of others cannot be

disturbed by entertaining a writ petition after a long delay.

13. In the present case the appellants have not impleaded those persons as party to the writ petitioners or in the present special appeal who according to them had been illegally given preference over them and had been appointed prior to them in 1988. If the contention of the appellants is entertained, it would result in disturbing the seniority list prepared in 1988-89. Valuable rights have accrued in favour of such persons who were given appointment prior to the appellants in 1988. It is also pertinent to mention that the appellants are not illiterate rustic villagers living in some remote area who may not be having any idea of court proceedings. The appellants were working as Routine Grade Assistant and, thereafter, as Lower Division Assistant in the High Court, and it can be safely presumed that they have some knowledge of court proceedings. As against a common man, it was very easy and convenient for them to take appropriate legal proceedings for redress of their alleged grievance that they should have been appointed in 1988. But they chose to remain silent and contended. In these circumstances, there is absolutely no ground to entertain any challenge regarding their initial appointment in the present writ petition which has been filed after more than 10 years in the year 1999.

14. For the reasons mentioned above, we find no merit in the present special appeal, which is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2001

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

Civil Misc. Writ Petition No. 49680 of 2000

Vishnu Dutt Sharma ...Petitioner
Versus
Regional Joint Director of Education, Agra and others ...Respondents

Counsel for the Petitioners:
Shri Ashok Bhushan
Shri Anil Bhushan

Counsel for the Respondents:
S.C.
Shri Sanjai Sharma
Shri Vinod Sinha

Constitution of India, Article 226 – Practice and Procedure Time bound Stay Order – Stay extension Pending – whether it ceases by efflux of time? Held 'No' it has same effect as an order till further order unless recalled or modified by the Court – direction issued to the office to give affirmative answer upon quarry.

Held – (Para 9)

The law thus appears to be settled, so far this court is concerned, that time bound stay orders do not cease to be effective by efflux of time. The result in law is that a time bound order has the same effect as an order till further orders of the court. In other words it continues to operate till it is recalled, vacated or modified. The rules also do not provide for time bound stay orders. Yet the confusion prevails and every day large numbers of applications are filed for extension of such orders consuming lot of Court's time. In the circumstances it has become necessary not only to

dispose of this application but also to issue following directions to the office.

1. The request for extension of interim order is disposed of by saying that no order is necessary as the time bound interim orders do not exhaust after expiry of time mentioned in the order.

2. The Registrar General of the Court is directed to issue necessary directions to the office within one week that in view of the decisions of this Court the applications for extension of time bound interim orders need not be listed. But if the petitioner applies for question – answer from the office to find out whether his application was pending and interim order was continuing even after expiry of time mentioned in the order the answer be given by the office in the affirmative.

Case law discussed

AIR 1993 SC 412
(1998) UPLBEC 599
1985(3) LUCKNOW CD 362
1994(1) ALR 32
1998 ARC (1) 526
1992 AWC (SUPPL) 43

By the Court

1. The questions that arise for consideration is whether an application for extension of time-bound stay orders is necessary and whether it must be heard by the same Judge or it could be heard by another Judge who is ceased of the jurisdiction as a result of rotation of bench?

2. Sri Anil Bhushan, learned counsel for the petitioner has urged that once a time bound interim order is passed by the court after application of mind, then unless the stay order is vacated by this court till then the interim order will continue to be operative and it cannot exhaust or automatically stand vacated on the expiry of the period or date mentioned in the interim order.

3. On the other hand, Sri Vinod Sinha the learned counsel for the respondent no. 3 has vehemently urged that while passing a time bound interim order, the court has not concluded the hearing of the stay application and the learned judge was in the process of hearing the matter and the stay application has to be decided by the same Judge as provided by Chapter V Rule 13 of the Allahabad High Court Rules 1952 (in brief 'Rules of the Court') and only he can extend the stay order as the stay application on which the interim order was passed remained pending. He further urged that even if a stay extension application is moved, it is for the same object and purpose for which the initial stay application was filed, therefore, it can only be heard by the same Judge who has passed the interim order and not by another Judge who is ceased of the jurisdiction by rotation of bench. He urged that after the expiry of the period mentioned in the time bound stay order, the stay order exhausted and unless the stay order is extended before the expiry of the period fixed in the order or it is extended or a fresh order is passed, it cannot be revived. He urged that it will depend upon the language of the interim order whether the stay order will exhaust on a particular date fixed by the court or it will be deemed to be continuing. Sri S.N. Srivastava the learned standing counsel appearing for the respondents nos. 1 and 2 has supported the argument of the learned counsel for the respondent no. 3.

4. An interim order is generally passed to preserve the state of affairs obtaining on the date of institution of

proceedings. The Constitution Bench of the apex court in **Shri Kihota Hallohon Vs. Mr. Zachillu and others AIR 1993 SC 412** in paragraph 51 held as below :-

"The purpose of interlocutory orders is to preserve in status quo the rights of parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency."

The interim order is granted where the court is satisfied that prima facie case, balance of convenience and irreparable loss is in favour of a person claiming interim order. Such order may assume different forms depending upon exigency of circumstances. But the usual interim orders granted are either until further orders or time bound that is for specific period mentioned in the order or till the next date of listing or till the next date of hearing. The time bound interim orders, appear to me to be granted, because the Judge is not satisfied to grant complete or unlimited order or till further orders of the Court. Yet the order is granted to protect the interest of the petitioner for a short while to enable the petitioner to furnish further details or information as required by the court till the respondents, in the meanwhile, files its counter affidavit. It also avoids injustice which may be caused by the interim order to the respondent for long as the case comes up again for consideration after short time or till either the respondent appears or the petitioner is able to make out a case for such order which may last till it is vacated or till the petition is heard. Further it manifests anxiety of the Judge to decide the dispute at the earliest. The object of time bound interim orders are defeated at times, by the change of jurisdiction of the Judge who granted the order. To take an example, before a Judge 'X' a matter is argued on three points a, b and c. The Judge 'X' is of the opinion that points a and c have no substance but on point b it calls for a counter within three weeks and rejoinder affidavits within two weeks and fixes the matter after five weeks and for a period of five weeks grants interim order. Before the expiry of period of five weeks the jurisdiction due to rotation of benches changes and is vested in Judge 'Y'. Before Judge 'Y' the arguments start afresh and he hears the entire matter de novo and even points a and c are pressed before him as it is not known to him as to on what point Judge 'X' had granted interim order. This results in colossal waste of time of the Court. If ten matters in which there is time bound stay orders have been passed are listed for stay extension, which is normally taken up after lunch, Judge 'Y' may either extend the interim order without adjudicating on the matter or if he tries to adjudicate, all the points a, b and c may be pressed before him. The result is that entire time of the court after lunch is consumed in hearing matters in which time bound interim orders have been passed and the matters placed in the cause list by the order of Hon'ble The Chief Justice remains usually untouched. To avoid this the learned counsel for the respondents argued that if the matter is taken up by the Judge 'X' who had granted the time bound interim order the matter can be disposed of early by him as he is well aware of the case and the case would be argued before him on point b only. And even if other points are argued it can be decided without much loss of time. Reliance is placed by the learned standing counsel on Chapter V Rule 13 of the rules of the court and it is argued that this court

has held that such orders do not exhaust or cease to operate after expiry of time. Once application for extension of time bound order is moved since the effect of such extension would be the same as interim order itself, therefore, extension of the interim order can, only be done by the same Hon'ble Judge who passed the time bound interim order, if he is available.

5. The argument cannot be accepted as it overlooks Chapter V Rule 14 which specifically provides that a case shall not be treated as tied-up to the bench which granted the ex-parte order. Therefore, it is not possible to accept the request of the learned counsel for the respondent to direct such applications for extension of interim order to be listed before the learned Judge who granted the interim order. At the same time this court is reeling under mounting pressure of arrears. The efficacy of time bound interim orders may be there but it has added to the burden. The benches are normally rotated after two or three months. The petition is heard by other Judge. He has to hear the matter afresh. The result is that when jurisdiction is changed after two months he is faced with such a situation that he is left with no time to devote to the cases listed before him and there is pressure for extending the stay order. The Court cannot afford to loose valuable time everyday in hearing and disposing of such applications. This court has held that such orders do not exhaust or cease to operate after expiry of time mentioned in the order. In Shiksha Prasar Samiti, Allahabad and another Vs. Registrar, Societies, Chits and Firms, U.P. Lucknow and others (1998) 1 UPLBEC 599 the Division Bench held in paragraph 12 as under :-

"…Limited interim order are passed by the Court to prevent misuse of the same. Quite often it does happen that limited interim orders are not extended on the date of expiry by this Court for want of time or for various other reasons. But normally whenever the case is next taken up, the interim orders are extended unless the matter is decided on the same day or the interim order is vacated by the specific order after hearing the parties. During such gap the authorities must wait for reasonable time and should refrain from passing order advantageous to one party. We have no hesitation in saying that these two petitions have come before us on account of the undue haste and unreasonable attitude adopted by respondent no. 2. He ought to have watched at least for a reasonable time and must have waited to see as to whether this Court extended the stay order further or vacated the same or decided the writ petition finally…"

6. This Court has been facing this problem of time bound interim order since long. In Ashiq Ali Vs. Mohd. Shakeel and other 1985 (3) Lucknow Civil Decisions 362 it has been held by this court that a time bound stay order till the next date of listing of the case would not automatically exhaust or come to an end on the date the case is listed in the cause list. If the matter is not taken up the stay order would continue till the next date of listing. This court in an another decision in Shambhoo Nath Singh Yadav Vs. State of U.P. 1994(1) ALR 32 has held as under :-

"It has been submitted at the bar that the court below will proceed with the case until the order is extended today. In my opinion the order passed by this Court on 28.05.1993 is amply clear and it means

that further proceedings in the case shall remain stayed untill the order is modified or vacated by some subsequent order. The words "till the next date of listing" implies that the case is listed and some further order is passed. I do not agree that the words "till next date of listing" should be interpreted literally. If a narrow and literal interpretation is given to the above words it will lead to uncertainty and make the High Court's order obscure. Judicial orders are to be certain in the meaning so that subordinate courts or other authorities may not be in any confusion and starts acting according to their own choice and whim. The next date of listing is neither known to the subordinate courts or other authorities. A case may be listed in the very next week while another case may not be listed for a year and hence the subordinate courts or other authorities who are bound by the stay order will never know how long the stay order has to continue. Listing of a case in the cause list has no magic in itself. Even if a case is listed on a particular day, it may not be taken up on account of a variety of reasons; there may be no sitting of the Court on the day of listing or due to pressure of other work the case may not be taken up for further orders. If listing alone determines the length of time during which the order has to survive the office of the High Court will become the real arbiter and it may or may not list a case at its choice. It is for the court to mention a clear date if it chooses to pass a time-bound stay order and not for the office to shorten or to give a long rope to the operation of a stay order.

The words "till the next date of listing" are, therefore, to be interpreted in a reasonable manner and not in a manner which may lead to absurdity or created confusion. Thus the words "till the next day of listing" are quite clear and certain in their meaning that the stay order has to continue till any subsequent order is passed by the Court."

7. This court in Ram Abhilakh Misra Vs. Cane Commissioner and other 1998(1) ARC 526 has held that a judicial order continues until and unless the same is vacated or not extended on the case being taken up. It shall not lapse automatically on its own when though the matter is listed in the cause list but is not taken up by the court due to lack of time. In Cold Storage Association, U.P. having its office at Fazalganj, Kanpur Vs. State of Uttar Pradesh and others 1992 AWC (Supplementary) 43 it has been held in paragraph 12 as below :-

"…The interim stay order dated 23.06.1992 which was a time bound order, exhausted on 17th August, 1992 in the absence of any extension. Under these circumstances, what this Court is seized of presently, is the final disposal of the application for interim relief on merits. Even if it may be assumed that the interim order dated 23.06.1992 stood automatically vacated on 7th August 1992 on account of non disposal of the stay vacation application dated 24.07.1992, there is no reason to hold that the interim relief application itself stood exhausted. The same is available for disposal on merits."

8. The law thus appears to be settled, so far this court is concerned, that time bound stay orders do not cease to be effective by efflux of time. The result in law is that a time bound order has the same effect as an order till further orders of the court. In other words it continues to

operate till it is recalled, vacated or modified. The rules also do not provide for time bound stay orders. Yet the confusion prevails and every day large numbers of applications are filed for extension of such orders consuming lot of Court's time. In the circumstances it has become necessary not only to dispose of this application but also to issue following directions to the office.

1. The request for extension of interim order is disposed of by saying that no order is necessary as the time bound interim orders do not exhaust after expiry of time mentioned in the order.

2. The Registrar General of the Court is directed to issue necessary directions to the office within one week that in view of the decisions of this Court the applications for extension of time bound interim orders need not be listed. But if the petitioner applies for question – answer from the office to find out whether his application was pending and interim order was continuing even after expiry of time mentioned in the order the answer by given by the office in the affirmative.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 23061 of 1999

Hari Shankar Mishra ...Petitioners
Versus
Vice Chairman/Kanpur Development Authority Kanpur and another
...Respondents

Counsel for the Petitioner:
Shri D. B. Mukerjee

Counsel for the Respondents:
S.C.
A.K. Shukla
Atique Ahmad

Constitution of India, Article 226 read with Registration Act, S.49 and Transfer of Property Act, 1882 SS. 107, 118 and 119-Mandamus – Issue of, directing KDA to give possession of plot in question to petitioners in pursuance of alleged deed of exchange executed on 25-02-1999-Evidence on record established that as alleged by the petitioner, no lease of alleged plot had been executed in his favour on 13.01.1953 and was registered on 29.01.1953 – As such petitioner could not have obtained a surrender-cum-fresh freehold deed of alleged plot – Further it shows that said deed was registered in his favour on account of collusion of lower staff of KDA and by playing fraud – Said deed is, therefore, void and can confer no title on the petitioner – Petitioner, therefore, held not entitled to get possession on the basis of aforesaid deed – Writ Petition dismissed.

Held-Para 8

The petitioner has failed to establish that any allotment order with regard to plot no. 47-B, Block-J, had been made in his favour and it is also established beyond any shadow of doubt that no lease deed with regard to the said plot had been registered in his favour. The very basis of the surrender-cum-fresh free-hold deed is the alleged execution and registration of the lease deed of plot no. 47-B, Block J in favour of the petitioner and as it is found that no such deed was ever executed in his favour and he is not the allottee or the owner of the said plot, there is no question of his surrendering the said plot in favour of the KDA and getting plot no. 32, block 0, Govind Nagar Scheme I, in exchange in its place. The stand of the KDA is that the

surrender-cum-fresh free –hold deed had been obtained on wrong facts and by playing fraud and is a void document. In view of the specific clause to that effect in the deed, the said deed is void and can confer no right or title upon the petitioner. The petitioner is, therefore, not entitled to get possession on the basis of the aforesaid deed.

Case law discussed

AIR 1979 Mad. 285
AIR 1975 Orissa 73 (DB)

By the Court

1. This writ petition under Article 226 of the Constitution has been filed praying that a writ of mandamus be issued directing the Kanpur Development Authority to give possession of plot no. 32, block O, Govind Nagar Scheme I, to the petitioner in pursuance of deed of exchange executed on 25.02.1999.

2. The case of the petitioner is that prior to enforcement of U.P. Urban Planning and Development Act, 1973 the development of building sites in Kanpur was done by Kanpur Development Board, which had been constituted under U.P. Nagar Mahapalika Adhiniyam. The Kanpur Development Board acquired land, and after developing the same let out plots on long-term lease. The petitioner claims that plot no. 47-B, Block-J, Govind Nagar was allotted to the him though the date of allotment is not mentioned, and according to the terms and conditions of the allotment, he deposited one fourth of the cost of the plot forthwith and the remaining three-fourth was to be paid in installments. However, the physical possession of the said plot was not delivered to the petitioner and as such he did not deposit the balance three-fourth amount. After the enforcement of U.P. Urban Planning and Development Act., 1973 a development authority known as Kanpur Development Authority (hereinafter referred to as the KDA) was constituted which became successor –in-interest of the Kanpur Development Board. The petitioner approached the KDA for delivery of possession of the plot, but it was revealed that the same had been illegally occupied by a third person who had also raised construction over the same. The KDA had also introduced a scheme for providing an alternate plot and in pursuance thereof the petitioner deposited the balance amount along with the interest and thereafter a deed of exchange was executed on 25.02.1999, under which plot no. 32, block O, Govind Nagar Scheme I, was allotted in his favour and the deed was registered on 23.03.1999. Even after registration of the deed, the possession of the plot was not delivered to him though he made several representations in this regard. The principal relief claimed in the writ petition is that the respondents may be directed to deliver the possession of the plot allotted to the petitioner.

3. The respondents have contested the writ petition on the ground, inter alia, that plot no. 47B, Block J, Govind Nagar had never been allotted to the petitioner nor any lease-deed of the said plot was executed in his favour. The deed of exchange under which the lease-deed of plot no. 32, Block O, Govind Nagar Scheme I, was executed in favour of the petitioner on 25.02.1999, had been obtained by playing fraud and in collusion with the lower staff of the KDA. According to the respondents, the aforesaid deed of exchange is a void document as neither plot no. 47-B, Block J, Govind Nagar had been allotted nor any

lease-deed of the said plot had been executed in favour of the petitioner.

4. The petitioner has filed a supplementary affidavit (sworn by Prem Shankar Sachan) on 10.11.2000, wherein a photostat copy of the proposal to amend the scheme relating to allotment of plots in pursuance of the Government Order dated 06.01.1993 has been filed and according to the petitioner the deed of exchange was executed in his favour on the basis of the aforesaid amended scheme. Item No. 20 of the said scheme relates to delivery of alternate plot / house. This provides that normally no alternate plot shall be given to anyone if a plot allotted to an allottee comes under a dispute. This further provides that in case there is no fault on the part of the allottee and he has made complete payment or up-to-date payment of instalments and has got the agreement executed or registration has been done within the time period fixed, he may be given an alternate plot/house, provided a plot/house is lying vacant and is available for allotment in the same scheme. This proposal provides for giving an alternate plot only where the plot allotted by Kanpur Development Authority comes under a dispute and it further requires that the allottee should have made up-to-date payments and had got an agreement executed in his favour or the deed of transfer had been registered. The claim of the petitioner is founded upon the alleged allotment of plot no. 47-B, block J, Govind Nagar, by Kanpur Development Board, sometime in the year 1953. The Kanpur Development Authority had been constituted under the U.P. Urban Planning and Development Act, 1973 and obviously, it was not in existence in 1953. The scheme of giving an alternate plot relates to a situation where the original allotment itself had been made by Kanpur Development Authority and it does not relate to a case where the original allotment of plot was made by some other body. It may also be noticed here that in paragraph 3 of the writ petition it is averred that the Kanpur Development Board had been constituted under the U.P. Nagar Mahapalika Adhiniyam, The U.P. Nagar Mahapalika Adhiniyam (UP Act No. 2 of 1959) came into force on 24.01.1959 and as such the Kanpur Development Board could not have been constituted under the aforesaid Act in the year 1953 when the petitioner claims to have been allotted plot no. 47-B, block J, Govind Nagar.

5. A copy of the surrender-cum-fresh free-hold deed executed in favour of the petitioner on 25.02.1999 has been filed as annexure-4 to the writ petition. The very first sentence of this deed mentions that it is a deed of exchange. In the second paragraph it is mentioned that a lease-deed of plot-no. 47-B, block J, Scheme I, Govind Nagar for 999 year was executed in favour of the petitioner, Hari Shanker Mishra, on 13.1.1953 and the said deed was registered in the office of the Sub-Registrar, Kanpur, on 29.1.1953 at Sl.No. 11, Bahi No.1, Jild 645/673, on page 73/93/113. According to the respondents after the surrender-cum-fresh free-hold deed had been executed and registered in favour of the petitioner, an enquiry was made on 19.5.1999 from the Addl. District Magistrate (Finance and Revenue), Kanpur Nagar who is the head of registration department of the district, regarding the deed relating to plot no. 47-B, Block J, Govind Nagar Scheme I. The Addl. District Magistrate (Finance and Revenue) then wrote a letter dated 28.05.1999 to the Secretary of the KDA

informing him that no such lease-deed, reference of which had been made in the surrender-cum-fresh free-hold deed dated 25.02.1999, had been registered in the office of the Sub-Registrar, Kanpur Nagar. A copy of this letter has been filed as annexure – 1 to the counter affidavit. This document knocks the bottom out of the petitioner's case that the lease of plot no. 47-B, block J, Govind Nagar Scheme I, had been executed in his favour on 13.01.1953 and was registered on 29.01.1953.

6. During the course of hearing of the writ petition, Sri D.B. Mukherji, learned counsel for the petitioner, challenged the correctness of the facts mentioned in the letter dated 28.05.1999 of the Addl. District Magistrate (Finance and Revenue) by which he had informed that no lease deed in favour of the petitioners was found to have been registered in the office of the Sub-Registrar on 29.01.1953. Learned counsel admitted that the petitioner is not in a position to produce the original lease-deed of plot no. 47-B, block J, Govind Nagar Scheme I. A detail order was passed on 15.12.1999 directing the petitioner to file a certified copy of the lease-deed which he claims to have been executed in his favour with regard to plot no. 47-B, block J, Govind Nagar Scheme I, within 3 weeks. The writ petition thereafter was listed on several dates, but every time the hearing was adjourned on the request of the learned counsel for the petitioner. An order was passed on 29.08.2000 for listing of the case on 28.09.2000 and for compliance of the order regarding filing of the certified copy of the lease-deed. The petitioner did not comply with the said order and a supplementary affidavit has been filed on 10.11.2000 where a Photostat copy of an unregistered lease deed has been filed. In paragraph 4 of this supplementary affidavit it is stated that the lease-deed of plot no. 47-B, block J, Govind Nagar, had not been registered but had only been executed. The Photostat copy does not show that it had been executed on stamp paper and it appears to be a Photostat copy of some proforma of lease-deed wherein the name of the petitioner and the plot number appear to have been typed out.

7. Section 107 of the Transfer of Property Act (hereinafter referred to as the TP Act) provides that lease of an immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only by a registered instrument. Section 49 of the Indian Registration Act provides that no document required by section 17 of the said Act or by any provision of the TP Act to be registered shall affect any immovable property comprised therein or be received as evidence on any transaction affecting such property unless it has been registered. In view of this statutory provisions, there can be no manner of doubt that the lease-deed of plot no. 47-B, block J, Govind Nagar Scheme I, which the petitioner claims to have been executed in his favour, could only be executed by means of a registered document and not otherwise. The letter dated 28.05.1999 of the Addl. District Magistrate (Finance and Revenue), Kanpur Nagar clearly establishes that no such deed, as claimed by the petitioners was registered in his favour. The petitioners was also given opportunity by us to file a certified copy of the lease-deed in order to substantiate his claim, but he has failed to produce the same and has

now come out with a case that no such deed was registered. The petitioner has also not filed a copy of the letter of allotment on the basis of which he claims that the said plot was allotted to him by the Kanpur Development Board, and in paragraph 5 of the writ petition he has himself averred that the letter of allotment is not available with him. The irresistible conclusion, therefore, is that no lease-deed of plot no. 47-B, block J, Govind Nagar was ever executed in favour of the petitioner. In such a situation, the petitioner could not have obtained a surrender-cum-fresh-free-hold deed for plot no. 47-B, block J, Govind Nagar Scheme I, having an area of 356 sq. yards and it shows that the said deed was registered in his favour on account of collusion of lower staff of the KDA and by playing fraud.

8. The surrender-cum-fresh-free-hold deed contains a clause that in case it is found that the purchaser had obtained the deed on the basis of incorrect facts or by playing fraud, then the said deed would be void and ineffective at the option of the KDA. It also mentions that is such a situation the decision of the KDA would be final, and it would also have the right to forfeit the amount deposited by the petitioner. The petitioner has failed to establish that any allotment order with regard to plot no. 47-B, Block-J, had been made in his favour and it is also established beyond any shadow of doubt that no lease deed with regard to the said plot had been registered in his favour. The very basis of the surrender-cum-fresh free-hold deed is the alleged execution and registration of the lease deed of plot no. 47-B, Block J in favour of the petitioner and as it is found that no such deed was ever executed in his favour and he is not the allottee or the owner of the said plot, there is no question of his surrendering the said plot in favour of the KDA and getting plot no. 32, block 0, Govind Nagar Scheme I, in exchange in its place. The stand of the KDA is that the surrender-cum-fresh free –hold deed had been obtained on wrong facts and by playing fraud and is a void document. In view of the specific clause to that effect in the deed, the said deed is void and can confer no right or title upon the petitioner. The petitioner is, therefore, not entitled to get possession on the basis of the aforesaid deed.

9. Sri Ateeq Ahmad, learned counsel for the respondents, has also relied upon Sections 118 and 119 of the TP Act and has urged that the Kanpur Development Authority is entitled to retain the possession of plot no. 32, block 0, as it is established that the petitioner had no title over plot no. 47-B, block J. Section 118 lays dows that when two persons mutually transfer the ownership of one thing for the ownership another, neither thing or both things being money only, the transaction is called an ‘exchange’. Section 119 provides that if any party to an exchange is by reason of any defect in title of the other party deprived of the thing or by any part of the thing received by him in exchange, then unless a contrary intention appears from the terms of the exchange such other party is liable to him for loss caused thereby or at the option of the person so deprived for the return of the thing transferred. This provision gave the right to the KDA to recover possession of plot no. 32, block 0, from the petitioner in case he had got possession of the said plot. In view of the fact that the possession has not been delivered to the petitioner and the same is still with the

KDA, the KDA is legally entitled to retain possession of the plot and not to deliver the same to the petitioner. We are supported in our view by a decision of Madras High Court in Chinnathambi Gounder Vs. Royal Gounder, AIR 1979 Madras 285, where it was held as follows:

"Where a party to an agreement for exchange of property lost possession of the property received in exchange due to defect in title of the other party, the former would be entitled to retain possession of the property he gave in exchange if he happened to be in possession thereof…..

The right to get the return of the thing transferred under Section 119 will certainly take into its fold the right to retain the same if such property were to continue in the possession of a person who was deprived of his possession due to defect in the title of the order party to the exchange. The right to claim the thing transferred is a larger right which will certainly embrace the right to continue to be in possession."

10. In Seetaraswamy Vs. Narsingha Panda, AIR 1975 Orissa 73, a Division Bench held that there is no reason why the principle should not apply to a case where instead of a subsequent deprivation of the property transferred, there is no transfer at all and it impliedly followed from the section that when a party to an exchange has failed to obtain possession of the property which he was entitled to receive in exchange, then also he is entitled at his option for the return of the property transferred by him.

11. No direction can, therefore be issued to the KDA to deliver possession of plot no. 32, block 0, to the petitioner merely on the ground that a surrender-cum-fresh-free-hold deed has been executed in his favour for the said plot as the petitioner has been found to have no title over plot no. 47-B, block J, which he purportedly surrendered in favour of the KDA by way of exchange for the said plot.

12. For the reasons mentioned above, we find no merit in this writ petition which is dismissed with costs of Rs. Two thousand.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 4883 of 2001

Bechan Ali ...Petitioners
Versus
Dy. Director of Consolidation/Addl. District Magistrate, Siddharth Nagar and others ...Respondents

Counsel for the Petitioner:
Shri H.P. Mishra

Counsel for the Respondents:
Shri R.K. Chitra Gupta

Constitution of India, Article 226 read with U.P. Consolidation of Holdings Act, 1953, SS. 4, 9-A, 52, 53-B and U.P. Consolidation of Holdings Rules, R. 109 and Limitation Act,1963 S.5 – Names of contesting respondents recorded in the basic year Khatauni – On Petitioner's objection u/s 9A his name recorded as sole tenure- holder on basis of adverse possession – Petitioner contending that in fact no proceedings were taken by him under S.9A and no orders were passed by consolidation officer on 28.01.1971 – Entire proceedings are fraudulent and he

was not given any notice of such proceedings – Secondly, entry of recording petition's name was not given effect to – Petitioner is alleged to have filed an application on 20.09.1992 to give effect to order dated 28.01.1971 – Entry of petitioner's name made on 15.09.1994 – D.D.C. having found that there was justification to condone the delay and to hear the revisions on merits- Revisions allowed and delay condoned- Writ against- Appeal/Revision filed after denotification- Maintainability- Held, it is not a fit case for interference under Art. 226 of the Constitution.

Held (Para 8)

In the present case admittedly in the basic year Khatauni, the names of the contesting respondents were recorded. The petitioner is alleged to have filed application for expunging their names and to record his name as the sole tenure holder on the basis of adverse possession. The contention of the petitioner is that in fact no proceedings were taken by the petitioners under section 9A of the Act and the Consolidation officer had not passed any order on 28.01.1971. The entire proceedings are fraudulent and secondly he was not given any notice of such proceedings. Thirdly, it may be noted that Consolidation Officer is alleged to have passed the order on 28.01.1971 expunging the names of the contesting respondents from the revenue record and directing the name of the petitioner to be recorded as sole tenure holder. This entry was not given effect to and the petitioner is alleged to have filed an application on 20.09.1992 to give effect to the order passed on 28.01.1971 and in pursuance to that application, the entries are alleged to have been made in favour of the petitioner on 15.09.1994. The Deputy Director of Consolidation having found that there was justification to condone the delay and to hear the revisions on merits. I do not find that it is a fir case for interference under Article 226 of the Constitution. The matter will be decided on merits by the Deputy Director of Consolidation.

Case law discussed

W.P. No. 5809 OF 1985
1982 RD 387
1995 RD 264
1983 ALJ 1250
1990 RD 258
1996 RD 231
1998 RD 204

By the Court

1. The petitioner seeks to quash the order dated 31.1.2001 passed by the Deputy Director of Consolidation, respondent no. 1 whereby the revisions have been allowed and the delay in filing the objections has been condoned.

2. Briefly, stated the facts, are that the village Sonari, District Siddharth Nagar was notified under section 4 of U.P. Consolidation of Holdings Act, 1953 (in short the Act). In the basic year khatauni, the names of Gopal Krishna Bansikar, respondent no. 3, Anant Bansikar sons of Ram Narain and Sukhdeo Prasad son of Ram Dayal, respondent no. 2 over the disputed plots were recorded.

3. The version of the petitioner is that he was in possession over the disputed plots. He filed objection under section 9A of the Act. The Consolidation Officer, vide order dated 28.01.1971 allowed the objection and passed an order to delete the names of the contesting respondents. This order, however, was not given effect to. The petitioners is alleged to have filed an application under Rule 109 of the U.P. Consolidation of Holdings Rules to give effect to the order passed by the Consolidation Officer on 28.01.1971. The Consolidation Officer allowed the

application vide order dated 15.09.1994 directing to make the entries in accordance with the order passed by the then Consolidation Officer dated 28.01.1971.

4. Respondent Nos. 2 to 4 filed Appeal No. 1870 of 1998-99 on 25.11.1998 against the order of the Consolidation Officer dated 28.12.1971 along with an application to condone the delay in filing the appeal before the Settlement Officer of Consolidation. Another Appeal No. 1869 of 1998-99 was filed against the order dated 15.09.1994 before the Settlement Officer of Consolidation. Both these appeals were dismissed by the Settlement Officer of Consolidation on 31.12.1999. Respondent Nos. 2 to 4 filed two separate revisions against the orders passed by the Settlement Officer of Consolidation. The petitioner filed an application on 27.12.2000 to decide the question of limitation first. Respondent No. 1 by the impugned order dated 31.01.2001 rejected the application of the petitioner and directed that the revisions be heard on merits. This order has been challenged in the present writ petition.

I have heard Sri H.P. Mishra, Learned counsel for the petitioner and Sri R.K. Chitra Gupta, learned counsel for the contesting respondents.

5. Learned counsel for the petitioner contended that the appeals and the revisions filed by the contesting respondents were not maintainable. It is urged that the village was de-notified under section 52 of the Act vide Notification dated 3.3.1997 and after the said date neither any appeal nor any revision against any order passed by the consolidation authorities was maintainable. Admittedly Section 5 of the Limitation Act will be applicable to any appeal or revision filed before the consolidation authorities. Section 53-B of the Act provides that section 5 of the Indian Limitation Act, 1963 shall apply to the applications, appeals or revisions under the proceedings under the Act or the Rules made there under. The question as to whether even after de-notification the applications, appeals or revisions can be filed alongwith an application to condone the delay under section 5 of the Limitation Act.

6. In Bhagwati Vs. Deputy Director of Consolidation and others, 1983 ALJ 1250 it was held that an appeal or revision can be filed even after de-notification against an order which was passed prior to the date of the de-notification although the limitation for filing the appeal or revision has already expired. In Mathani Singh Vs. Asstt. Director of Consolidation, Ghazipur, 1990 RD, 258 it was held that a restoration application can be filed to set aside the ex parte order even after de-notification of the village under Section 52 of the Act. In Radhey Shyam and another Vs. The Deputy Director of Consolidation, Bhadohi and others, 1996 RD 231 an order passed by the Deputy Director of Consolidation was sought to be recalled on the ground that it was ex parte even after the de-notification of the village. The Court held that even after denotification, the Deputy Director of Consolidation had jurisdiction to recall the order if the order was passed without giving opportunity to the other side. Various decisions were considered by me in Ram Rati Vs. Deputy Director of Consolidation, Banda and others 1998 RD 204 wherein the view taken by earlier

decisions was followed holding that even after de-notification an appeal or revision is maintainable if the delay is explained by the applicant.

7. Learned counsel for the petitioner has placed reliance upon the decision in Writ Petition No. 5809 of 1985 (Ram Briksh Vs. Deputy Director of Consolidation, Gorakhpur and others) wherein it was held that an objection purporting to be under Section 9A(2) can be filed only after the notification under section 4 of the Act has been issued and before issuance of a notification under section 52(1) of the Act. It was a case where the objection itself was to be filed before the de-notification under section 52 of the Act. The Court itself made the observation that in case the objections were filed before de-notification under section 52 of the Act, the position would be different. It was not a case where an appeal or revision was filed after de-notification, along with an application to condone the delay in filing such appeal or revision. In Raja Ram and others Vs. Deputy Director of Consolidation, U.P., Lucknow and others 1982 RD 387 it was held that a person cannot approach the consolidation authorities to give effect of an order under Rule 109A read with Section 52 of the Act. In Nanhki Vs. Deputy Director of Consolidation, Pratapgarh and others 1995 RD 264 it was held that if the village has been de-notified by issuance of notification under section 52(1) of the Act, an application to make the correction is not applicable. These cases have no application to the facts of the present case.

8. In the present case admittedly in the basic year khatauni, the names of the contesting respondents were recorded. The petitioner is alleged to have filed application for expunging their names and to record his name as the sole tenure holder on the basis of adverse possession. The contention of the petitioner is that in fact no proceedings were taken by the petitioner under section 9A of the Act and the Consolidation Officer had not passed any order on 28.01.1971. The entire proceeding are fraudulent and secondly he was not given any notice of such proceedings. Thirdly, it may be noted that the Consolidation Officer is alleged to have passed the order on 28.01.1971 expunging the names of the contesting respondents from the revenue record and directing the names of the petitioner to be recorded as sole tenure holder. This entry was not given effect to and the petitioner is alleged to have filed an application on 20.09.1992 to give effect to the order passed on 28.01.1971 and in pursuance to that application, the entries are alleged to have been made in favour of the petitioner on 15.09.1994. The Deputy Director of Consolidation having found that there was justification to condone the delay and to hear the revisions on merits. I do not find that it is a fit case for interference under Article 226 of the Constitution. The matter will be decided on merits by the Deputy Director of Consolidation.

The writ petition is, accordingly dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2001

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

Civil Revision No. 386 of 2000

Vinay Kumar Chowdhary ...Revisionist
Versus
Ghanshyam Narain Kohli ...Respondent

Counsel for the Revisionist:
Shri Ajit Kumar

Counsel for the Respondent:
Shri A.K. Srivastava

Code of Civil Procedure, 1908, O.IX R.13, O.41 Rule 3-A and S.141 read with Limitation Act, 1963 S.5 –Applicability order passed by District Judge appointing applicant as Managing Trustee of the trust as per scheme dated 13.8.1938 prepared in O.S. 7 of 1927 – O.P. moved an application under O.IX R.13 to recall the said order with application for condonation of delay – Both the applications allowed by District Judge – Matter sent for fresh decision alongwith other connected matters – Against which present revision filed – Fraud and suppression of fact.

Held (Para 14 and 15)

In my opinion the contention is not correct. The applicant should have disclosed regarding these cases as the same are regarding the same trust. It is not disputed that Suit No. 390/88 was for the removal of the father of the applicant as Managing Trustee. The father of the applicant has died for whose removal the suit was filed. The applicant claim the right of Managing Trust on the basis that his father was Managing Trustee. Therefore, it was incumbent on him to disclose regarding the suit no. 390/88. The suit no. 322/88 is also regarding Management of the said Trust and therefore it should also be disclosed.

It may also be mentioned that by order, dated 21.07.83 passed in O.S. No. 4127/83 the District Judge, Varanasi ordered for appointment of the opposite party as a trustee of the disputed trust. Therefore, the opposite party was not an outsider but was the Trustee of the Trust is dispute. It was, therefore, incumbent to the applicant to implead him as party in this case. Without impleading him the order regarding managing trustee was obtained. Thus the material facts were surpressed and fraud was practiced.

Case law discussed
JT 2000 (3) SC 151
AIR 1982 All 23
(2000) 7 SCC 372

By the Court

1. An order was passed on 29.02.2000 (annexure no. 9 of the stay application) by the District Judge, Varanasi in Case No. 155 of 2000 appointing the applicant Vinay Kumar Chowdhary as Managing Trustee of the Trush Lachchi Ram Dharamshala, Varanasi in accordance to the scheme, dated 13.08.1938 prepared in O.S. No. 7/27. The opposite party on 29.05.2000 moved an application under order 9 Rule 13 C.P.C. to recall the order with an application for condonation of delay in filing the application. The application was opposed on the ground that the opposite party was not party in the proceedings and therefore he has no right to apply for the recall of the order under order 9 Rule 13 C.P.C. The application for condonation of delay was also opposed. However, by order, dated 21.08.2000, the learned District Judge, Varanasi has allowed the application for condonation of delay and also the application for recall of the order,

dated 29.02.2000 passed by him and has sent the matter for fresh decision to the Ivth Additional District Judge, Varanasi alongwith other connected matters. Aggrieved by it, the present revision has been preferred.

2. I have heard Sri Ajit Kumar, learned counsel for the revisionist and Sri A.K. Srivastava, learned counsel for the opposite party and have gone through the record.

3. The first argument of the learned counsel for the revisionist is that the application for stay of the order was filed and the District Judge, Varanasi on 30.05.2000 (annexure no. 6 to the affidavit) ordered that the stay shall be considered after disposal of application under Section 5 of Limitation Act. That inspite of that order the learned District Judge has passed a composite order allowing the application under Section 5 of Limitation Act and also allowing the application for recall of the order. The composite order is bad in law. It is contended that after condonation of delay opportunity should have been given for consideration of application for recalling the order. The learned counsel for the revisionist in support of the argument has referred to the decision of the Apex court in state of M.P. and another Vs. Pradeep Kumar and another (2000) 7 Supreme Court Cases 372.

It was observed in the case:

"The object of enacting Rule 3-A in order 41 of the Code seems to be two fold. First is, to inform the appellant himself who filed a time-barred appeal that it would not be entertained unless it is accompanied by an application explaining the delay. Second is, to communicate to the respondent a message that it may not be necessary for him to get ready to meet the grounds taken up in the memorandum of appeal because the court has to deal with application for condonation of delay as a condition precedent. Barring the above objects, we cannot find out from the Rule that it is intended to operate as unremidiable or irredeemably fatal against the appellant if the memorandum is not accompanied by any such application at the first instance."

4. I have considered the arguments, but disagree with the same. The above observation is based on Rule 3-A in order 41 C.P.C. which applies to the appeals. This provision cannot be applied to miscellaneous application. Rule 3-A of order 41 C.P.C. does not apply to the miscellaneous applications.

5. Form the order passed by the District Judge, Varanasi it appears that he has heard the arguments on merits as well on application for condonation of delay and passed a composite order. There is no illegality in the same.

6. Another reason for not interfering in the order is that application for condonation of delay in this case was only a formality, which was not at all required. The opposite party who moved the application was not a party to the proceedings and he moved the application for recalling the order when he came to know of the order. Therefore, he was not required to explain the delay. The only requirement was to show as to when he came to know the order. Therefore, the main question for consideration was regarding the ground for recalling the order. The first argument of the learned

counsel for the revisionist therefore, cannot be accepted.

7. It is further contended that order 9 Rule 13 C.P.C. does not apply in the present case. It is contended that the opposite party was not party to the proceedings, therefore, he cannot take resort to the provisions of order 9, Rule 13 C.P.C. and his application was not maintainable. It is also contended that proceedings are miscellaneous proceedings and therefore, the provisions of Order 9, Rule 13 C.P.C. does not apply.

8. This argument is also not correct. By virtue of section 141 C.P.C. order 9 Rule 13 C.P.C. also applies to the miscellaneous proceedings. The question is whether the opposite party can move an application under order 9, Rule 13 C.P.C. though he was not party to the proceedings. According to the opposite party the order was obtained by practicing fraud and surpressing the facts and the recall of the order has been requested on this ground.

9. Learned counsel for the respondent has referred to several cases. The first is: Surajdeo Vs. Board of Revenue, AIR 1982, Allahabad page 23.

10. In this case after considering various decisions of the Supreme Court it was held by this Court that a stranger can apply for setting aside the ex-parte order, which has been obtained by fraud and collusion.

11. The other case referred to is: United India Insurance Co. Ltd. Vs. Rajendra Singh & others JT 2000(3)SC 151. In this case an order for grant of compensation for causing injuries was passed. Later on report of the police was filed that the injuries were caused in some other incident. Therefore, the request was made for recalling the order and it was pleaded that the order has been obtained by practicing high degree of fraud. It was observed by the Apex Court that:

"… Therefore we have no doubt that the remedy to move for recalling the order on the basis of the newly discovered facts amounting to fraud of high degree cannot be foreclosed in such a situation. No court or tribunal can be regarded as powerless to recall its own order if it is convinced that the order was wangled through fraud or misrepresentation of such a dimension as would effect the very basis of the claim."

12. The learned District Judge has observed that the order has been obtained by practicing fraud and surpressing of the facts. Therefore, he can recall the order, under Order 9, Rule 13 C.P.C. and the argument that the application is not maintainable and cannot be accepted.

13. The learned counsel also argued on the merits of the case and contended that there was no sufficient ground to recall the order. It is contended that the scheme of management of trust was prepared on 13.08.1938. According to the said scheme, the father of the applicant was the Managing Trustee. After the death of the applicant's father the applicant moved an application for appointing him the Managing Trustee, which was allowed by the District Judge, Varanasi by the impugned order. That, therefore, remedy was to move an application under Section 92 C.P.C. for appointment of trustees or for removal.

The application for recall of order is only an abuse of the process of the Court. That no fraud was practiced. It is further contended that in the impugned order it has been observed that miscellaneous Case No. 390/88 Ghanshyam Narain Vs. Gauri Shanker Chaudhary and Case No. 322/88 are pending in the court regarding this Trust. That this fact was suppresed. It is contended that these cases were not relevant and, therefore, not required to be disclosed. The documents of the same have been filed and it is argued that in suit no. 322/88 is for injunction against the opposite party in which injuction order was issued on 26.09.88 (annexure 14 to the affidavit) against the opposite party restraining him from working as Managing Director of the Trust. That the said order still subsists, as appears from annexure no. 15 to the affidavit. It is contended that these orders are in favour of the applicant and therefore there was no necessity of disclosing of the suit and these orders. It is further contended that Suit No. 390/88 was filed against the father of the applicant, who has died. That, therefore, there was no question of disclosing that case. That, therefore, no fraud was practiced.

14. I have considered the arguments. In my opinion the contention is not correct. The applicant should have disclosed regarding these cases as the same are regarding the same trust. It is not disputed that suit no. 390/88 was for the removal of the father of the applicant as Managing Trustee. The father of the applicant has died for whose removal suit was filed. The applicant claim the right of Managing Trust on the basis that his father was Managing Trustee. Therefore, it was incumbent on him to disclose regarding the Suit No. 390/88. The Suit No. 322/88 is also regarding the Management of the said Trust and, therefore, it should also be disclosed.

15. It may also be mentioned that by order, dated 21.07.83 passed in O.S. No. 4127/83 the District Judge, Varanasi ordered for appointment of the opposite party as a trustee of the disputed trust. Therefore, the opposite party was not an outsider but was the Trustee of the Trust is dispute. It was, therefore, incumbent to the applicant to implead him as party in this case, without impleading him the order regarding Managing Trustee was obtained. Thus the material facts were surpressed and fraud was practiced.

16. Considering these circumstances, I am of the view that the order was rightly recalled by the learned District Judge, Varanasi. The matter has not been finally decided. It has been sent to the IVth Addl. District Judge, Varanasi for decision alongwith the other pending cases. There is no reason to interfere in the impugned order.

17. The revision is without merit and is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.3.2001

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

Second Appeal No. 1238 of 1974

Shyam Sunder and others ...Appellants
Versus
Firm Narain Das Bal Krishna Das and others ...Respondents

AND

Second Appeal No.1331 of 1974

Umashanker and another ...Appellants
Versus
Firm Narain Das Bal Krishna Das and another ...Respondents

Counsel for the Appellants:
Shri Sankatha Rai
Shri K.N. Tripathi
Shri Aditya Narain

Counsel for the Respondents:
Shri S.O.P. Agarwal
Shri S.N. Singh
Shri R.N. Singh

Code of civil procedure, 1908, S. 47, O. XXI R. 90 read with U.P.Z. A. and L.R. Act, 1951 and Hindu Law-Scope and applicability Suit for recovery of money-Money Decree – Ex-parte-Execution-Attachment and Sale of land in court auction- Purchased by Decree- holder-On confirmation of Sale D.H. obtained possession- Objections u/s 47 were filed by sons of Judgement debtor on attaining majority as well as by J.Ds - Objections by sons converted into original suit, in which, held that suit was entertainable by revenue Court –Plaint returned for presentation in proper Court-On appeal suit again converted into objection u/s 47 C.P.C.- Objections filed by the two J.Ds. dismissed- Order challenged in appeals- Appeals dismissed- Present second appeals filed against the same- In first appeal it is contended that land being sirdari land was not transferable even in court auction- As such auction by Court was void – Held, that finding that land was grove land is correct- In S.A. by sons of J.D. who were not even parties to suit it was contended that this objection under S. 47 was not maintainable- Appellants contended that present appellants being members of Joint Hindu Family were also partners in Firm business- Therefore they will be deemed to be parties in the suit and the decree as against the firm-Held, that they cannot avail benefit of 0.47 as they were not parties to the suit.

Held-

I have gone through the judgement of the court below and it appears that various documents on record were considered in detail and thereafter a finding has been recorded that the land was a grove land. The learned counsel for the appellants has only referred to the above extract of Khataunis, but could not point out any illegality in the finding of the lower Court that the land was a grove land which is based on the consideration of entire evidence and documents on record. It may also be added that this fact has not been disputed that grove existed over the disputed land at the spot. Therefore, I have no reason to interfere in the finding of the court below that the land in dispute was a grove land in which the tenure holder were having transferable rights. In view of the above the appeal no.1331 of 1974 is without merit and is fit to be dismissed. No substantial question of law arise for decision in this appeal. (Para 7)

However, under these provisions the members of Joint Hindu Family does not become entitled to file objections under section 47 C.P.C. Section 47 C.P.C. is a special provision regarding objections in the execution by the parties to the suit. It can not be extended to the persons, who are not parties to the suit on the basis that they are also members of Joint Hindu Family. This provision can not be availed by them and the only option for them was to file a separate suit. (Para 12)

Case law discussed
2001(92) RD 79 (SC)

By the Court

1. Both these appeals are connected arising out of the common judgement and therefore they are being disposed of by this judgement.

2. The facts giving rise to these appeals are as follows :

The suit no.326 of 1956 was filed by the M/s Narain Das Bal Krishna Das against the firm Raja Ram Chhannoo Lal and its partners Uma Shanker Prasad and Jagar Nath Prasad for recovery of Rs 1,530/-. The suit was decreed ex-parte on 08.5.1957. The decree was transferred for execution of Munsif Havali, Varanasi where on 14.10.1957 execution case no.192 of 1957 was registered. The disputed land was attached on 13.11.1957. The plots were put to auction sale on 20.03.1958 and were purchased by decree holder- plaintiff himself.

3. Thereafter on 17.04.1958 Uma Shanker partner of the firm filed objections under order 21Rule 90 C.P.C. which were rejected in default on 26.07.1958. The judgment debtor again filed objections under Order 21 Rule 90 C.P.C. on 30.08.1958 which were rejected on 30.08.1958 on the ground that identical objections have already been rejected. Thereafter the sale was confirmed and the decree holder purchaser obtained possession on 16.05.1959.

4. Objections under Section 47 C.P.C. were filed by Shyam Sunder, Raj Kumar and Vimal Kumar, sons of Uma Shakner on 02.09.1964 (Misc. Case No. 113 of 1964) alleging that they were minors at the date of the sale. That there is an ancestral trading firm carrying out the joint business in the name and style of firm Raja Ram Chhannoo Lal. That the property of the minors have been illegally sold during their minority and they have been dispossessed. The objections were also filed by the judgment debtors under section 47 C.P.C. On 27.01.1965 the objections of Shyam Sunder, Raj Kumar and Vimal Kumar were converted in to O.S. No.65 of 1965. The issue no.4 was framed in that suit and it was held that the suit is entertainable in the revenue court and therefore the plaint was returned for presentation to proper court, Against that order Civil Appeal No.288 of 1968 was filed, in which the suit was again converted into objection under section 47 C.P.C. The objections filed by Uma Shanker and Arun Kumar, judgment debtors were registered as Misc. Case no. 108 of 1971 under section 47 C.P.C. Both these objections under section 47C.P.C. (Misc. Case no.108/71 and Misc. Case no.113/64) were dismissed by common order on 13.01.1973. Against that order two civil appeal no.146 of 1973 and 148 of 1973 were filed. The appeals have been dismissed by a common judgement dated 07.02.1974. Against that judgement the present second appeals have been filed.

5. I have heard Sri Sankatha Rai, learned counsel for the appellants in Second Appeal No.1331 of 1974 and Sri Aditya Narain, learned counsel for the appellants in Second Appeal No.1238 of 1974 and Sri R.N. Singh and Sri S.N. Singh learned counsel for the respondents and have gone through the record.

6. In Second Appeal No.1331 of 1974 the argument advanced by the learned counsel for the appellants is that the land in suit was sirdari land at the date of auction and therefore could not have been transferred by sale or otherwise as provided by U.P.Z.A. & L.R. Act Even transfer in auction sale by the court is void. The learned counsel in support of the argument has referred to khatauni of 1356 fasli, in which Uma Shanker have been recorded as occupants Khatauni

no.1367 fasli has also been filed in which they have been recorded as Sirdari in Shreni II. The khatauni of 1359 fasli has also filed. It is contended that this document show that Uma Shanker and Jagar Nath were occupancy tenants of the land in dispute and were not having transferable rights and therefore the sale is void As against this it is contended by the learned counsel for the respondents that there is consistent finding of both the courts below that the land was a grove land and there fore Uma Shanker and others where having transferable rights. It is contended that the evidence on this point was considered in detail by both the courts below and it is a finding of fact which can not be challenged in the second appeal.

7. I have gone through the judgements of the court below and it appears that various document on record were considered in detail and thereafter a finding has been recorded that the land was a grove land. The learned counsel for the appellants has only referred to the above extract of khataunis, but could not pointed out any illegality in the finding of the lower court that the land was a grove land which is based on the consideration of entire evidence and documents on record. It may also be added that this fact has not been disputed that grove existed over the disputed land at the spot. Therefore, I have no reason to interfere in the finding of the court below that the land in dispute was a grove land in which the tenure holder were having transferable rights. In view of the above the appeal no.1331 of 1974 is without merit and is fit to be dismissed. No. substantial question of law arise for decision in this appeal.

8. Now coming to the Second Appeal No.1238 of 1974. It may be mentioned that in this case the objections were filed by Shyam Sunder, Raj Kumar and Vimal Kumar sons of Uma Shanker. They were not parties to the suit and therefore there objections under section 47 C.P.C. were not maintainable and were wrongly entertained. Clause (1) of Section 47 C.P.C. reads as follows:

"Section 47 (!): All questions arising between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

9. In view of the above provision the objection of Shyam Sunder and others, who were not parties to the suit are not maintainable.

10. In this connection learned counsel for the appellants, Shyam Sunder and others has referred to the various provision of Hindu Law. It has been contended that ancestral business was of the Joint Hindu Family. Therefore, the members of the Joint Hindu Family are also partners in the business. That the suit was filed against the firm Raja Ram Chhannoo Lal which was carrying ancestral business. The present appellants being members of the Joint Hindu Family were also partners in the business of the said firm and therefore they shall be considered to be parties in the suit and the decree as the decree is against the firm, Raja Ram Chhannoo Lal. Learned Counsel has referred to Section 234,240 and 251 and certain other provisions of Mullas, Hindu Law, On scrutiny of these

provisions it appears that were the joint family firm is carrying on business, the members of Joint Hindu Family shall also be deemed to be partners in the business.

11. Learned counsel for the appellants have also referred to the case of Gaya Din through L.R.s and others Versus Hanuman Prasad, 2001(92) R.D.79 decided by the Apex Court. It was observed in this case "that the members of the joint family collectively own the coparcenary property. Each member has an interest in such property, though his interest becomes definite on partition. Till then, it is an undivided interest. The view expressed in Mahabir Singh and other cases mentioned above, that the members were not the tenants of the holding because they had no interest in it, is, with respect, fallacious. In law, the members of the joint Hindu family together become the tenants of the holding. The co-parcenary body as such and as an entity apart from its members, does not own property. The property does not vest in the co-parcenary but in its members though collectively."

12. I have considered the provision of law referred to by the learned counsel. However under these provisions the members of joint Hindu family does not become entitled to file objections under section 47 C.P.C. Section 47 C.P.C. is a special provision regarding objection in the execution by the parties to the suit. It can not be extended to the persons, who are not parties to the suit on the basis that they are also members of joint Hindu family. This provision can not be availed by them and the only option for them was to file a separate suit.

13. The objections against the execution were already filed by the other partners. Therefore, separate objections by the appellant of Second Appeal no.1238 of 1974 were not maintainable and were wrongly entertained. They are not entitled to file separate objection under section 47 C.P.C. not being parties to the suit.

14. In view of the above the objections by Shyam Sunder and others were wrongly entertained. Therefore, the objections were not maintainable. Therefore, the appeals preferred by them is also liable to be dismissed.

Both the appeals are dismissed with costs. The stay orders, if any, are hereby vacated.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.3.2001

BEFORE
THE HON'BLE D.S. SINHA, J.

Civil Revision No.734 of 1989

Bal Krishna ...Applicant
Versus
Ramanand Dixit and another
...Opposite Parties

Counsel for the Revisionist:
Shri B.N. Agarwal

Counsel for the Respondents:
Shri Prakash Gupta
Shri R.R. Dubey

Code of Civil procedure Order 15 r. 5- Strike of defence- claim of the Tenant for adjustment of Rs.8,000/- Theory of advance not permissible, Except the amount paid towards taxes to the local authorities.

Held- para 13

Code in as much as the Explanation (3) to sub –rule (1) of Rule 5 of Order XV of the code clearly forbids any deduction from 'the monthly amount due' except the taxes, if any, paid to a local authority in respect of the building on lessor's account. It is rather per incuriam, and cannot lend support to the contention of the learned counsel of the applicant.

Case law discussed

1990(2) ARC-189

By the Court

1. Heard Sri B.N. Agarwal, the learned counsel appearing for the defendant- applicant and Sri Prakash Gupta, the learned counsel appearing for the respondent opposite parties.

2. Instant revision under Section 25 of the Provincial Small Cause Courts Act, 1887, as amended by the State of U.P., is directed against the order dated 16th September, 1989 passed by the Judge, Small Causes Court/IV Addl. District & Sessions Judge, Jhansi in Original Suit No.15 of 1988, Ramanand Dixit & another Vs. Bal Krishna.

3. The impugned order was passed on the application No.30-C moved by the plaintiff opposite parties under Rule 5 of Order XV of the Code of Civil Procedure, 1908, hereinafter called the 'Code', and by the order the defence of the defendant-applicant has been struck off. The applicant seeks to assail the impugned order on the following two grounds:-

1. That the trial court has misconstrued the provisions of Order XV Rule 5 of the Code of Civil Procedure and wrongly struck off the defence of the defendant applicant in as much as under Order XV Rule 5 of the Code of Civil Procedure only admitted amount is to be deposited by the defendant-applicant but defendant-applicant has not admitted any amount which is due and as such the defence was not liable to be stuck off and

2. that the application of the plaintiff-opposite parties for striking off the defence of the applicant was not maintainable after close of the evidence of the plaintiffs witnesses and the trial court committed illegality in entertaining and allowing the application.

4. So far as ground no.2 is concerned, it does not survive in as much as on a reference made in this case itself a Division Bench of this Court by its judgement and order rendered on 9th April, 1996 has held as below:

"---in view of the provisions of Rule 5 of order XV of the Code, where the defendant commits default in making the deposit of the monthly amount due, during the continuation of the suit, even after the closure of the evidence of the plaintiff, the Court shall have power to strike off defence, and to consider the application made by the landlord under Order XV Rule 5 C.P.C. and decide the same on merits."

5. For the purposes of proper appreciation of and adjudication upon ground No.1, the provisions of Rule 5 of Order XV of the Code, as amended by the up Act. No.57 of 1976, is quoted below in extenso:-

"5. Striking of defence for failure to deposit admitted rent, etc.:- (1) In any suit by a lessor for the eviction of lessee after the determination of his lease

and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per centum per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2), strike off his defence.

Explanation :- The expression 'first hearing' means the date for filling written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned.

Explanation 2:- The expression 'entire amount admitted by him to be due' means the entire gross amount, whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account (and the amount, if any, paid to the lessor acknowledged by lessor in writing signed by him) and the amount, if any, deposited in any Court under S 30 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972.

Explanation 3:- The expression 'monthly amount due' means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any paid to a local authority, in respect of the building on lessor's account.

(2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within 10 days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that 'such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

(Emphasis supplied)

6. Sub-rule (1) of Rule 5 of Order XV of the Code mandates that in any suit by lessor for eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the "entire amount admitted by him to be due together with interest at the rate of nine per Centum per annum". It further ordains that the defendant shall, whether or not he

admits any amount to be due, throughout continuation of the suit regularly deposit " the monthly amount due " within a week from the date of its accrual. Disobedience of the mandate of making the deposit of " the entire amount admitted by him to be due" as aforesaid, may, subject to the provisions of sub-rule (2), invite penalty of striking off the defence of the defendant.

7. In the instant case, obligation with regard to the deposit of the entire amount admitted to be due together with interest thereon at the rate of nine per centum, at or before the first hearing of the suit, does not arise in as much as the applicant has not admitted any amount to be due. Therefore, the only question which is required to be considered is whether the applicant has incurred penalty of having his defence struck off for non-compliance of the mandate with regard to deposit of the monthly amount due within a week from the date of its accrual regularly during the continuations of the suit.

8. The expression "monthly amount due" as defined by Explanation (3) to sub-rule (1) of Rule 5 of Order XV of the Code, means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any paid to a local authority, in respect of the building on lessor's account.

9. In the instant case, it is not disputed that the amount falling due every month as rent is Rs.300/- Further, it is admitted that no monthly amount due has been deposited by the applicant. Thus, there is no escape from the conclusion that the applicant did commit default in compliance of the mandatory requirement of depositing "the monthly amount due", which means the amount of rent due from him in respect of building for use and occupation at the admitted rate of rent, namely Rs300/-.

10. The learned counsel appearing for the applicant further contends that the trial court should have decided the question whether the applicant was entitled to adjustment towards rent from the advance of Rs.8000/-deposited by him as per agreement, and the trial court committed error in the eye of law in not accepting the theory of advance deposit put forward by the defendant applicant. Thus, the impugned order deserves to be annulled.

11. To buttress his contention, Sri Agarwal places reliance upon the order dated April 12, 1990 passed by a learned single judge of this Court in Civil Revision No. 273 of 1990, Anil Kumar Mahajan Vs. Ashok Kumar and another, reported in 1990 (2) Allahabad Rent Cases at page 189, wherein it has been observed as below:

"After hearing learned Counsel for the parties at some length, I am of the opinion that the trial Court should record a finding as to whether the plea taken by the defendant is a bona fide plea and also a finding as to whether there was a consent of the landlord for spending Rs.45,000/- and adjusting the same in the rent which would have become due for the future months. It is only after recording such a finding on the aforesaid question that the application under Order XV, Rule 5, C.P.C. be disposed of in accordance with the contract, whether implied or express, arrived at between the

parties. It is, however, made clear that this Court is not expressing any opinion on merits of the case and the Court below will records its own finding on the basis of the materials filed by the parties before it.'

12. Mere perusal of the part of the order extracted above makes it clear that the opinion expressed in the order does not constitute a binding precedent. An order cannot be read beyond what it decides. Therefore, the opinion expressed in the order on the basis of the facts and circumstances of that case cannot be assigned a status higher than an instance of the course adopted by the Court.

13. The provisions of sub-rule (1) of Rule 5 of Order XV of the Code unmistakably, enjoin upon the defendant in a suit by a lessor for his eviction to regularly deposit the monthly amount due within a week from the date of its accrual throughout continuation of the suit. In the event of default, the Court may, subject to the provisions of sub-rule (2) of Rule 5 of Order XV of the Code, strike off his defence. The opinion expressed by the learned single judge in the case of Anil Kumar Mahajan Vs. Ashok Kumar and another (supra) is not in consonance with the provisions of Rule 5 of Order XV of the Code in as much as the Explanation (3) to sub – rule (1) of Rule 5 of Order XV of the Code clearly forbids any deduction from "the monthly amount due except the taxes, if any, paid to a local authority in respect of the building on lessor's account. It is rather per incuriam, and cannot lend support to the contention of the learned counsel of the applicant.

14. All told, in the opinion of the Court, the revision lacks merit and is dismissed. The interim order/ orders shall stand vacated. There is no order as to costs.

15. The suit has remained pending for over twelve years. Therefore, the trial court is directed to dispose of the suit as expeditiously as possible, but not later than six months from the date of receipt of the certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 16, 2001

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

Civil Misc. Writ Petition No. 26986 of 1998

Ghanshyam Upadhyay Petitioner
Versus
The U.P. Public Service Commission, Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Ashok Bhushan
Shri Yar Mohammad

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

U.P. Public Services (Reservation for S.C./S.T. & O.B.C.) Act 1994-U.P. Act No. 4 of 1994- Reservation quota-reservation post remained unfilled-carried forward over to the next year held-proper provided in the relevant year the reservation post not exceed 50%.

Held- Para 6

Having bestowed our most amicable considerations to the submissions made

across the bar, we are of the firm view that 111 unfilled vacancies of 1996 belonging to the various reserved categories were rightly allocated to the respective reserved categories and the rule that reservation should not exceed 50/- of the total number of vacancies has not been infringed upon

Case law discussed

AIR 1993 SC- 477

By the Court

1. Common questions of law and facts inter-knit these petitions and the respective counsel having expressed themselves in concurrence to common disposal, it would be apt to dispose them of by a composite judgment.

2. The facts draped in brevity are that the U.P. Public Service Commission issued an advertisement-bearing no. A-1/E-1/1997-98 inviting applications upto 12.2.97 in respect of 548 posts of Principals and Senior Lecturers for Government Intermediate Colleges and normal/training colleges besides 200 posts of Dy. Collector/Dy. S.P./other allied services for which Combined State/Upper Subordinate Services (Preliminary) Examinations 1997, was held on 18.5.97. It was, however, expressly provided in the advertisement that the number of the vacancies might increase or decrease. The petitioners applied for the posts of Principal (Hill Cadre) and appeared in the preliminary examination the result of which was pronounced on 3.7.1997. In all, 722 candidates including the petitioners herein romped home in the preliminary examination held for the posts of Principals and lecturers and accordingly, they went ahead with appearing in the main examination. The result of the main examination was announced on 8.1.98. The number of vacancies, as declared in the result, was, however, pruned to 443 as against 548 posts initially advertised. Though the petitioners were not amongst the candidates declared successful in main examination, they were provisionally allowed by the Court to be interviewed and on the basis of interim order passed by the Court. The final result of the selection was declared on 25.1.98. the break-up of 443 posts was as under:

(a) Principal (Plain Cadre)	19
(b) Principal (Hill Cadre)	238
(c) Senior Lecturer (Plain Cadre)	162
(d) Senior Lecturer (Hill Cadre)	24
Total	=443

3. The figure of 238 posts of Principal belonging to Hill Cadre was admittedly inclusive of 111 posts belonging to reserved classes that were carried forward from the previous recruitment year, 1996 and accordingly, these vacancies were allocated to the respective reserved categories as per section 3 (2) of the U.P. Act 4 of 1994. Allocation of posts to general candidates was made out of remaining 127 posts. The 238 posts of Principal belonging to Hill Cadre were allocated to various classes/categories as under:

(a) General	69
(b) Scheduled Castes	70
(c) Scheduled Tribes	06

(d) O.B.C 93

Total =238

The figure of 238 was inclusive of 15 posts of physically handicapped, Dependants of Freedom fighters and Defence Personnel adjusted horizontally in the respective class to which they belonged.

4. The petitioners in this fascicle of writ petitions have circumscribed their claims as against the posts of Principal ear-marked for Hill cadre. The only grouch of the petitioner spelt out in these cases and as submitted by their learned counsel, is that the over-all reservation out-ran the limit of 50%. It has been submitted with vehemence by Sarvsri Ashok Bhusan, Ashok Khare and D.S. Singh that where due to unavailability of suitable candidates in any of the vacancies reserved under sub-section (1) of Sec. 3 of the U.P. Public Services (Reservation for SC/ST and OBC) Act, 1994, the posts remain unfilled, the same may be carried forward over to the next year commencing from Ist of July in which the recruitment is to be made "subject to the condition that in that year total reservation of vacancies for all categories of persons mentioned in sub-section (1) would not exceed 50% of the total vacancies." Credence has been placed upon sub-section (4) of Sec. 3 as also the law laid down by the Apex Court in **Indra Sawhney's case**[1]**.** It has been canvassed by the learned counsel that 111 unfilled vacancies of 1996 falling in the reserved categories could no doubt be clubbed with vacancies of the recruitment year in question but while computing the quota of reservation for reserved categories of candidates, care should have been taken that the total reservation of vacancies for all categories of persons mentioned in sub-section (1) did not exceed 50% of the total vacancies. This principle, submit the counsel, has been infringed upon and it is owing to this reason that the petitioner could not be selected.

5. Sri S.K. Singh learned counsel representing the Uttar Pradesh Publish Service Commission has canvassed that the unfilled vacancies of 1996 belonging to reserved categories that were carried forward to the recruitment year in question, were apportioned to the respective reserved categories inasmuch as such vacancies were not liable to be thrown in the common pool of vacancies of recruitment year in question. It is further canvassed by Sri S.K. Singh that the rule that the reserved quota should be so computed as not to transcend the bounds of 50% of the total number of vacancies as propounded by the Apex Court in **Indra Sawhney's case** and as laid down by Sub-section (4) of Sec. 3 of the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 comes into play only if the vacancies remain unfilled due to non-availability of candidates "even after special recruitment referred to in sub-sectioned (2)" which visualises that the unfilled vacancies of reserved categories are to be filled by special recruitment for "*such number of times, not exceeding three, as may be considered necessary to fill such vacancies from amongst the person belonging to that category*". It has been submitted by Sri S.K. Singh that the provisions contained in sub-sections (2) and (4) of Sec. 3 of the Act, will have to

[1] AIR 1993 SC 477

be construed harmoniously as otherwise the very purpose of the carry-forward rule embodied in sub-section (2) of Sec. 4 will be frustrated.

6. Having bestowed our most amicable considerations to the submissions made across the bar, we are of the firm view that 111 unfilled vacancies of 1996 belonging to the various reserved categories were rightly allocated to the respective reserved categories and the rule that reservation should not exceed 50% of the total number of vacancies has not been infringed upon. It is no body's case that the unfilled vacancies of 1996 belonging to the reserved categories were already carried forward for more than three times. The expression "even after special recruitment referred to in sub-section (2)" occurring in sub section(4) of Sec. 3 of the Act is of pivotal significance. The said expression clearly connotes that it would apply to situation where due to non-availability of suitable candidates any of the vacancies reserved under sub-section (1) remains, "even after special recruitment referred to in sub-section (2)". The special recruitment, as visualised by sub-section (2) may be held for "such number of times, not exceeding three, as may be considered necessary to fill such vacancy from amongst the persons belonging to that category." In the fact-situation of the case in hand, the provisions contained in sub-section (4) of Sec. 3 are not attracted. It comes into play only after exhaustion of the maximum permissible limit of special recruitment's to which the unfilled vacancies of the reserved category can be carried over under section 3 (2) of the Act. It is not disputed that out of 127 vacancies in the posts of Principal (Hill Cadre), 69 were allocated to general candidates whereas 50% 127 posts comes to 63. The petitioners were although sub-joined in the list of general candidates selected for interview on the basis of marks obtained in the written examination, but finally, after the interview, they could not secure enough marks to enable them to find a place in the merit-list amongst the general candidates. The selection and appointment of reserved category candidates against unreserved posts on the basis of merits have rightly not been challenged in view of the provisions contained in section 3 (6) of the Act 4 of 1994 which provides that candidates selected on merits shall not be taken into reckoning against vacancies meant for respective reserved category. In such view of the matter, the petitions lack merit and are liable to be dismissed.

7. Before parting with the case, it may be observed that 164 vacancies falling in various reserved categories remained unfilled due to non-availability of suitable candidates. These vacancies were carried forward to the next recruitment year 1998 for which the selection process has already been completed with the declaration of result except in respect of 51 post the result of which could not be declared due to interim order passed by this Court. The interim order is liable to be discharged for the reason aforestated.

In the result, the petitions fail and are dismissed without any order as to costs. Interim order is discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.3.2001

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

Civil Misc. Application No. 27696 of 2001

Sri Kamlakar Tripathi ...Petitioner
Versus
The Vice-Chancellor, B.H.U., Varanasi and others ...Respondents

Counsel for the Petitioners:
Sri Irshad Ali
Sri Shailendra Kumar Pathak

Counsel for the Respondents:
Sri V.K. Upadhyaya

Constitution of India, Article 215 contempt jurisdiction- whether the High Court being a court of record can punish the authority to enforce its order- held, yes- Provisions of Rule 4 A(E) XXXV-E of the High Court Rules will not come in the way of exercising the Power under Article 215 of the Constitution.

Held- Para 10 and 11

The power to proceed under Article 215 is an inherent power of the High Court. It cannot be curtailed or abridged by either Contempt of Courts Act 1971 or under Chapter XXXV-E of the Allahabad High Court Rules 1952.

Case law discussed
(1997)3 SCC-11
AIR- 1992 SC-904
(1998) 4 SCC-409
(1998) 7 SCC -379

By the Court

1. This is an application under Article 215 of the Constitution filed by the petitioner for initiating contempt proceedings against Sri Y.C. Simhadri, Vice Chancellor, Banaras Hindu University, Sri V.V. Menon, Controller of Examinations, Banaras Hindu University and Sri P.C. Upadhyaya, Registrar, Banaras Hindu University for wilful disobedience of the order dated 21.3.2001 passed by this court in Civil Misc. Writ Petition No.47177 of 1999. It is prayed that the aforesaid respondents be punished for contempt of court.

2. Notice on contempt application was served on Sri V.K. Upadhaya learned counsel appearing for respondents on 26.3.2001. This application came up before this court on 27.3.2001 and it was directed to be put up along with the records.

3. Petitioner appeared in LL.B. IInd year Examination in 1997. After examination of LL.B. IInd year the petitioner was expelled by order dated 5.2.1997 passed by Vice Chancellor of the University. The expulsion was for a period of two years. The order further stated that he was not allowed to appear in entrance test for admission to any course of the University. After the expulsion period of two years expired the petitioner moved an application on 12.8.1999 that his result of LL.B. IInd year examination which was withheld due to expulsion be declared and he be permitted to complete LL.B. IInd year course provisionally. The respondents did not admit the petitioner of LL.B. IIIrd year course nor declared his result. The respondents issued show cause notice to the petitioner on 23.10.1999 to show cause why the petitioner be not expelled from the University for all times to come. No order has been passed by the University in pursuance to show cause notice. Since the expulsion period of two years was over the respondents could not

deny admission to the petitioner in LL.B. IIIrd year course. The respondents were further under legal duty to declare the result of petitioner of LL.B. IInd year examination which was withheld due to expulsion as the respondents had not cancelled the examination of petitioner of LL.B. IInd year.

4. This court, after hearing the learned counsel for the petitioner and Sri V.K. Upadhyaya learned counsel appearing for the respondents, passed an interim order on 21.3.2001 which is extracted below:-

"Heard Sri Irshad Ali learned counsel for the petitioner and Sri V.K. Upadhyaya learned counsel appearing for respondents.

By order dated 5.2.1997 passed by the university the petitioner was expelled from the university for a period of two years. He was not allowed to appear in any entrance test for admission to any course of the university. After the expulsion period of two years expired, the petitioner moved an application on 12.8.1999 that he has passed LL.B. 1st year examination and his result of LL.B. IInd year examination was withheld due to his expulsion. The order of expulsion passed by the university came to an end on 5.2.1999. He prayed that his result of LL.B. IInd year be declared and he be permitted to complete LL.B. IIIrd year course. The respondents did not admit the petitioner and instead issued a show cause notice to him on 23.10.1999 to show cause why the petitioner be not expelled from university for all times to come. No order has been passed by the University in pursuance of the show cause notice. The respondents could not deny admission to the petitioner in LL.B. IIIrd year course and were bound to admit the petitioner in LL.B. IIIrd year course.

Sri V.K. Upadhyaya learned counsel appearing for the respondents has urged that till the petitioner is declared pass in LL.B. IInd year examination he cannot be permitted to appear in LL.B. IIIrd year examination. From the facts of this case, it is clear that after the expulsion came to end it was duty of the respondents to declare the result of the petitioner of LL.B. IInd year examination. For this lapse on the part of the university the petitioner is entitled to be compensated by the university. The university shall show cause as to why adequate compensation be not awarded to the petitioner. The university shall further explain in the counter affidavit as to whose accountability has to be fixed for non declaration of result of the petitioner. In this view of the matter the petitioner is entitled for interim order.

Until further orders of this court the respondents are directed to declare the result of the petitioner of LL.B. IInd year examination, 1997 within three weeks from the date a certified copy of this order is produced before respondent no. 3. The respondents no. 1 to 4 are further directed to admit the petition in LL.B. IIIrd year course and permit him provisionally to appear in LL.B. IIIrd year examination which is scheduled to commence from 23.3.2001. The necessary form shall be got filed from the petitioner and the admit card shall be issued to the petitioner 22.03.2001 by the respondent no.3. This order shall be complied by respondent no. 3 and a certified copy of this order be produced before him on 22.03.2001 by the petitioner.

"Office is directed to issue a certified copy of this order to the learned counsel for the parties today on payment of usual charges."

5. The petitioner served a certified copy of the order passed by this court on 21.3.2001 on the Controller of Examinations, Banaras Hindu University, Varanasi on Sri V.V. Menon who himself received the order on 22.3.2001. A copy of the order dated 21.3.2001 was also served by the petitioner on Vice Chancellor as well as Registrar of the University. The petitioner complied with order dated 21.03.2001. This contempt application under Article 215 has been filed by the petitioner for punishing the respondents for committing contempt of court as they have not complied with the order dated 21.3.2001.

6. Sri Irshad Ali the learned counsel for the petitioner has urged that the respondents have intentionally, deliberately and wilfully flouted the interim order dated 21.3.2001 passed by this Court He urged that respondents are guilty of committing contempt of court and are liable to be punished under Article 215 of the Constitution. He urged that Constitutional powers of this court under Article 215 of the Constitution cannot be restricted by the provisions of Contempt of Courts Act 1971 or by the Rules of the Allahabad High Court and this court has ample power to punish the respondents under Article 215 of the Constitution.

7. On the other hand, Sri V.K. Upadhyaya the learned counsel appearing for the respondents has vehemently urged that this court had no power under Article 215 of the Constitution to hear a contempt alleged to have been committed by the respondents. He urged that under Chapter XXXV-E of the Rules of the Court, a civil contempt or criminal contempt could only be heard by a Single Judge or a Division Bench nominated by Hon'ble the Chief Justice. He placed reliance on the decision of the apex court in High Court of Judicature at Allahabad through its Registrar v. Raj Kishore Yadav and others (1997) 3 SCC 11.

8. Though judicial hyper sensitiveness in not warranted but angelic silence on the part of a Judge is also not expected vis-à-vis an infraction of the majesty of law. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundation of our society. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice or which tends to impede its course or tends to shake public confidence in the judicial institutions. This jurisdiction may also be exercised when the act complained of adversely affects the majesty of law or dignity of the courts of law. This jurisdiction is not exercised to protect the dignity of an individual judge but to protect the administration of justice from being maligned. In the general interest of the community it is imperative that the authority of courts should not be imperilled and there should be no unjustifiable interference in the administration of justice. No such act can be permitted which may have the tendency to shake the public confidence in the fairness and impartiality of the administration of justice.

9. Article 215 of the Constitution of India states that "Every High Court shall be a court of record and shall have all the powers of such a court including power to punish for contempt of itself." The Constitution vests the High Court power to punish for contempt of itself and no Act of Legislature could take it away. Power under Article 215 can only be curtailed or excluded with respect to any matter by a constitutional amendment and not by any ordinary legislation. The maxim “Salus populi suprema lex", that is "the welfare of the people is the supreme law": adequately enunciates the idea of law. This can be achieved only when justice is administered lawfully, judicially, without fear or favour and without being hampered and thwarted, and this cannot be effective unless respect for it is fostered and maintained. It may be necessary to punish for contempt if someone makes mockery of the judicial process and mocks at the order of the court that whatever may be the result he would abide by his administrative decision, which he takes irrespective of the courts order. In such situations the court has the duty of protecting the interest of the public in due administration of justice so that the confidence of people in judiciary is not eroded.

10. The argument of Sri V.K. Upadhyaya that this court has no power to proceed under Article 215 against the respondents and the only remedy available to the petitioner is to file a contempt petition under the Contempt of Courts Act 1971 under Chapter XXXV-E of the Allahabad High Court Rules 1952 cannot be accepted. The power to proceed under Article 215 is an inherent power of the High Court. It cannot be curtailed or abridged by either Contempt of Courts Act 1971 or under Chapter XXXV-E of the Allahabad High Court Rules 1952. It has to be exercised sparingly and with caution. The Contempt of Courts Act 1971 is concerned with nature and type of punishment which a court of record may impose whereas Chapter XXXV-E of the Allahabad High Court Rules 1952 has been framed under section 23 of the Contempt of Courts Act 1971 is concerned with the procedure for presentation and hearing of contempt of court cases under the Contempt of Courts Act 1971. Allahabad High Court Rules 1952 do not lay down any procedure for exercise of power under Article 215 of the Constitution. The apex court has considered the scope of power under Article 215 of the Constitution in Pritam Pal v. High Court of Madhya Pradesh, Jabalapur through Registrar AIR 1992 SC 904 and has held in paragraph 24 as under:-

" From the above judicial pronouncements of this Court, it is manifestly clear that the power of the Supreme Court and the High Court being the Courts of Record as embodied under Article 129 and 215 respectively cannot be restricted and trammelled by any ordinary legislation including the provisions of the Contempt of Courts Act and their inherent power is elastic, unfettered and not subjected to any limit."

In the same decision in paragraph 41 the apex court observed:-

"The position of law that emerges from the above decisions is that the power conferred upon the Supreme Court and the High Court, being courts of Record under Article 129 and 215 of the Constitution respectively is an inherent

power and that the jurisdiction vested is a special one not derived from any other statute but derived only from Articles 129 and 215 of the Constitution of India (see D.N. Taneja vs. Bhajan Lal (1988)3 SCC (26) and therefore the constitutionally vested right cannot be either abridged by any legislation or abrogated or cut down. Nor can they be controlled or limited by any statute or by any provision of the Code of Criminal Procedure or any Rules. The caution that has to observed in exercising this inherent power by summary procedure is that the power should be used sparingly, that the procedure to be followed should be fair and that the contemner should be made aware of the charge against him and given a reasonable opportunity to defend himself"

11. The Constitution Bench of the apex court in Supreme Court Bar Association v. Union of India and another (1998)4 SCC 409 has held that, "The nature and types of punishment which a court of record can imposed in a case of established contempt under the common law have now been specifically incorporated in the Contempt of Courts Act 1971 insofar as the High Courts are concerned and therefore to the extent the Contempt of Courts Act, 1971 identifies the nature or types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under Article 215 either. No new type of punishment can be created or assumed". The apex court in another decision in Dr. L.P. Mishra vs. State of U.P. (1988)7 SCC 379 in paragraph 12 has held that. " It is true that the High Court can invoke powers and jurisdiction vested in it under Article 215 of the Constitution of India but such a jurisdiction has to be exercised in accordance with the procedure prescribed by law." It further held that the procedure prescribed under Chapter XXXV-E of the Allahabad High Court Rules has to be followed. Even in the decision of the apex court in Raj Kishore Yadav (supra) relied by learned counsel for the respondents it has been held in paragraph 16 that, "Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India." This decision was concerned with the question whether Rule 4 (a) of Chapter XXXV-E of the Allahabad High Court Rules 1952 is ultra virus to Article 215 of the Constitution. It did not lay down that the inherent power of High Court under Article 215 has been curtailed by Allahabad High Court Rules 1952. Moreover, in view of law laid down by the Constitution Bench of the apex court Supreme Court Bar Association (supra) that the Contempt of Courts Act, 1971 does not impinge upon the inherent powers of the High Court under Article 215 this court has inherent power to proceed against the respondents on an application under Article 215 of the Constitution.

12. From the facts on record it is born out that orders passed by this court on 21.3.2001 in writ petition was communicated to the respondents but they did not comply with the order knowingly, wilfully, intentionally and deliberately which is clear from the counter affidavit filed today in the writ petition while this order was being dictated by this court. In the counter affidavit there is no whisper that order dated 21.3.2001 has been

complied by the respondents. Issue notice to the respondents.

Sri V.K. Upadhdyaya has accepted notice on behalf of respondents.

Sri Y.C. Simhadri, Vice Chancellor, Banaras Hindu University, Varanasi and Sri V.V. Menon, Controller of Examination, Banaras Hindu University, Varanasi and Sri P.C. Upadhyaya, Registrar, Banaras Hindu University, Varanasi are directed to file counter affidavit within two weeks and they shall be personally present in the court on 16.4.2001.

List this case on 16.4.2001 before appropriate bench.

Office is directed to place the record of this Contempt Application within one week from today before Hon'ble the Chief Justice for nominating appropriate bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.3.2001

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE S.K. JAIN, J.

Civil Misc. Writ Petition No. 6421 of 2001

Raj Kishore and others ...Petitioners
Versus
The Commissioner, Gorakhpur Division, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Misra

Counsel for the Respondents:
S.C.

U.P. Zamindari Abolition And Land Reforms Act, 1950- Ss. 4 and 6 read with Northern India Ferries Act, 1878, S. 4- Petitioners claiming ownership of ferry and right to realise toll on the ferry in question- Notification issued under Ss. 4 and 6 of Z.A. Act vesting ferries in the State- Petitioners failing to prove ownership over the ferry- Petition dismissed.

Held- (Paras 3, 4 and 6)

Copy of the order dated 18.9.1953 passed by the District Land Reforms Officer, Deoria (filed as Annexure 2 of the writ petition) is an incomplete copy. It is also not certified copy of the said order. A reading of the order shows that Sabhapati of the Gram Panchayat, Baikunthpur had given some report against Bhujawan and others regarding management of the Baikunthpur Ghat. The order recites that 'existing rights of the contractors of ferries will continue according to paragraph 3 (f) of Revenue (A) Department G.O. No. 1301-1-A/450-1950 dated March 20, 1952 and the existing contractor will continue'. Towards the bottom of the order, there is an endorsement- copy forwarded to the existing contractor Sri Bhujawan to deposit due amount in treasury at once. This order shows that Bhujawan was working in the capacity of a contractor and it does not at all establish any proprietary right of Bhujawan over the ferry. The direction in the order to the effect that contractor Bhujawan should deposit the amount completely negatives the case of the petitioners that they had any kind of ownership right over the ferry.

The notification under section 4 was issued on July 1, 1952. Thereafter all rights, title and interest of all the intermediaries in every estate in such area including ferries ceased and vested in the State of U.P. free from all encumbrances. Ferry is a passage over water by boat and is a continuation of the high way from one side of the water

over which it passes to the other. The ferry is a right to keep a boat for the carrying of persons or their belongings in consideration of a reasonable toll. It is referred as a link between two high ways on either side of the river. If ferry was part of the Zamindari of the intermediary, it vested with the State on July 1, 1952.

Having considered the submission of the learned counsel for the petitioners and the material on record, we are satisfied that the petitioners have failed to establish any title over the ferry in question inviting tenders for giving the right to collect tolls on the same.

By the Court

1. The Executive Engineer, P.W.D. Deoria issued an advertisement inviting tenders upto 28.2.2001 for letting out the right to realise tolls on Baikunthpur Ghat on Chhotigandak river. The present writ petition under Article 226 of the Constitution has been filed for quashing of the aforesaid tender notice.

2. The seven petitioners claim that they are mallah/nishad by caste and have been running a ferry from time immemorial over the aforesaid ghat. They further claim that Baikunthpur Ghat was being managed by the fore-fathers of the petitioners from ages and their families are depended upon the same. In support of their claim, the petitioners rely upon Khatauni of 1359- Fasli of Village Baikunthpur where the name of Bhujawan and others were recorded over Khata no. 270. It is averred in the writ petition that the petitioners are descendants of Bhujawan. The petitioners further rely upon an order dated 18.9.1953 passed by the District Land Reforms Officer, Deoria and according to them this order recognises the right of Bhujawan to run a ferry. The contention of the petitioners is that the ownership of the ferry vests with them and as such the State has got no right to interfere in their management and to let out the right to collect tolls on the said ferry.

3. Copy of the order dated 18.9.1953 passed by the District Land Reforms Officer, Deoria (filed as Annexure-2 to the writ petition) is an incomplete copy. It is also not certified copy of the said order. A reading of the order shows that Sabhapati of the Gram Panchayat, Baikunthpur had given some report against Bhujawan and others regarding management of the Baikunthpur Ghat. The order recites that 'existing rights of the contractors of the ferries will continue according to paragraph 8(f) of Revenue (A) Department G.O. No. 1301-I-A/450-1950 dated March 20, 1952 and the existing contractor will continue'. Towards the bottom of the order, there is an endorsement- copy forwarded to the existing contractor Sri Bhujawan to deposit due amount in treasury at once. This order shows that Bhujawan was working in the capacity of a contractor and it does not at all establish any proprietary right of Bhujawan over the ferry. The direction in the order to the effect that contractor Bhujawan should deposit the amount completely negatives the case of the petitioners that they had any kind of ownership right over the ferry.

4. Section 6 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as the Act) gives consequences of the vesting of an estate in the State and relevant part of this section is being reproduced below:

" **Consequences of the vesting of an estate in the State-** when the notification under section 4 has been published in the Gazette, then, notwithstanding anything contained in any contract or document or in any other law for the time being in force and save as otherwise provided in this Act, the consequences as hereafter set forth shall, from the beginning of the date of vesting, ensure for area to which the notification releases, namely:

(a) all rights title and interest of all the intermediaries-

(i) in every estate in such area including land (cultivable or bareen), grove-land, forests whether within or outside village boundaries, trees (other than trees in village abadi, holding or grove), fisheries, tanks, ponds, water-channels, ferries, Pathways, abadi sites, hats, bazars and melas held upon land to which clauses (a) to (c) of sub-section (1) of Section 18 apply) and,

(ii) in all sub-soils in such estates including rights, if any, in mines and minerals, whether being worked or not,

shall cease and be vested in the State of Uttar Pradesh free from all encumbrances"

The notification under section 4 was issued on July 1, 1952. Thereafter all rights, title and interest of all the intermediaries in every estate in such area including ferries ceased and vested in the State of U.P. free from all encumbrances. Ferry is a passage over water by boat and is a continuation of the high way from one side of the water over which it passes to the other. The ferry is a right to keep a boat for the carriage of persons or their belongings in consideration of a reasonable toll. It is referred as a link between two highways on either side of the river. If ferry was part of the zamindari of the internmediary, it vested with the State on July 1, 1952.

5. Learned counsel has contended that section 4 of Northern India Ferries Act, 1878 contemplates a public ferry and a private ferry and the State has no right to let out the right to collect tolls on private ferry. Section 4 (b) of this Act no doubt gives power to the State Government to take possession of private ferry and to declare it to be a public ferry. However it may be noticed that this Act was enacted in 1873 and as the preamble of the Act shows the object of the Act is to regulate ferries in Northern India. The U.P. Zamindari and Land Reforms Act was enacted in 1950 and the vesting as contemplated by section 4 of the said Act took place on July 1, 1952. The Northern India Ferries Act can be of no assistance to the petitioners for the purpose of establishing their title over the ferry in dispute in view of the vesting of the ferry with the State under section 6 of the Act.

6. Having considered the submission of the learned counsel for the petitioners and the material on record, we are satisfied that the petitioners have failed to establish any title over the ferry in question and therefore they cannot object to the advertisement issued inviting tenders for giving the right to collect tolls on the same.

The writ petition lacks merits and is hereby dismissed summarily at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2001

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

Civil Misc. Writ Petition No. 7986 of 2001

Babu Singh ...Petitioner
Versus
XIII Addl. District Judge, Kanpur Nagar and another ...Respondents

Counsel for the Petitioner:
Shri Vinod Mishra

Counsel for the Respondents:
S.C.
Sri R.K. Saxena

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, S. 21 (1) (a) and (b)- Ambit and Scope- Release application- Bonafide need.

Held- Para 7 and 10

A lawyer cannot set up his practice unless he has a chamber with office and the people in general know place of his availability. In any case, as said above, the tenant cannot dictate that the landlord may have his office on the roof of the garage.

So far as the release application under clause (b) of sub-section (1) of Section 21 of the Act is concerned, the lower appellate court has appraised the opinion of the Engineer and the report of the Advocate Commissioner and has recorded a finding of fact that the accommodation in occupation of the petitioner as well as other two tenants is in dilapidated condition and is required to be demolished for reconstruction. The landlord has fulfilled all the conditions required for release of the accommodation under clause (b). the finding recorded by the lower appellate court cannot be faulted on any ground.

By the Court

1. The dispute relates to premises no 107/268 Brahma Nagar, Kanpur. Rudra Sen Bajpai-respondent no. 2 had purchased the said house in the year 1977 from one Smt. Rani Devi. The house consisted of two Kotharies and a Khaprail. One of the Kotharies was under the tenancy of Smt. Siromani Devi and the other was under the tenancy of late Dev Singh and the tiled (Khaprail) accommodation was in occupation of Doodh Nath Singh as tenant. Rudra Sen Bajpai, who happens to be a practicing Advocate on the criminal side filed a petition for release of the accommodations, aforesaid, under the provisions of clauses (a) and (b) of sub-section (1) of Section 21 of the U.P. Urban Buildings (Regulation of Rent, Eviction and Letting) Act, 1972 (Act no. XIII of 1972) (hereinafter referred to as 'the Act') for the purposes of construction of a garage and office, registered as P.A. case no. 820 of 1980. The release petition was dismissed by the learned Prescribed Authority by order dated 27.03.1982. The respondent no. 2 landlord preferred an appeal under section 22 of the Act (Rent Appeal No. 156 of 1982) which was partly allowed by order dated 11.04.1983, inasmuch as, khaprail in occupation of Doodh Noath Singh tenants was released and in respect of the two other tenants, the appeal was dismissed. The appellate court appeared to be of the view that the landlord may conveniently have his office constructed over the roof of the garage. The landlord filed a writ petition no. 9078 of 1983, which has been allowed by this court by order dated. 21.01.2000 whereby

the order dated 11.04.1983 passed in appeal was quashed and the 13th Additional District Judge was directed to consider the appeal afresh keeping in view the observations made in the body of the decision. Two specific observations were made by this court in the body of the judgement, firstly, that the appellate authority did not examine the opinion of the Engineer and the report of the Advocate Commissioner, in relation to two other accommodations in respect of which, the release petition was dismissed even though these two accommodations were adjoining to the third one about which release petition was allowed though they were of the same age and secondly, the question whether an Advocate of long standing can suitably and conveniently have his office on the roof of the garage.

2. The learned XIIIth Additional District Judge, Kanpur Nagar decided the appeal no. 156 of 1982 afresh by the impugned order dated 9.1.2001 He has found that the need of the landlord to get all the three tenanted accommodations in premises no. 107/268 Brahma Nagar Kanpur was bona fide and that the balance of hardship tilted in his favour and accordingly allowed the release petition. It appears that the tenant Doodh Nath Singh had handed over possession of the tenanted accommodation in respect of which the release application was allowed by the appellate court on 11.04.1983. Smt. Siromani Devi has also not challenged the release order passed in appeal.

3. The petitioner is the son of Late Dev Singh, tenant in Kothari at a monthly rent of Rs. 15/-. After the death of Dev Singh, his legal heirs were impleaded as respondents nos. 4 to 11 in appeal. Some of the substituted respondents as legal heirs of Dev Singh also died and one of them was married outside the family. Babu Singh, the present petitioner was respondent no. 4 in appeal. He has challenged the order dated 9.1.2001 by filing the present writ petition.

4. Counter and rejoinder affidavits have been exchanged. Heard Sri Vinod Mishra, learned counsel for the petitioner and Sri R.K. Saxena appearing on behalf of the respondent no. 2, at considerable length.

5. To begin with, it may be mentioned that the order of release passed against Smt. Siromani devi and Doodh Nath Singh has become final. Babu Singh son of late Dev Singh tenant has challenged the order of release passed in appeal primarily on the ground that the learned appellate court has misdirected itself as it has observed that it would confine its findings and limit the decision only to the two aspects covered by the observations made by this court in order dated 21.01.2001 in Civil Misc. Writ No. 9078 of 1983 and shall not look into the bona fide need of the landlord as it has already been determined by this court. Sri Vinod Misra, learned counsel for the petitioner urged that since the order dated 11.04.1983 passed in appeal no. 156 of 1982 had been quashed it was expected and required of the lower appellate court to decide the case afresh taking into consideration all the grounds which have been taken by late Dev Singh, tenant to oppose the release petition. Sri R.K. Saxena, Advocate for the landlord took me through the decision of the lower appellate court dated 9.1.2001 and pointed out that the lower appellate court has considered all the material on record

placed by the parties and after taking into consideration the entire evidence has independently come to the conclusion that the need of the landlord for his office and garage is bona fide, genuine and pressing. It was maintained on behalf of the landlord that the lower appellate authority has not restricted his decision to any particular point or was not, in any manner, swayed away to confine his findings in the light of the observations made by this court.

6. I have given thoughtful consideration to the matter and have waded through the entire judgement delivered by the IIIrd Additional District Judge, Kanpur Nagar on 9.1.2001 in Rent Appeal No. 156 of 1982 and find that the submissions made by Sri Vinod Misra are wide off the mark. This court by order dated 11.04.1983 meaning thereby the order passed earlier in appeal became non existent and since learned Prescribed Authority has dismissed the release petition, it was to be decided in appeal whether the need of the landlord to get the disputed accommodations released for constructing garage and an office was bona fide or not and if the need was found to be genuine, what was the balance sheet of the hardship. A reading of the impugned judgement dated 9.1.2001 undoubtedly indicates that the lower appellate authority found itself shackled with the observations made by this court in order dated 21.1.2000 passed in Civil Misc. Writ No. 9078 of 1983 and initially seem to have taken the view that since the bona fide need of the land-lord has already been accepted by this court, it is not required to be gone into. As one proceeds to read the judgement as a whole, it would become apparent and clear that the lower appellate court did not confine its decision to the observations made by this court and instead thereafter dealt with the bona fide need of the landlord and its genuineness and has also dealt with the question of hardship. The case has been approached by the lower appellate court in its true perspective uninfluenced by the observations made by this court. The moot points for consideration before the lower appellate court were:

(i) Whether in view of the opinion of the Engineer/Advocate Commissioner, was it appropriate and justified to allow the landlord's application in respect of one particular portion and to reject the same in respect of the other portions in spite of the fact that the age of all the portions as one unit was one and the same;

(ii) Whether the need of the landlord to have a garage and separate office is bona fide and genuine.

(iii) Whether the need of the landlord could be satisfied by constructing the office on the roof of the garage on the released portion which was earlier in the tenancy of Doodh Nath Singh, and

(iv) Balance sheet of hardship.

The lower appellate court has addressed itself and adverted to all the above questions independent and uninfluenced by the observations made by this court. On all the above points, the lower appellate court has recorded the findings in favour of the landlord.

7. Lest there be any confusion about the decision of the lower appellate court, I

have myself appraised the matter in my quest to reach the truth. It is an indubitable fact that the landlord has been in active criminal practice for the last about one quarter of the century. He has been paying income tax since the year 1964. He is having his residence in a house in Nehru Nagar Kanpur Nagar. He as a practicing Advocate wants to maintain his separate office and to construct a garage for his own car. His requirement to have separate office after such a long standing practice cannot be said to be fanciful or imaginary. The suggestion that the family of the landlord presently comprised of only three members, i.e. himself, wife and a daughter and, therefore, he can continue to run the office from his residential house does not appear to be acceptable. It is true that presently the landlord, his wife and unmarried daughter are sharing the residential house at Nehru Nagar but the fact remains that some of the members of the landlord who are living outside the city cannot be treated to have abandoned their claim to live with the family in the residential house. Here, it is not the question whether the landlord has sufficient accommodation at his disposal in the residential house to maintain office as an Advocate but the point germane for determination is whether a practicing Advocate is entitled to have his office apart from his residence in the tenanted house which he has purchased for the specific purpose (i.e., for constructing the garage and the office). An Advocate undoubtedly is required to have a separate office which may have enough space to house a library, record room, to accommodate his juniors and clerks besides place for consultation with clients and waiting room for the clients. Maintenance of office in residential premises, undoubtedly inundates privacy. For a comfortable and peaceful living of the family members, it is necessary to maintain the professional office at some distance. Imbued with this feeling, the landlord had purchased the property in question, being premises no. 107/268 Brahma Nagar. It is the innate desire of every owner/landlord to utilize the property purchased by him keeping in view the standard of life which he has attained and the convenience of all other family members. The suggestion made on behalf of the petitioner that the landlord may have his office on the roof of the garage is not acceptable. No tenant can compel or force the landlord to live in a particular manner and to utilize his property. by dictating or suggesting certain alternatives. It is for the landlord to decide whether he wants to have his office on the roof of the garage or separately. The dimensions of the garage have certainly to be small than the accommodation required for office. A spacious office with its appendages cannot be constructed over the small roof of the garage. Moreover, it may not be as convenient to have an office on the first floor. If it is located on the ground floor it may be easily accessible from the road side. Looking to the facts and circumstances of the case, there can be no quarrel with the finding recorded by the lower appellate court that the need of the landlord to have a separate garage and an office is bona fide and genuine and that it would be highly inconvenient for a lawyer of the standing of the present landlord to have a small office on the roof of the garage. In a number of decisions of this court, the need of a practising Advocate to have separate office has been held to be bona fide. A reference may be made to the decision in ***Sarlan Singh V. IXth***

Additional District Judge, Kanpur and others- 1995 (1) A.R.C.-200 and ***Abdul Hafeej Khan and another Vs. IIIrd District Judge and other.-*** 1998 (1) A.R.C-96 A lawyer cannot set up his practice unless he has a chamber with office and the people in general know place of his availability. In any case, as said, the tenant cannot dictate that the landlord may have his office on the roof of the garage.

8. The landlord is the master of his convenience. It is for him to decide where he wants to maintain his office. Conjectural alternatives as suggested by the tenant are of no consequence. It would be appropriate to make a reference to the decision of the apex court in ***Mrs. Meenal Ekanath Kshirshagar Vs M/s Traders and Agencies and another*** – J.T. 1996 (6) S.C.- 468 in which it has been held that landlord is the best judge of his residential requirement and it is for him to decide how and in what manner he would live. In ***Harnam Singh Vs. Raksha Rani and others*** – 1997 All. C.J.-1493, the question of bona fide requirement of the landlord was contested on the ground that he was having other houses which were found to be not fit for habitation. It was found by the apex court that it could hardly be said that the landlord does not bona fide require the premises for personal occupation because he owns houses not fit for habitation. An inspiration may be drawn from the said decision that if the residential house with the landlord is not fit for maintaining office for the variety of reasons indicated by the lower appellate court, it cannot be said that the need of the landlord to have the tenanted accommodations vacated for the purposes of constructing garage and separate office is not bona fide.

9. Though in every case of eviction some sort of hardship is to be faced by the tenant, in the instant case, balance of hardship tilts much more in favour of the landlord rather than the petitioner for one simple reason that the petitioner-tenant is residing in House No. 104/A/46 Rambagh Kanpur. He is using the disputed accommodation for his Baithaka and for running a tea shop on the Chabutra in front of it which is said to be the only source of his livelihood. The litigation between the parties is going on for the last more than two decades. During this long period, the petitioner does not appear to have taken any concrete steps for finding out an alternative accommodation. To mitigate the hardship, the petitioner may put up the tea shop in or in front of the premises where he resides in Rambagh, Kanpur. He has certainly no right to stick to the tenanted accommodation to the serious detriment of the landlord.

10. So far as the release application under clause (b) of sub- section (1) of Section 21 of the Act is concerned, the lower appellate court has appraised the opinion of the Engineer and the report of the Advocate Commissioner and has recorded a finding of fact that the accommodation in occupation of the petitioner as well as other two tenants is in dilapidated condition and is required to be demolished for reconstruction. The landlord has fulfilled all the conditions required for release of the accommodation under clause (b). The finding recorded by the lower appellate court cannot be faulted on any ground.

11. In the conspectus of the above facts, the petition turns out to be without any merits and substance. The order of release passed by the lower appellate

court suffers from no legal infirmity and, therefore, it has to be upheld.

12. Lastly, it was urged by the learned counsel for the petitioner that the lower appellate court has not awarded any amount of compensation to the petitioner for vacating the released accommodation. In para 14 of the counter affidavit, the landlord has expressed his willingness to pay the requisite amount of compensation to the petitioner. I feel that a sum of Rs.5000 (Rupees Five Thousand only) should be appropriate amount of compensation which the landlord is required to pay to the petitioner tenant for vacating the released accommodation.

13. The writ petition is dismissed without any order as to costs. It is however, made clear that the order of release passed by the lower appellate court on 9.1.2001 in rent appeal no. 156 of 1982 arising out of P.A. case no. 820 of 1980 shall become executable soon after the landlord pays a sum of Rs. 5000/- (Rupees Five Thousand only) as compensation to the petitioner and if he refuses to accept, deposits the same with the Prescribed Authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.3.2001

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

Civil Misc. Writ Petition No. 28406 of 1999

Sushil Kumar Dubey ...Petitioner
Versus
State of U.P. through Secretary, Department of Home, Government of U.P. Lucknow and others ...Respondent

Counsel for the Petitioner:
Sri Ashok Khare

Counsel for the Respondent:
S.C.

Constitution of India –Article 226- the power of Judicial review does not extend to interfering with a policy providing for out of turn promotion - Departmental wisdom has to prevail.

Held (Para 12)

Since the case of the petitioner was earlier recommended for out of turn promotion, his case undoubtedly was required to be considered by the committee. It was necessary to record reasons for denying the benefit of out of turn promotion to the petitioner as his case had been recommended at all the levels. If the individual role of the petitioner is not, in any manner, inferior to the role played by Jitendra Kumar Singh, Sub Inspector, who has been granted out of turn promotion and all other things remaining the same, then certainly, the petitioner would also be entitled for out of turn promotion.

By the Court

1. The case of the petitioner – Sushil Kumar Dubey, who is Sub Inspector of Police and was, at the relevant time, posted in district Agra was recommended for out of turn promotion pursuant to the Government order no. 665 (1) Pi-1-24/94 dated 3.2.1994 for having displayed exemplary courage and bravery risking his own life in the course of an encounter with a dreaded and notorious criminal, namely, Alya alias Ali Mohd. alias Pappu Pahalwan. The incident had taken place in the following circumstances.

2. On 19.1.1997, a prominent businessman- brick kiln owner and leader

of Kisan Kamgar Party – Chaudhary Nepal Singh – was kidnapped with his Maruti car by certain unknown miscreants. The incident gave rise to Crime No. 33 of 1997 under Section 364 I.P.C registered at P.S. Kotwali, Bulandshahar city. On getting a tip from an informer, the Senior Superintendent of Police, Bulandshahar organised a raid on 25.2.1997 and positioned four separate police parties comprising in all 31 police officials, including four Sub Inspectors of Police, viz, Rajesh Kumar Dwivedi, Ashok Kumar Verma, Jitendra Kumar Singh and the present petitioner – Sushil Kumar Dubey. At about 11.35 A.M. on noticing a moving white Maruti car coming from the side of Aligarh Rajesh Kumar Dwivedi, Sub Inspector of Police signalled it to stop. It sped up. The presence of the abductee Chaudhary Nepal Singh in the car was noticed and consequently Rajesh Kumar Dwivedi, S.I. pursued the same. The miscreants swerved the car on a Kucha pathway. It struck up in sand near a bush. Thereupon, desperadoes, five in number, alighted from the car and dragging the abductee moved swiftly towards the jungle. There was exchange of fire. Police parties surrounded the miscreants and asked them to surrender. Rajesh Kumar Dwivedi and Ashok Kumar Verma, Sub Inspectors of Police sustained fire arm injuries in the process of getting the abductee released. The other party members opened fire with the result three miscreants were laid to death on the spot. The other two were successful in escaping. Chaudhary Nepal Singh, adbuctee was recovered. Three criminals who were killed in encounter included Alya alias Ali Mohd alias Pappu Pahalwan.

3. The gallantry on the part of the police officials was praiseworthy and it received wide publicity and commendation. Recommendation for out of turn promotion of the concerned police officials was made which was met with favourable response at all the stages till it reached the High Powered Committee constituted for the purposes of consideration of out of turn promotion. On 2.5.1998, the committee scrutinised the entire matter and after taking into consideration all the facts, implications and ramifications, did not recommend promotion of any one of the police officials mainly on the ground that it was a group action and no particular person was responsible for the successful outcome of the raid. This decision obviously incensed the participants and resulted in dissatisfaction and frustration in the rank and file. A proposal was sent for reconsideration of the matter for out of turn promotion of Sub Inspectors Rajesh Kumar Dwivedi, Ashok Kumar Verma, Jitendra Kumar Singh, and Constables Ram Kumar and Jitendra Singh through the Inspector General of Police Meerut Zone. The Committee in its meeting dated 26.10.1998 reviewed and reconsidered the matter and after appropriate examination and analysis of the documents and the facts, turned down the recommendation. The Director General of Police discussed the matter with the members of the Committee and constituted a committee headed by Deputy Inspector General of Police, Meerut for in-depth study of the matter and to report about the individual role played by the police officials in the entire episode. The Committee sponsored and recommended the name of the above named three Sub Inspectors and two Constables for out of turn promotion in its meeting held on 23.12.1998 to the

Director General of Police who approved the same on 24.12.1998. The name of the petitioner did not figure in the recommendation. He made a representation and sought out of turn promotion but was not met with any better luck.

4. By means of this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for a writ to command the respondent to grant him out of turn promotion w.e.f. 27.12.1998 and to permit him to function as Inspector in the Civil Police.

5. Counter and rejoinder affidavit have been exchanged. Record of the proceedings of the committee constituted for the purpose of consideration of out of turn promotion under Government order dated 3.2.1994 was produced.

6. Heard Sri Ashok Khare, Senior Advocate, for the petitioner and the learned Standing counsel. Shri Ashok Khare pointed out that there was a clear, unambiguous and positive recommendation at all the stages in favour of the petitioner also for out of turn promotion and non-consideration of his case which resulted in ultimate denial of promotion of the petitioner is arbitrary. Sri Khare maintained that since other three Sub Inspectors of Police have been given the benefit of out of turn promotion, the petitioner, in all fairness, should have been extended the same benefit. The learned standing counsel urged that out of turn promotion has been granted to five out of 31 police officials on the basis of specific role played by them in challenging and encountering of the criminals and recovery of the abductee. It was pointed out that Rajesh Kumar Dwivedi and Ashok Kumar Verma, Sub Inspectors of Police received bullet injuries which indicated that they had risked their lives to get the abductee released from the clutches of the criminals. Sri Ashok Khare pointed out that the third Sub-Inspector – Jitendra Kumar Singh, who has been given out of turn promotion, did not receive any fire arm injury and the claim of the petitioner is exactly on similar footing.

7. I have given anxious consideration to the matter. Promotion as understood under service law jurisprudence means advancement in rank, grade or both. It is always a step towards advancement to a higher position, grade or honour. It is normal incident of service. The provision for promotion increases efficiency in public service while stagnation reduces efficiency and makes the service ineffective. In **Council of Scientific and Industrial Research V. K.G.S. Bhatt-** A.I.R. 1989 SC –1972, the Hon'ble Supreme Court observed:

"It is often said and indeed, adroitly, an organization public or private does not 'hire a hand' but engages or employs a whole man. The person is recruited by an organization not just for a job, but for a whole career. One must, therefore, be given an opportunity to advance. This is the oldest and most important feature of the free enterprise system. The opportunity for advancement is a requirement for progress of any organization. It is an incentive for personnel development as well. (See Principles of Personnel Management by Flipo Edwin B. 4th Ed. P. 246). Every management must provide realistic opportunities for promising employees to move upward. 'The organization that fails

to develop a satisfactory procedure for promotion is bound to pay a severe penalty in terms of administrative costs, misallocation of personnel, low morale, and ineffectual performance, among both non-managerial employees and their supervisors.' (See Personnel Management by Dr. Udai Pareek p. 277). There cannot be any modern management much less any career planning, man-power development, management development etc., which is not related to a system of promotions. (See Management of Personel in Indian Enterprises by Prof. N.N. Chatterjee Ch. 12, p. 128.

Since efficiency in public service is an essential part of the machinery of a welfare State, promotional policies having the effect of stagnation either by reason of the terms of the policy or by not providing for promotion will result in reducing such efficiency and making the service ineffective. Such a policy would obviously be unfair, unjust and against public interest and, therefore, unreasonable and arbitrary violating Article 14 and 16 of the Constitution."

8. Although an employee has no right to be promoted, he has a right to be considered for promotion. The right to be considered for promotion is one of the 'matters relating to employment or appointment' within the meaning of Article 16 (1) of the Constitution of India. The operation of Article 14 and 16 in matters relating to employment is now too elementary and hardly needs further discussion. The Fundamental Right to equality in Article 14 and 16 of the Constitution, therefore, prohibits the application of unreasonableness or unfair standards in the matter of considering an employee for promotion. The discrimination or unfairness or unreasonableness in the rules or norms or policies relating to promotion may be with regard to criteria for consideration, i.e., determination of seniority or determination of merit. Article 14 specifically obligates the State to ensure equality of opportunity in matters relating to employment or appointment to any office under the State. Consideration for promotion is directly related to the concept of opportunity in Article 16 and the constitutional requirements of equality with regard to such opportunity necessarily means exclusion of arbitrariness in the course of consideration for promotion, for example, arbitrary deviation from rules or norms. A statutory rule or a statutory norm or a policy or an executive order relating to promotion cannot transgress any constitutional restriction. In the context of the principle under consideration, it is necessary to emphasise that Article 16 of the Constitution expressly provides equality of opportunity in the matters relating to appointment (which includes promotion also) to any office under the State.

9. In the background of the constitutional prescription contained is all pervasive Article 14 and 16 of the Constitution, the policy of out of turn promotion has to be viewed. The Government order dated 3.2.1994 for out of turn promotion is applicable to the employees of the police department. The safety, security, peace and tranquillity of the citizens is to be maintained at all costs by the police force. There are various serious hazards in the way of police officials in providing security to the public, in general, and individuals, in particular, and maintaining peace and

tranquility in the society. They have to be prepared to remake any sacrifice to meet any eventuality. With a view to ensure that every police official has zeal and enthusiasm in exhibiting exemplary courage, bravery and gallantry, a provision for out of turn promotion has come to be made by way of incentive. Out of turn promotion is granted to those police officials who have shown extraordinary courage and bravery by risking their lives in the performance of their duties.

10. In the present case, the stand taken by the petitioner is that he has been discriminated in the matter of out of turn promotion by not considering his case at all, and in any case, he has been denied equal treatment as has been extended to other Sub Inspectors. As said above, there were 31 members who formed different parties to combat the menace of the dreaded notorious criminal Alya alias Ali Mohd. alias Pappu Pahalwan who had extended his criminal activities in different States. Out of them, the names of eight persons (four Sub Inspectors of Police and four Constables) were initially recommended for out of turn promotion. The petitioner was one of them. The recommendation was turned down obviously on the ground that it was a group action and individual specific role was not discernible. On subsequent reconsideration of the matter, the recommendation was confined to five persons only, namely, three Sub Inspectors of Police and two Constables and it was at this stage that the name of the petitioner came to be omitted. Sri Ashok Khare took pains to point out that in the cadre of Sub Inspectors, Jitendra Kumar Singh has been granted out of turn promotion and since the case of the present petitioner was on the same footing as that of Jitendra Kumar Singh, he cannot be denied promotion on any perceivable ground. This submission is founded on the basis that though the two Sub Inspectors – Rajesh Kumar Dwivedi and Ashok Kumar Verma have received bullet injuries as a result of the cross fire, the present petitioner as well as Jitendra Kumar Singh did not receive any injury. It was maintained that if Jitendra Kumar Singh could be granted promotion why not petitioner? Call of equable treatment was made. It was also urged that the petitioner is entitled for promotion in view of the decision of this court in ***Ashok Rana Vs. Home Secretary U.P. Shashan*** –2000(4) E.S.E. 2713 (Allahabad). I have thoroughly studied the said decision and find that the observations made therein do not squarely apply to the facts of the present case. In the instant case, the question is whether the case of the petitioner can be distinguished from that of Jitendra Kumar Singh, who has been granted out of turn promotion. The report of the Committee which was ultimately accepted by the Director General of Police does not indicate that the case of the petitioner was ever considered. His case had been recommended at all the stages. Things would have been different if the case of the petitioner had been considered and then rejected on the ground of the specific role played by him. It is quite possible that on account of positioning of the petitioner at the time of the raid, his role may have been negligible or otherwise beyond the ambit of the expression 'exemplary courage and bravery'. If on the ground of parity only, promotion is granted to the petitioner, the remaining 25 persons would spring up to claim out of turn promotion. Granting of promotion to

all would frustrate the very purpose for which Government order for out of turn promotion has been issued. The Government order cannot be reduced to a farce and cannot be banked upon for normal promotion.

11. The power of judicial review does not extend to interfering with a policy providing for out of turn promotion. This court is not in a position to say that which particular person has to be granted out of turn promotion and which one has to be denied. Ultimately, departmental wisdom has to prevail. The past antecedents of the employee concerned are also to be looked into. If an employee is not having neat past, or his service record is not up to the mark, he would perhaps be denied the benefit of out of turn promotion howsoever exemplary courage or bravery he might have exhibited. There have to be certain parameters which have to be adopted in granting out of turn promotion.

12. As said above, since the case of the petitioner was earlier recommended for out of turn promotion, his case undoubtedly was required to be considered by the Committee. It was necessary to record reasons for denying the benefit of out of turn promotion to the petitioner as his case had been recommended at all the levels. If the individual role of the petitioner is not, in any manner, inferior to the role played by Jitendra Kumar Singh, Sub Inspector, who has been granted out of turn promotion and all other things remaining the same, then certainly, the petitioner would also be entitled for out of turn promotion. All the above facts can well be taken into consideration by the departmental authorities. To ensure fairness and equable treatment, the case of the petitioner needs reconsideration.

13. In the conspectus of the above facts, the writ petition is finally disposed of with the direction that the Deputy Inspector General of Police, Karmik, U.P. Police Headquarters, Allahabad – respondent no. 5 shall place the necessary material before the committee formed under the Government order dated 3.2.1994 for consideration of the matter of the petitioner in the light of the observations made above. The committee shall meet for the purpose within a period of six months from the date of production of a certified copy of this order before the respondent no. 5.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No.44986 of 1998

Arvind Kumar Rai & others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri Ashok Khare

Counsel for the Respondents:
S.C.

U.P. Regularisation of Ad-hoc Appointment (On posts within the purview of Public Service Commission) Rules, 1979- Rule 4- Daily wagers- Regularisation- Petitioners working as Junior Engineers in U.P. State Irrigation Department on daily Wages for about last ten years- Claiming regularisation- Petitioners 4, 5 and 9 only working from prior to 01-10-1986, the cut off date-

Ordered to be considered for regularisation with in two months- Adhoc appointment.

Held- (Paras 9 and 15)

Petitioner nos. 4,5 and 9 who are claiming to have been working since prior to 1.10.1986, can be considered for regularisation under the 1979 Rules referred to above. The respondent no.1 shall consider them for regularisation within two months from the date of production of a certified copy of this order. As regards other petitioners, since they are working on daily wages after 1.10.1986 the are not covered by the 1979 Rules.

A person who is appointed on daily wages cannot claim a better position from those persons who were appointed on adhoc or on temporary basis. If a person appointed on temporary basis cannot be regularized in service under the regularisation rules, a person working on daily wages can also not be regularized unless there is any rule for regularisation of his services.

Case law discussed:

1995 supp. (4) SCC- 182
1999 (1) U.P.L.B.E.C. 140
AIR 1998 SC 1477
1999 SCC (L & S) 642
1996 (2) S.L.R. 321 (S.C.)
1995 (1) U.P.L.B.E.C. 93
(1993) 2 SCC 213 (219)

By the Court

1. Petitioner nos. 1 to 9 are seeking regularisation of their service on the post of Junior Engineers (Civil) while Petitioner no. 10 is seeking regularisation of his services on the post of Junior Engineer (Mechanical). Besides this the petitioners are seeking the quashing of the selection proceedings undertaken by the U.P. Public Service Commission, Allahabad for these posts.

2. The petitioners allege that they are working as Junior Engineers in the Irrigation Department of the State of U.P. on daily wages under the respondents at least for the last about ten years. The details as regards the dates since when they started working are given below:

Name	Date of starting work	Department
1. A. K. Rai	18.3.1989	Flood Works Division, Alld.
2. A. Narian	1.3.1990	--do--
3. M. Kushwaha	1.1.1991	Bagla Canal Division, Alld.
4. V. K. Arora	1.1.1984	Irrigation Divn, Rudrapur
5. J. S. Visht	16.8.1986	K. N. Khand-2, Ramnagar
6. A. K. Singh	1.11.1987	M. K. Bandh Prakhand, Varanasi
7. H. S. Pandey	20.9.1989	--do--
8. R. Kaushik	1.11.1985	Upari Ganga Nahar, Aligarh
9. P. Pandey	1.11.1985	T.S. Khand, Nainital
10. Lalji Pandey	01.1.1990	Flood Works Division, Alld.

3. The State Government has framed various rules in regard to regularisation of Class III posts. They are as under:-

(i) The Uttar Pradesh Regulation of Adhoc Appointment (On Posts Within the Purview of Public Service Commission) Rules, 1979

(ii) The Uttar Pradesh Regulation of Ad-hoc Appointments (On Post Outside the Purview of the Public Service Commission) Rules, 1979

(iii) The U.P. Regularisation of Daily Wages Appointment on Group-C Post (Outside the purview of U.P.P.S. Commission) Rules, 1998.

4. The posts of Junior Engineers (Civil) and (Mechanical) come within the purview of Public Service Commission. A person who is selected by the Public Service Commission is entitled for appointment to the post of Junior Engineer. The contention of the petitioners is that the post of junior engineer in the Irrigation Department was a post which was excluded from the purview of U.P. Public Service Commission by Notification dated 25-11-1989 and the same was with in the purview of U.P. Subordinate Services Selection Commission Act, 1998. The U.P. Subordinate Service Selection Commission Act, 1998 has been repealed by the U.P. Subordinate Services Selection Commission (Repeal) Act,1998.

5. Those petitioners who are covered by the U.P. Regularisation of Ad-hoc Appointment (On Post Within the Purview of Public Service Commission) Rules, 1979 (In short 1979 Rules) can be considered for regularisation of appointments under Rule 4 which reads as under:-

"4.Regulation of adhoc appointments- (1) Any person who-

(i) was directly appointed on ad-hoc basis before January 1, 1977 and is continuing in service, as such , on the date of commencement of these rules;

(ii) possessed requisite qualifications prescribed for regular appointment at the time of such ad-hoc appointment, and

(iii) has completed or, as the case may be, after he has completed three years continuous service; and shall be considered for regular appointment in permanent or temporary vacancy as may be available on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

(2) In making regular appointment under these rules, reservation for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Backward Classes and other categories, shall be made in accordance with the orders of the Government in force at the time of recruitment.

(3) For the purpose of sub-rule (1), the appointing authority shall constitute a Selection Committee and consultation with the Commission shall not be necessary.

(4) The appointing authority shall prepare an eligibility list of the candidates, arranged in order of seniority as determined, from the date of order of appointment and if two or more persons are appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with their character rolls and such other records, pertaining to them, as may be considered necessary to judge their suitability.

(5) The selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4).

(6) The Selection Committee shall prepare a list of selected candidates, the names in the list being arranged in order of seniority, and forward it to the appointing authority."

6. Rule 10, however, was added to 1979 Rules by Notification dated 7.8.1989 providing that these rules shall apply mutatis mutandis also to any person directly appointed on ad-hoc basis on or before October 1, 1986 and continuing in service as such, on the date of commencement of the U.P. Regularisation of Ad-hoc Appointments (On Post Outside the Purview of the Public Service Commission (Second Amendment) Rules. 1989.

7. The question, however, remains as to whether the petitioners who are working on daily wages can be treated to have been appointed on adhoc basis. A person who is appointed on daily wages cannot normally be treated to have been appointed on ad-hoc basis. Rule 4 has, however, to be interpreted in the context and nature of the appointment and the work on which a person is employed.

According to the Welster's Encyclopedic Unabridged of Dictionary of English Language 'Ad-hoc' means "for this (special purpose); with respect to this (subject or thing.)"

According to Words and Phrases (Permanent Edition) Volume 2 'Ad-hoc' means "The word 'spread' as used in relation to the appointment of special curator, has very much the same meaning as the words 'Ad-hoc', which is the original while special is the translation.

According to the Law lexicon by P. Ramanath Aiyar 'Ad-hoc' means "for particular purpose made, established, acting or concerned with particular end or purpose."

8. The Supreme Court in the Case of Khagesh Kumar Vs Inspector General of Registration, reported in 1995 Supp.(4) SCC 182 has applied the 1979 Regularisation Rules for regularizing the services of daily wages employees of the Registration Department of the State. This decision was followed in Ajai Kumar Misra Vs Secretary, U.P. Shasan & others, 1999 (1) U.P.L.B.E.C.140, wherein it has been held that the Registration Clerk appointed on or before 1.10.1986 on daily wages, in view of the sanction given by the Government for such post, would be deemed to be taken ad-hoc employees within the meaning of Rule 4 of the U.P. Regularisation of Ad-hoc Appointment (On post Outside the Purview of the Public service Commission) Rules, 1979.

9. Petitioner nos.4, 5 and 9 who are claiming to have been working since prior to 01-10-1986, can be considered for regularisation under the 1979 Rules referred to above. The respondent no.1 shall consider them for regularisation within two months from the date of production of a certified copy of this order.

As regards other petitions, since they are working on daily wages after 1-1-1986 they are not covered by the 1979 Rules.

10. Shri Ashok Khare, Learned counsel for the petitioners, submitted that the cut off date mentioned under Rule 10 of the 1979 Rules is arbitrary. He has referred to the U.P. Regularisation of Daily Wages Appointment on Group C Posts (Outside the Purview of Public Service Commission) Rules, 1998 where under the daily wages employees

appointed on or before 29.06.1991are entitled to be regularized. A person cannot claim parity in respect of regularisation relying upon the provisions of Rules, which are not applicable in the case of the petitioners. It is for the State Government to consider as to whether an employee is to be regularized or not under the Rules framed by it.

11. The next contention of the learned counsel for the petitioners is that if the petitioners are not entitled to be regularized under 1979 Rules then they will be entitled to be regularized under the general principles of reasonableness and fair play. He has referred to the decision rendered in Arun Kumar Rout & Others Vs State of Bihar & Others, A.I.R. 1998 S.C. 1477, wherein the Hon'ble Supreme Court held that if after appointments the services were terminated on the ground that initial appointments were irregular, unless it is shown that the employees concerned had committed fraud, they should be regularized taking sympathetic consideration. In Urmila Devi & Others Vs State of Bihar & Others, 1999 S.C.C. (L & S) 642, it has been held by the Hon'ble Supreme Court that the persons working on daily wages basis in the State of Bihar for a long period may be considered for regularisation in absence of statutory right of regularisation. These cases have no application to the facts of the present case.

12. One view is that the post are to be filled in accordance with the rules for appointment to the posts and a person cannot be brought in regular service merely because he was given employment on daily wages for one reason or the other. If the person who was given appointment on daily wages or on ad-hoc basis, is entitled to participate in the selection for the post but if he keeps himself out from the selection process, he cannot turn up and say to regularize his service merely because he had worked on daily wages. The other view is that the persons who are working for a long period should not be thrown out, rather they should be regularized in service.

13. In State of Himanchal Pradesh Vs Suresh Kumar Verma & another, 1996 (2) S.L.R.321 (S.C.) it was held that the appointment is to be made in accordance with the rules and the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules. The Court observed that the appointment of persons on daily wages cannot be a conduit pipe for regular appointments which would be a back door entry, detrimental to the efficiency of service and would breed seeds of nepotism and corruption.

14. In Dr. Arundhati Ajit Pargaonkar Vs State of Maharasthra & another, (1995) 1 U.P.L.B.E.C. 93, the appellant claimed regularisation on the ground that she had worked on a permanent post for about nine years but her contention was repelled on the ground that the recruitment was to be made in accordance with the rules and a person appointed temporarily was not entitled for regularisation. The claim of the appellant for regularisation was also rejected on the ground that the post was within the purview of the Public Service Commission and the Temporary Government Service Regularisation Rules issued by the Government in 1975 could not be made applicable in the larger interest to such persons who are not covered by the Rules. The Court referred to the observations made in the decision

rendered in Dr. M.A. Haque Vs Union of India, 1993 (2) S.C.C. 213 (219) as follows.

"….We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the by passing of the Public Service Commission are permitted, it will open a back- door for illegal recruitment without limit. In fact this Court has of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employee, some Governments and authorities have been increasingly resorting to irregular recruitment. The result has been that the recruitment rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course."

15. A person who is appointed on daily wages cannot claim a better position from those persons who were appointed on ad-hoc or on temporary basis. If a person appointed on temporary basis cannot be regularized in service under the regularisation rules, a person working on daily wages can also not be regularized unless there is any rule for regularisation of his services.

16. It is, however, made clear that if the Government frames any scheme for regularisation in respect of Junior Engineers, the petitioners other than petitioner nos. 4, 5 and 9 may be considered for regularisation under the said scheme.

17. The petitioners have challenged the selection process undertaken by the U.P. Public Service Commission, Allahabad for the post of Junior Engineers in pursuance of the Advertisement No.3/98-99 on the ground that unless they are regularized, no further appointments be made. The selection has already taken place and the appointments have also been made. It is made clear that if petitioner nos. 4, 5, and 9 are regularized in service they shall be absorbed on the substantive posts, which were notified by advertisement no. 3/98-99.

The writ petition is disposed of with the above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD APRIL 13, 2001

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

Civil Misc. Writ Petition No. 8571 of 2001

Ram Kumar Verma ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma

Counsel for the Respondents:
S.C.

U.P. Government Servants (Discipline and Appeal) Rules 1999- Rule-4 (c)- Delegation of Power- Suspension Order passed by other than the appointing authority- ever the delegation of power by the authority other than the appointing authority- held- illegal being

contrary to the provision of Rule 24 of General Clauses Act - various reasons disclosed.

Held- Para 7 and 8

The principle laid down in Section 24 of the U.P. General Clauses Act, 1904 will equally apply to a case rescission and re-enactment of statutory rules. In my opinion, therefore, the notification relied on by the learned Standing Counsel cannot save the impugned order of suspension which has not been passed by the Appointing Authority or its delegate. The view I am taking finds support from the decision dated 3.12.1999 rendered in Civil Misc. Writ Petition No. 5915 of 1999 (S/S) (Giri Raj Singh Vs. State of U.P. and others) by the Lucknow Bench of this Court.

Since the impugned order is liable to be quashed on the ground that it has been passed by an authority lacking in jurisdiction, it is not necessary to go into the other questions raised by Sri U.N. Sharma.

By the Court

1. Impugned herein is the order dated 24.2.2001 whereby the petitioner has been placed under suspension in contemplation of disciplinary enquiry against him on charge of having committed grave irregularities and connived with the millers/intermediaries in paddy procurement. Identically worded orders of even date are sought to be quashed on common grounds and hence it would be convenient to dispose of these three writ petitions by a common order.

2. It has been submitted by Sri U.N. Sharma, learned counsel appearing for the petitioner that the order placing petitioner under suspension has been passed without any rhyme or reason and without application of mind to materials and reports available with the Regional Food Controller who passed the impugned order of suspension. It has also been submitted by Sri Sharma that Regional Food Controller is not the appointing authority and the power of suspension has not been delegated to the Regional Food Controller by the appointing authority namely the Commissioner Food and Civil Supplies in accordance with the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 in short the Rules. Learned Standing Counsel on the other hand submitted that there was enough material before the Regional Food Controller to make out a prima facie case of suspension in contemplation of disciplinary enquiry against the petitioner. Learned Standing Counsel submitted that the charge as mentioned in the impugned order of suspension was grave enough to warrant recourse to suspension. The first proviso to Rule 4(1) of the U.P. Government Servants (Discipline and Appeal) Rules, 1999 which provides that recourse to suspension should not be taken unless if the charge is grave enough to warrant imposition of major penalty in the event of the same being established at the enquiry, has not been violated. As regards the power of suspension learned Standing Counsel has submitted that the power of suspension had been delegated to the Regional Food Controllers vide notification dated July 10, 1997. The delegation is referable for its source to the provisions of the Civil Services (Classification, Control and Appeal) Rules, 1930 and Punishment and Appeal Rules for Subordinate Services, Uttar Pradesh, 1932. Such delegation, -proceeds the submission, will remain valid unless cancelled or rescinded as visualized by

Rule 17 (2) (a) of the U.P. Government Servants (Discipline and Appeal) Rules, 1999.

3. Having heard the counsel I veer around the view that if it is found that Regional Food Controller is not competent to suspend a Marketing Inspector it will not be necessary to go into other questions raised by Sri Sharma. Therefore, the first question which needs to be determined is whether the Regional Food Controller was competent to suspend the petitioner. Rule 4 (1) of the Rules reads as under:-

"4. Suspension (1) A Government Servant against whose conduct an enquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority.

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

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

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

4. The power to suspend a Government Servant under the Rules is vested in the Appointing Authority. The word Appointing Authority means the authority empowered to make appointments to the posts under the relevant service rules. The third proviso to Rule 4(1) of the Rules, however, provides that the appointing authority, in the case of any Government Servant or class of Government Servants belonging to Group C and D posts, may 'delegate its power under this rule to the next lower authority'. 'Appointing Authority' in relation the posts of Marketing Inspector is the Commissioner, Food and Civil Supplies, Government of U.P., Lucknow. The said authority has not delegated its power under the Rules to the next lower authority. The notification dated July 10, 1997 reliance on which has been placed by the learned Standing Counsel, was issued by the State Government. The delegation is traceable for its source of power to the provisions of rule (1-A) of the Punishment and Appeal Rules for subordinate Services, Uttar Pradesh, 1932. The sub-rule (1) of rule 1-A is quoted below:

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

Provided that in the case of any Government servant, or class of Government servants, not belonging to a State service, the appointing authority may delegate its power under this sub-rule to the next lower authority.

Provided further that any other authority empowered by the Government by general or special order in this behalf,

may place a Government servant under suspension under this sub-rule.'

5. The 2nd proviso to sub-rule (1) of rule 1-A extracted above permitted suspension of a Government servant by any authority empowered by the Government in this behalf by general or special order. The said Rules have been rescinded vide Rule 17 (1) of the U.P. Government Servants (discipline and Appeal) rules, 1999. Sub rule (2) of Rule 17 which saves delegation of power of suspension etc. under the rescinded Rules, in so far as it is relevant, is quoted below:

"17 **Rescission and Savings**-
(1) xx xx xx
(2) Notwithstanding such rescission-

(a) Delegation of power mentioned in punishment and Appeal Rules for Subordinate Services U.P., 1932 and any order issued under the Civil Service (Classification, Control and Appeal) Rules, 1930 or Punishment and Appeal Rules for Subordinate Services Uttar Pradesh 1932 delegating the power of imposition of any of the penalties mentioned in Rule 3 or power of suspension to any authority, shall be deemed to have been issued under these rules and shall remain valid unless cancelled or rescinded.'

6. Under the provisions of the Civil Services (Classification, Control and Appeal) rules, 1930 and Punishment and Appeal Rules for subordinate Services, Uttar Pradesh, 1932 the State Government had the power to delegate the power of suspension vested in the 'appointing authority' to 'any authority' and the notification relied on by the learned Standing Counsel must be deemed to have been issued by the State Government in exercise of such power. Question is whether the notification is saved by clause (a) of sub Rule (2) of Rule 17 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999? As noticed herein above the third proviso to sub Rule (1) of Rule 4 empowers the 'Appointing Authority' to delegate its power of suspension under the Rules to the next lower authority whereas under the rescinded Rules, the State Government had the power to delegate the power of suspension vested in the appointing authority to any authority. It has been contended, and in my opinion rightly, by Sri U.N. Sharma that the notification under the rescinded Rules being inconsistent with the third proviso to Rule 4(1) cannot survive notwithstanding the saving clause (a) of sub Rule (2) of Rule 17.

7. There is no manner of doubt that as a consequence of Rule 17 (1) of the Rules, Civil Services (Classification, Control and Appeal) Rules, 1930 and Punishment and Appeal Rules for Subordinate Services, Uttar Pradesh 1932 are completely effaced as if these rules had never been promulgated. Clause (a) of sub Rule (2) of Rule 17, however, saves the delegation of power made under the rescinded Rules. The argument is that delegation of power under the U.P. Government Servants (Discipline and Appeal) Rules, 1999 is permissible only by the 'Appointing Authority', and, therefore, continuance of the delegation made earlier by the State Government would be 'inconsistent' with the third proviso to Rule 4 (1) of the Rules. The argument in my opinion is not without substance. Section 24 of the U.P. General Clauses Act, 1904 deals with situations in

which notifications etc. issued under an enactment which is repealed and re-enacted. If the principle laid down therein is extended to rescission and re-enactment of statutory rules, it cannot be gainsaid that continuance of the delegation of power of suspension made under the rescinded Rules would be subject to; the qualification that it is not inconsistent with the provisions of the re-enacted Rules. Section 24 of the U.P. General Clauses Act, 1904 clearly provides that where any enactment is repealed and re-enacted by any Uttar Pradesh Act with or without modification, then, unless it is otherwise expressly provided, any appointment, notification, order, scheme rule, form or bye-law, made or issued under the repealed shall, 'so far as it is not inconsistent with the provisions re-enacted' continue in force, and be deemed to have been made or issued under the provisions so re-enacted, unless and until it is superseded by any notification, issued under the provisions so re-enacted. The principle laid down in Section 24 of the U.P. General Clauses Act, 1904 will equally apply to a case rescission and re-enactment of statutory rules. In my opinion, therefore, the notification relied on by the learned Standing Counsel cannot save the impugned order of suspension which has not been passed by the 'Appointing Authority' or its delegate. The view I am taking finds support from the decision dated 3.12.1999 rendered in Civil Misc. Writ Petition No. 5915 of 1999 (S/S) (Giri Raj Singh Vs. State of U.P. and others) by the Lucknow Bench of this Court.

8. Since the impugned order is liable to be quashed on the ground that it has been passed by an authority lacking in jurisdiction, it is not necessary to go into the other questions raised by Sri U.N. Sharma.

In the result, therefore, the petitions succeed and are allowed. The impugned order is quashed without prejudice to the right of the disciplinary authority to pass such order as it may deem fit and proper under the provisions of Rule 4 of the U.P. Government Servants (Discipline and Appeal) Rules, 1999.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2001

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

Civil Revision No. 561 of 1985

The State of U.P. through Collector, Mainpuri and another ...Appellants
Versus
Sri Badan Singh ...Respondent

Counsel for the Appellants:
Shri N.L. Ganguli

Counsel for the Respondent:
Shri S.K. Singh

Provincial Small Causes Courts Act, 1887, S.25- U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 S.9 read with Transfer of Property Act, 1882 and Code of Civil Procedure, 1908, Ss.11 and 80 and 0.17 R.27-Applicability – After finding as to non-applicability of Act XIII of 1972, Plaintiff-respondent 'terminated applicants' tenancy by serving simple notice to quit and arrears of rent – Suit for arrears of rent damages and ejectment – Dependants disputing rate of rent as barred by res-judicata- Notices under S.106 T.P. Act and S.80 C.P.C. alleged to be illegal and pleaded that suit was bad for non-joinder of I.G. (Police) –

Suit decreed by J.S.C.C. under O.XVII R.2 C.P.C. – Revision by State allowed since no finding by J.S.C.C. regarding rate of rent and validity of notice.

Held –Para 11

Since no proper finding regarding rate of rent validity of notice have been recorded, the suit was not properly decided. This Court, therefore, has no option but to allow the revision and remit the case to the Trial Court for fresh decision in the light of observation made above.

By the Court

1. The State of U.P. and Superintendent of Police, Govt. Railway Police have filed this revision against the judgement and order dated 03.07.1985 passed by the 1st Additional District Judge/J.S.C.C., Mainpuri in S.C.C. Suit no. 2 of 1980 decreeing the suit of the opposite party for ejectment and arrears of rent and damages.

2. The plaintiff/respondent filed S.C.C. suit no. 2 of 1980 against the State of U.P. applicant no. 1 and Superintendent of Police, G.R.P., Agra applicant no. 2 for ejectment and arrears of rent and damages on the ground that the applicants approached him to let out his house to the State of U.P. for occupation of staff of G.R.P., Mainpuri as it was urgently required. The G.R.P. Mainpuri occupied the disputed premises on 08.02.1979 on an understanding that reasonable rent would be paid to the respondent/plaintiff having regard to prevailing rent in the vicinity. However, the rent could not be settled between parties and the applicant no. 2 continued paying Rs. 130/- PM as rent subject to the settlement of the rent subsequently. The premises in question consisted of 12 rooms, 2 verandas and a big courtyard with a much more than rent Rs. 312.50 p. The respondent/plaintiff served a notice on the applicants demanding rent at the rate of Rs. 250/- PM and no reply was received. He moved an application under Section 9 of the U.P. Act No. 13 of 1972 (herein after called as "the Act") for determination of standard rent before the Rent Control and Eviction Officer. The said application was rejected. He filed appeal against the said order in the Court of District Judge Mainpuri. It was allowed and the case was remanded back. The Rent Control and Eviction Officer again rejected the application and the respondent/plaintiff again filed appeal. The appeal was dismissed on the ground that the provisions of the Act were not applicable to the premises in question. Since the provisions of the Act were not applicable the respondent/plaintiff terminated the tenancy of the applicants by serving simple notice to quit. He also claimed Rs. 11875/- as rent and damages. Despite service of notice the applicants did not vacate the premises hence the suit.

3. The applicants contested above suit on the grounds that the rate of rent was Rs. 130/- PM and not Rs. 312.50 P. as claimed by plaintiff/respondent. The assertion of respondent/plaintiff regarding rent was barred by res judicata. Notice given under Section 106 of the Transfer of Property Act and section 80 C.P.C. to the applicants/defendants were illegal and that suit was also bad for non joinder of Inspector General of Police.

4. On the date of hearing plaintiff/respondent examined himself. Thereafter, learned counsel for the defendants/applicants moved application for adjournment. The learned J.S.C.C.

rejected the above application. Thereafter, learned counsel for the applicants left the Court and the learned J.S.C.C. proceeded with the case under Order XVII rule 2 C.P.C. Considering the examination in chief of the plaintiff/respondent the learned J.S.C.C. decreed the suit of the plaintiff/respondent in toto.

5. The above judgement and decree has been challenged in this revision.

6. Heard the learned Standing Counsel appearing on behalf of the applicants and none appeared from the side of the respondent and perused the record.

7. It was contended by the learned Standing Counsel that the learned J.S.C.C. has decreed the suit holding that rate of rent was Rs. 312.50 P.M. which the applicants failed to pay after alleged service of notice of demand while on the own showing of the plaintiff/respondent, the rent of the premises in question was not agreed and he applied twice for fixation of rent before the Rent Control & Eviction Officer, but was unsuccessful. Therefore, the findings of the learned J.S.C.C. that rent was Rs. 312.50 P. is without any basis and suffer from perversity.

8. On the own showing of the plaintiff/respondent no rent was agreed between the parties and defendants/applicants continued to pay Rs. 130/- PM subject to settlement of rent subsequently. He applied before the Rent Control and Eviction Officer under Section 9 of the Act twice for fixation of rent, but his applications were rejected. As such on the own showing of plaintiff/opposite party no rent was fixed and therefore notice of demand to pay the rent at the rate of Rs. 312.50 Paisa P.M. was invalid. Moreover, the learned J.S.C.C. has also not recorded any finding about the rate of rent.

9. The defendants/applicants have also raised a plea that the notices under Section 106 of the Transfer of Property Act and under Section 80 C.P.C. were invalid. The suit for ejectment could be decreed only if it was proved that tenancy of tenant was legally and validly terminated. The learned J.S.C.C. has not recorded finding that notices under Section 106 of the Transfer of Property Act and Section 80 C.P.C. were valid and Tenancy of the defendants/applicants was legally and validly terminated.

10. In this way the finding recorded by the learned J.S.C.C. suffers from perversity and are based on no evidence.

11. Since no proper finding regarding rate of rent validity of notice have been recorded, the suit was not properly decided. This Court, therefore, has no option but to allow the revision and remit the case to the Trial Court for fresh decision in the light of observation made above.

12. The revision is, accordingly, allowed. The order under revision is set aside and the case is remitted back to the Court concerned for fresh decision, after affording opportunity to the parties to adduce their evidence, in the light of observations made above.

13. Office is directed to send the copy of this order to the J.S.C.C. concerned within a period of one week.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2001

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

Criminal Misc. Writ Petition No. 569 of 2001

Islam alias Islam Uddin ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri N.K. Jafri
Shri Shahbuddin

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure, 1973, Section 125 – Maintenance –Grant of – In absence of any special reasons in the order, maintenance of minor daughter to be granted from the date of the order only.

Held –Para 2

The purpose behind introducing this relief in Code of Criminal Procedure is not to allow any vagrancy to afflict the life of the married woman or the minor children. It has not given any woman a right to use it as a tool to wreak vengeance against the husband. If the person fails he is liable to simple jail term but it will fail to serve the spirit behind the enactment of this section. The courts must not always be guided by compassionate feelings or disposition. It is a must to have a fair look into the capacity to pay of the husband as well. In the present case the applicant, the husband, was not on the wrong side but it was the wife herself. The daughter suffered due to her because she abandoned her husband's roof without any valid reason or a proper cause. Therefore, in my opinion it shall be most irrational to burden this applicant from the date of the application.

By the Court

1. Heard learned counsel for the petitioner and learned A.G.A.

2. I have gone through both the judgements one of the Judicial Magistrate 1st, Jaunpur dated 11.03.1998 as well as of the revisional court dated 19.01.2001. On merits learned counsel for the petitioner is not able to assail the judgements of the two courts. The trial court has only granted maintenance to the minor daughter. So far as the wife was concerned he was of the opinion that she is not entitled to maintenance and therefore her application is not entertainable under section 125 Cr.P.C. It has also been held that she was living without any valid reason away from the company of her husband and the applicant has never declined to maintain her. Moreover, she is permitted under the Muslim Women (Protection of Rights) Act, 1986 to claim maintenance from the Waqf Board if she is unable to maintain herself. So far as this girl is concerned the only challenge thrown by the learned counsel for the petitioner to the grant of maintenance to her is that this maintenance should have been granted from the date of the order and not from the date of the application. The reason behind this submission is that the law does not permit to do so unless special reasons are recorded by the court below. I have gone through the entire judgment but I am unable to find any special reason having been recorded by the trial court. Even the judgement in revision does not contain any such reason. Learned counsel for the respondent nos. 2 and 3 Sri Ali

Hasan has argued that this application for maintenance was contested by opposite party for full 11 years i.e. from the year 1989 till early 2001 when the revision was decided by the revisional court. According to him this itself is a good ground for maintaining the order passed by the trial court in favour of the minor daughter respondent no. 3. After hearing the submission of both parties I am of the opinion that by doing so this Court will saddle the applicant with a burden which will be humanly not possible for him to discharge at the rate of Rs. 300/- per month. The applicant will be liable to make payment of Rs. 3,600/- per year for 11 years when multiplied this amount will come to over Rs. 45,000/-. By doing so this court will be committing the error of refusing by implication the benefit of the order to this minor. For this applicant it will be impossible to pay such a huge arrear. He is a labour earning Rs. 50/- to 60/- per day now. In the circumstances if the petitioner is asked to pay the respondent no. 3, minor daughter from the date of the order it will suffice. In case of failure to pay due to his incapacity this order will not serve any useful purpose. The purpose behind introducing this relief in Code of Criminal Procedure is not to allow any vagrancy to afflict the life of the married woman or the minor children. It has not given any woman a right to use it as a tool to wreak vengeance against the husband. If the person fails he is liable to simple jail term but it will fail to serve the spirit behind the enactment of this section. The courts must not always be guided by compassionate feelings on disposition. It is a must to have a fair look into the capacity to pay of the husband as well. In the present case the applicant, the husband, was not on the wrong side but it was the wife herself. The daughter suffered due to her because she abandoned her husband's roof without any valid reason or a proper cause. Therefore, in my opinion it shall be most irrational to burden this applicant from the date of the application.

3. The trial court will calculate the amount due from the petitioner from the date of his own order and the applicant shall be intimated about the same. The trial court is further directed to divide the entire amount so calculated into three instalments. The first instalment shall be paid by the petitioner within one month from the date he will be directed by the trial court. The second instalment shall be paid after 45 days and the last instalment will be paid by the petitioner after another 45 days from the second instalment. He will further go on paying each month's instalment regularly on every 10thdate of successive month. Any failure in complying with this direction will result into complete negation of the present order and he will be liable to pay amount from the date of application as directed by the trial court by its order dated 11.03.1998.

With this direction this petition stands finally disposed of.
