ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD 22.2.2001

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

Habeas Corpus Writ Petition No. 6321 of 2001

Smt. Usha Pandey ...Petitioner(In jail)
Versus
A.C.J.M.-II and others ...Respondent

Counsel for the Applicant:
In person
Km. Abha Pandey

Counsel for the Respondents:
Sri V.B. Upadhyay
A.G.A.
Amicus curiae

Constitution of India, Article 226, read with Indian Penal Code S.22- Petitioner made Derogatory Remark against Magistrate- On its term Magistrate ordered for lodging complaint before C.J.M.-Held-Court should over look even unfair malicious unjustified remark- Proceeding u/s 228 quashed.

Held - Para 13

We would like to go further than Lord Denning and say that often the Court should overlook even unfair, malicious and totally unjustified remarks. The person making such remarks often wants publicity for himself, and by ignoring them the Court denies him the publicity which he wants.

By the Court

1. Heard the applicant, Km. Abha Pandey, in person, Sri V.B. Upadhyaya, learned Senior Advocate whom we requested to assist us as amicus curiae and also the learned Government Counsel.

2. This Habeas Corpus petition has been filed by Km. Abha Pandey on behalf of her mother Smt. Usha Pandey, who has been taken into custody in pursuance of the order of the learned A.C.J.M.-II, Basti dated 17.1.2001, in Criminal Misc. Case No. 80 of 2001, State vs. Usha Pandey, under section 340 Cr.P.C.

3. We have perused the order dated 17.1.2001, it appears that Smt. Usha Pandey had appeared before the learned A.C.J.M. –II Basti on 17.1.2001 in a case under section 125 Cr. P.C. against her husband Prahlad Pandey. During the hearing she is said to have made derogatory remarks against the learned Magistrate. The order dated 17.1.2001 states:-

"श्रीमती उषा पाण्डेय दिनांक १७-१-२००१ को समय करीब ११-५५ बजे न्यायालय में उपस्थित होकर जोर-जोर से बहस करने लगी तथा इस न्यायालय में कार्यरत पीठासीन अधिकारी, अधोहस्ताक्षरी के तरफ इंगित कर कहने लगी कि "इस प्रकरण में मेरे नाम से २२९बी प्रार्थना-पत्र का अमलदरामद करा दो, तुम बहुत होशियार बनते हो, विपक्षी से मिले हुए हो, आज मैं विपक्षी के साथ-साथ तुम्हें नहीं छोड़ूँगी । इस न्यायालय के पीठासीन अधिकारी, अधोहस्ताक्षरी द्वारा मना करने पर श्रीमती उषा पाण्डेय ने जोर-जोर शब्दों में पीठासीन अधिकारी अधोहस्ताक्षरी की तरफ इंगित कर कहने लगी कि तुम्हें जेल में बन्द करवा दूँगी, सारी मजिस्ट्रेटी भूल जायेगी । उपरोक्त कहते हुए श्रीमती उषा पाण्डेय ने शोर मचाकर न्यायालय कक्ष में अनाप शनाप बकने लगी एवं न्यायिक कार्य में सारवान बाधा डाला । "उल्लेखनीय है कि श्रीमती उषा पाण्डेय का उपरोक्त अभिकथन सम्बन्धित दाण्डिक वाद सं० २५४/२००० श्रीमती उषा पाण्डेय बनाम् प्रहलाद थाना मुण्डेरवा अन्तर्गत धारा १२५ दं०प्र०सं० की पत्रावली के आदेश-पत्र में मेरे द्वारा स्वयं की हस्तलिपि में अंकित किया गया है जिसकी प्रतिलिपि ३क साथ में संलग्न किया

गया है । पत्रावली पर उपलब्ध सामग्री के अवलोकन से स्पष्ट है कि श्रीमती उषा पाण्डेय के उपरोक्त कृत्य से न्यायालय के न्यायिक कार्यवाही में बैठे हुए पीठासीन अधिकारी एवं न्यायालय का साशय अपमान हुआ एवं न्यायिक कार्यवाही में सरकारी बाधा पहुँचा । जो भा०द०वि० की धारा २२८ के अन्तर्गत दण्डनीय अपराध है । अतः श्रीमती उषा पाण्डेय के विरूद्ध उपरोक्त अपराध के लिए दण्डित करने के लिए परिवाद मुख्य न्यायिक मजिस्ट्रेट बस्ती के न्यायालय में दाखिल करने का आदेश किया जाता है । "

4. In view of the above remarks the learned Magistrate directed that since the conduct of Smt. Usha Pandey amounts to an offence under section 228 I.P.C. hence action should be taken against her.

5. It appears that on the basis of the said report of the A.C.J.M.-II the learned C.J.M. Basti took cognizance on the same day and directed that Smt. Usha Pandey be taken into custody.

6. We have perused the record of the case. On the record there is an order of this Court dated 26.4.1990 in Criminal Misc. Application No. 6223 of 1988, under section 482 Cr. P.C. in which it is stated that inspite of the compromise between Smt. Usha Pandey and her husband in the case under section 125 Cr.P.C. no payment has been made to Smt. Usha Pandey.

7. Litigation of various kinds has been going on between Smt. Usha Pandey and her husband since 1986, and hence obviously feelings between them are badly embittered, and Smt. Usha Pandey seems to be very much mentally upset. It is probably in those circumstances that she made such derogatory remarks to the learned Magistrate.

8. Though we certainly cannot find any justification for such baseless remarks against the learned Magistrate, we are of the opinion that it would have been better if the learned Magistrate had ignored them, consideration the mental state of Smt. Usha Pandey.

9. There are many things that a Judge should overlook nowadays and it is not necessary that in every such case a Judge must punish for contempt or send a person who makes such accusations against the Court to jail. Just because someone has lost his/her balance, this does not mean that a judge should also lose his balance. The Judge must preserve a cool mind and overlook many faults. Today's society is in a turbulent state and many things must be overlooked today by a Judge, even if they could not have been overlooked earlier.

10. In this connection **Lord Denning** in one of his books **"The Due process of Law"** writes :-

"On every Monday morning we hear litigants in person. Miss Stone was often there. She made an application before us. We refused it. She was sitting in the front row with a bookcase within her reach. She picked up one of Butterworth's "Workmen's Compensation Cases" and threw it at us. It passed between Lord Justice Diplock and me. She picked up another. That went wide too. She said 'I am running out of ammunition'. We took little notice. She had hoped we would commit her for contempt of court-just to draw more attention to herself. As we took no notice, She went towards the door. She left saying : 'I congratulate your Lordships on your coolness under fire'."

11. Now a days, so many things happen in Court but the Judge should preserve his equanimity and even overlook remarks and conduct which may be unjustified. If he does so it will enhance his dignity and respect in society.

12. In **Rex** v. **Commissioner of Police of the Metropolis**, (1968)2 QB 150 at 154, Lord Denning observed –

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

'It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

13. We would like to go further than Lord Denning and say that often the court should overlook even unfair, malicious and totally unjustified remarks. The person making such remarks often wants publicity for himself, and by ignoring them the Court denies him the publicity which he wants.

14. On the facts and circumstances of the case we set aside the impugned orders dated 17.1.2001, passed by the A.C.J.M.-II, Basti as well as of the C.J.M., Basti, and quash the proceedings under section 228 I.P.C. The petition is allowed Smt. Usha Pandey shall be released forthwith.

15. However, none of the observations made in this judgment shall be treated as any adverse remark against the learned A.C.J.M.-II, Basti or the learned C.J.M., Basti and they shall not be placed on their confidential record. We also direct that the case under section 125 Cr.P.C. must be decided very expeditiously but by some Judge other than the A.C.J.M.-II, Basti.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 27.2.2001

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

Civil Misc. Writ Petition No. 7779 of 2000

Committee of Management, Baheri and others ...Petitioners
Versus
Director of Education (Secondary) U.P., Lucknow and others ...Respondents

Counsel for the Petitioners:
Shri Ashok Khare
Shri Ram Kriti Singh

Counsel for the Respondents:
S.C.
Shri S.K. Singh
Shri V.K. Singh
Shri S.N. Srivastava

U.P. Intermediate Education Act 1921 S-16-A (5)- Managing Committee passed resolution extending the terms from 3 years to 5 years – held- R.J. DE is required to satisfy about the compliance of the Act and Regulation- rather to consider the conduct of the management.

Held- Para 10

The RJDE in rejecting the resolution on the ground that an F.I.R. was in contemplation acted on irrelevant consideration. If the RJDE is required to be satisfied about the conduct of the committee of Management then it will defeat the purpose of amendment in the Scheme of Administration and would confer arbitrary powers on the RJDE to pick and chose a committee of Management for granting approval to amendment for enhancing the term prescribed in the scheme of Administration. In absence of any guideline for extension the RJDE was only required to be satisfied about compliance of the Act and Regulation. He could not consider the conduct of committee of Management. Therefore the order of RJDE passed on 28.1.2000 cannot be maintained.

Case law discussed

2000(2) UP.LBEC 1418

By the Court

1. The question that arises for consideration in this petition is whether amendment in the Scheme of Administration under section 16-A(5) of the U.P. Intermediate Education Act 1921 can be made only by the Director of Education or by the Regional Joint Director of Education as well ? And what should be the term of Committee of Management of an institution in absence of any period prescribed under the Act or Regulations framed under it ?

2. Baheri Education Society, Baheri, District Bareilly is a society registered under the Society Registration Act 1860 and it runs and manages an education institution known as Mahatma Gandhi Memorial Inter College, Baheri, District Bareilly (in brief institution). The institution has a Scheme of Administration approved on 7.8.1986 by the Deputy Director of Education, District Bareilly. In the Scheme of Administration in clause 9 it is provided that the term of committee of management would be three years. It further provided that the term of every office bearer would continue till next election but such period would not be more than one month i.e. three years one month. The committee of management of the institution was elected on 16.2.1997, Shri Gajendra Singh elected as Manager and the Deputy District Magistrate Baheri was to be ex-officio President. The District Inspector of Schools, Bareilly (in brief DIOS) recognised the election on 9.4.1997. The management lodged First Information Report against the officiating principal Sri Jasmel Singh on 26.11.1998 under section 406 I.P.C. The ex-officio president did not convene the meeting, therefore, the manager, convened the meeting for 24.1.1999 in which Sri Jasmel Singh was suspended. The management submitted the papers to the DIOS for approval. The suspension was not approved.

3. On 20.5.1999 the general body of the society passed a resolution for enhancing the term of the committee of management from three years to five years. The resolution was sent to the Regional Joint Director of Education (in brief RJDE) on 11.12.1999 for amendment in clause 9 of the Scheme of Administration. This resolution of the

management is not on record. But it admittedly was rejected on 28.1.2000 by the RJDE. The reason for rejection of the resolution, as mentioned in the order, is that many complaints had been received against the committee of management and the matter of lodging the First Information Report against the management was pending consideration before the DIOS, therefore, the application of the management for enhancing the term of the committee of management from three years to five years was not proper.

4. Shri Ashok Khare the learned counsel for the petitioner has vehemently urged that while exercising powers under section 16-A(5) of the U.P. Intermediate Education Act 1921 (in brief the Act) the RJDE could not reject the resolution because some complaints were pending against the committee of management. He could only consider the validity of resolution sent by the committee of management and if there was no defect in it he had to extend the term from three years to five years. According to the learned counsel the order rejecting the resolution was passed on irrelevant considerations.

5. On the other hand, Shri S.N. Srivastava the learned standing counsel appearing for respondents no. 1 to 5 and Shri Sheo Kumar Singh the learned counsel for the appearing for respondent no. 6 have urged that in view of Division Bench decision of this court in Mangla Prasad Inter College, Society, Allahabad and another v. Director of Education, Allahabad and others 2000 (2) UPLBEC 1418, the proposal sent by the management to the RJDE was not maintainable as power to amend the scheme of administration vests in the Director. Since no resolution for amendment in the Scheme of Administration was filed before the Director of Education, therefore, the resolution for amendment in the Scheme of Administration was rightly rejected by the RJDE.

6. Section 16-I of the Act lays down that the Director with the approval of the State Government could delegate all or any of the powers under the Act to an officer or officers who are not below the rank of Deputy Director of Education. The Director in exercise of this power delegated the powers conferred on him, with the approval of the State Government, under Sections 16-A(5), 16-B and 16-C by notification dated 23.9.1959 on Deputy Directors of Education of seven regions. By notification dated 1.10.1964,28.8.1970 and 30.9.1961 three more regions and posts of Regional Deputy Director of Education were created at Nainital, Faizabad and Jhansi. Subsequently, more new regions were created. The Act was amended by U.P. (Amendment) Act No. 1 of 1981 and Section 16-CCC and Third Schedule were added in the Act. The Schedule laid down the principles on which the authorities could grant approval to a Schemes of Administration. In the light of these principles the State Government issued a G.O. dated 13.2.1981 that the existing Schemes of Administration of the institutions be revised and amended on democratic principles and necessary directions be issued by the Director to the officers for implementing the directions mentioned in the Government Order. In compliance of G.O. dated 13.2.1981 the Additional Director of Education (Secondary) U.P. Allahabad issued a letter on 30/31.3.1981

directing the Regional Deputy Director of Education to ensure compliance of G.O. dated 13.2.1981 and Schemes of Administration of institutions be amended within the stipulated period. The period of six months fixed by G.O. dated 13.2.1981 was extended by U.P. Ordinance no. 30 of 1983 and later on by Intermediate Education (Amendment) Act 1984 the period of six months mentioned in Section 16-CCC of the Act was substituted as three years. In the supplementary counter affidavit filed by Shri Mitra Lal, Additional Director of Education (Secondary), U.P., Allahabad it is stated that framing of Model Scheme of Administration was deliberated upon at various levels of the State Government and Deputy Director of Education U.P. (School Management) sent on 5.3.1960 a Model Scheme of Administration to all the regions. But the Director decided not to thrust a Model Scheme of Administration on the institutions and it was decided to leave the management free to frame their own scheme according to their needs which were not inconsistent with the provisions of the Act and Regulations. Along with the two supplementary counter affidavits filed by the respondents it is clear that the various institutions in the State have framed their Schemes providing for periodical elections and in some schemes the term is three years one month, in others three years four months etc. Only in Agra Region the term for holding periodical election is four years one month.

7. The power of approval of Scheme of Administration was exercised by Regional Deputy Director of Education in pursuance of notification dated 25.1.1984. The State Government on 12.12.1995 issued G.O. no. 2477/-15-10-959 (II)/94 by which thirteen posts of RJDE were created and distribution of work between Regional Deputy Director of Education and RJDE was made. The RJDE were given the administrative powers with regard to leave, transfer, appointment, probation etc. The G.O. dated 12.12.1995 did not confer any power on the RJDE to exercise powers under section 16-A(5) of the Act. The powers under 16-A(5) remained with the Regional Deputy Director of Education and Scheme of Administration was to be approved and any amendment in it could be made by the Regional Deputy Director of Education. Another order was issued on 19.12.1997 by the State Government which further bifurcated the distribution of work between the RJDE and Regional Deputy Director of Education but power amending the Scheme of Administration remained with the Regional Deputy Director of Education. The State Government in exercise of its power under clause (dd) of section 2 of the Act issued a notification by which all the RJDE were conferred powers of the Regional Deputy Director of Education. The notification no. 1014/15-7-1998, published in U.P. Gazette, Extra, Para 4, Section (ka), dated 17th March, 1998 is extracted below :-

"In exercise of the powers under clause (dd) of Section 2 of the Intermediate Education Act, 1921, U.P. Act No. II of 1921) the Government is pleased to authorise all the Regional Joint Directors, Education to perform all the duties of Regional Deputy Director, Education under the said Act."

8. From the date the notification was issued the RJDE, therefore, became entitled to approve or disapprove or

amend the Scheme of Administration. The notification mentioned above and Section 16-I were not brought to the notice of Division Bench in Mangla Prasad Inter College, Society, Allahabad(supra), therefore, this decision is not of any help to the respondents. It is, thus, clear that the RJDE had power to amend the Scheme of Administration under Section 16-A(5) of Act.

9. The next question is whether the Regional Joint Director of Education could enhance the term of Committee of Management from three years to five years? Under the Act or Regulations the term of Committee of Management has not been prescribed. Third Schedule to the Act only prescribes periodical elections. If the term for holding periodical elections has not been provided by the Act, then it could be only on democratic principles. In Civil Misc. Writ Petition No. 38932 of 1996 Committee of Management, Lal Babu Baijal Memorial Inter College, and others v. The Director of Education Madhyamik, Lucknow and others this court on 10.12.1996 passed an order that the Director should take a decision for enhancing the term of Committee of Management from three years to five years. The Director of Education referred the matter to the State Government. The State Government by its letter dated 19.12.1997 informed the Director that under section 16-CCC of the Act there is no provision that the term of Committee of Management would be three years and Chapter-I Regulation 14-(a) provides for proper and effective functioning of the Committee of Management but it no where provides either in the Act or Regulation, the term of Committee of Management. And the Director should take a decision at his end in compliance of the order of the court. In pursuance of this letter of the State Government the Director issued a circular on 30.3.1998 to all the RJDE that the term of Committee of Management could be enhanced from three years to five years. And if any Committee of Management makes a request for enhancing the term of Committee of Management the RJDE can examine the resolution and if satisfied, approve amendment in the scheme of administration enhancing the term of Committee of Management from three years to five years. In pursuance of the decision of the Director where a Committee of Management applied for amendment in the Scheme of Administration to extend the term fixed by the Scheme of Administration for holding periodical election, the RJDE could amend the Scheme of Administration and enhance the term from three years to five years. The reason for such extension from three years to five years has been given in the first supplementary counter affidavit filed by Shri Mitra Lal, Additional Director of Education (Secondary) U.P., Allahabad. In paragraph 21 it has been mentioned that since under the Act there was no term prescribed for Committee of Management and in Societies Registration Act 1860 the term of society is five years, therefore, in order to keep the term of Executive Body of the Society running the institution in consonance with the term of Committee of Management of the institution the term of five years was recommended. It is, thus, clear that neither this court nor the government or the department has treated three years as fixed period. The term of Committee of Management has been extended up to five years. The rationale for such extension has been explained by the department. It cannot be said to be

arbitrary. Therefore, the period of Committee of Management from three years to five years could be extended by the RJDE.

10. The next question is whether the Regional Joint Director of Education could reject the resolution sent by Committee of Management for enhancing the term from three years to five years? The RJDE has to be satisfied that the provisions of Act and Regulations have been compiled and the amendment sought is not inconsistent with the provisions of the Act or Regulations. Once he is satisfied that the amendment sought by the Committee of Management is legal, he cannot refuse to amend the Scheme of Administration. The last election of petitioners, Committee of Management was held on 16.2.1997. On 27.5.1999 the Committee of Management resolved to amend the Scheme of Administration from three years to five years and papers were forwarded to RJDE for approval. The RJDE by his order dated 28.1.2000 refused to amend the Scheme of Administration on the ground that there were complaints against the institution and the DIOS was contemplating to lodge a First Information Report, therefore, it would not be proper to extend the term of Committee of Management. The RJDE had to be satisfied as to whether the amendment sought was in accordance with provision of Act or Regulations or not. He could not refuse to amend the Scheme of Administration on any other consideration. If there were complaints against the institution and the RJDE was satisfied that the complaints were such that it warranted action against the institution or the Committee of Management he has ample powers under the Act to proceed against the institution or the management. But he could not refuse amendment. The RJDE in rejecting the resolution on the ground that an F.I.R. was in contemplation acted on irrelevant considerations. If the RJDE is required to be satisfied about the conduct of the Committee of Management then it will defeat the purpose of amendment in the Scheme of Administration and would confer arbitrary powers on the RJDE to pick and chose a Committee of Management for granting approval to amendment for enhancing the term prescribed in the Scheme of Administration. In absence of any guideline for extension the RJDE was only required to be satisfied about compliance of the Act and Regulation. He could not consider the conduct of Committee of Management. Therefore the order of RJDE passed on 28.1.2000 cannot be maintained.

11. In the result this writ petition succeeds and is allowed. The order dated 28.1.2000 passed by Regional Joint Director of Education Annexure-5 to the writ petition is quashed. The Regional Joint Director of Education is directed to extend the term of Committee of Management from three years to five years from the date it was elected, within a period of one month from the date a certified copy of this order is produced before him.

Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: FEBRUARY 19, 2001

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

Civil Misc. Writ Petition No. 1722 of 1999

Sahdev Singh ...Petitioners
Versus
U.P. Public Service Tribunal and others ...Respondents

Counsel for the Petitioners:
Shri Siddhartha

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Quantam of Punishment- Petitioner a confirmed Police Constable found having consumed liquor after enquiry dismissed from service inspite of prayer for forgiveness and assurance about not committing such an act in future-held-punishment too harsh-lessor punishment of 25% salary during suspension period awarded.

Held-Para 2

In these circumstances we are of the opinion that a lenient view should be taken against the petitioner and some lessor punishment should be given to him. In the circumstances we are of the opinion that although the petitioner does deserve some punishment but the punishment of dismissal is too harsh. Hence we set aside the impugned order dated 3.6.1997, 31.10.1993 and 30.7.1993 and we direct that the petitioner shall be reinstated in service but he will be given only 25% of the back salary from the date of dismissal to the date of reinstatement.

By the Court

1. The petitioner was a police constable. He was appointed on 31.1.1976 and was confirmed on that post. In the night of 25.1.1993 he was found having consumed liquor. He was charge sheeted and after enquiry he was dismissed from service. His appeal was also rejected and his claim petition before the U.P. Public Service Tribunal was also dismissed. Hence this petition.

2. A perusal of the impugned order of the Tribunal shows that the petitioner has stated that he has nothing to say in his defence nor he has to produce any witness but he has prayed for forgiveness and assured that he will not commit such act again in future. In these circumstances we are of the opinion that a lenient view should be taken against the petitioner and some lessor punishment should be given to him. As Portia said in Shakespeare's 'Merchant of Venice', Justice should be tempered with mercy. In the circumstances we are of the opinion that although the petitioner does deserve some punishment but the punishment of dismissal is too harsh. Hence we set aside the impugned orders dated 3.6.1997, 31.10.1993 and 30.7.1993 and we direct that the petitioner shall be reinstated in service but he will be given only 25% of the back salary from the date of dismissal to the date of reinstatement and he shall be reinstated within a month of production of a certified copy of this order before the S.S.P. Saharanpur. We further warn the petitioner not to commit such act in future. It is made clear that the petitioner will get continuity of service.

The petition is partly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.2.2001

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

Civil Misc. Writ Petition No. 7171 of 2001

Sher Singh ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri S.K. Singh
Shri V.K. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Article 226 Service Law-Transfer-after creation of new state Uttaranchal- Employees working in State of U.P. Transferred against their will- only on deputation for one or two years can be sent – after expiry of deputation period should be brought back and another fresh batch be sent on their place until local recruitment is made.

Held – Para 4

It would be advisable that if certain employees are required in Uttaranchal then U.P. State Government employees can be sent on deputation for one or two years to Uttaranchal and after that period they should be brought back to (U.P.) and a fresh batch of State Government employees can be sent in their place. This process can be go on for a few years, until local recruitment is made.

By the Court

1. The petitioner has been transferred to Uttaranchal against the impugned transfer order he made a representation on 12.1.2001 and he may make such other representation as advised and the same will be decided by the concerned authority within a month of production of the certified copy of this order.

2. Till disposal of the representation the impugned transfer order dated 11.1.2001 and the order dated 19.2.2001 shall remain stayed.

The petition is disposed of.

3. We would also like to recommend to the State Government that no State Government employee should be permanently posted to Uttaranchal against his wish. People living in the plains may have difficulty in adjusting to hill areas if they are permanently posted there against their wish, and some of them may even get mental depression, apart from other hardships.

4. In our opinion, it would be advisable that if certain employees are required in Uttaranchal then the U.P. State Government employees can be sent on deputation for one or two years to Uttaranchal and after that period they should be brought back to (U.P.) and a fresh batch of State Government employees can be sent in their place. This process can be go on for a few years, until local recruitment is made.

5. Hence, we recommend to the U.P. Government to reconsider it's policy and consider our suggestion of not sending the employees from U.P. permanently to Uttaranchal against their wish but only on deputation for short period.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 28.2.2001

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

Civil Misc. Writ Petition No. 25990 of 1998

Ram Dulari ...Petitioners
Versus
Moradabad Development Authority and others ...Respondents

Counsel for the Petitioners:
Shri V.P. Rai
Shri B.B. Rai

Counsel for the Respondents:
MR. P.K. Singh
Mr. D.V. Jaiswal

Constitution of India, Article 226 and 14- Petitioner destitute widow, applied for a house under a Scheme floated by Moradabad Development Authority in 1993 on first come first serve basis- She fulfilled all requirements of deposits- Respondent No. 2 allotted the house in question to respondent no. 3, wife of the gunner of Chairman of Moradabad Development Authority despite the fact that neither respondent no.3 nor her husband is an employee of Development Authority-Hence the impugned allotment, held, to be arbitrary and showed favoritism- Impugned order, therefore, quashed.

Held- (Para 9)

The scheme in question never permitted an allotment of house in favour of wife of a gunner/body guard of any of the officials of the Moradabad Development Authority. Apparently the direction issued showed favouritism which is impermissible and against the constitutional philosophy enshrined under Article 14 of the Constitution. Further it is indeed regrettable that the repeated cry of the destitute widow, who has lost her son and was residing in a dilapidated house on rent, had gone in vain.

By the Court

1. The petitioner, who is a destitute widow having lost her young son residing on rent in a dilapidated house, and who had applied for a house under a scheme floated by Moradabad Development Authority in 1993 and having paid in that regard a sum of Rs. 48,000 in all as evident from Annexure-2, has come up with a prayer to quash the Office Note/D.O. dated 2.4.1998 as contained in Annexure-3, and allotment order dated 2/4-4-1998 as contained in Annexure-4, allotting House no. 5, Navin Nagar Aawaasiya Yojna pursuant to order dated 12.12.1996 passed by Respondent No.1 and to command Respondent Nos. 1 & 2 to allot that house to her.

2. She asserts as follows:- As per the scheme as contained in Annexure-1 to the writ petition houses were to be allotted to persons belonging to general category on first come first served basis for which one was required to deposit 25% towards cost of the house alongwith his application and further 25% at the time of handing over possession of the house and remaining amount of 50% was required to be deposited in 48 equal instalments with an interest rate of 16% per annum within a span of four years plus 12% for freehold charges; she fulfilled all requirements and thereby was/is entitled to the house in question; even though she had made deposits but no action was taken by the Development Authority ; she moved from pillar to post but without any result; in the meantime Respondent no. 2 allotted the

house in question to respondent no. 3 Smt. Shiksha Rani – wife of the gunner of the Chairman of the Moradabad Development Authority despite the fact that neither respondent no. 3 nor is her husband an employee of the Development Authority concerned; and thus the allotment of the houses in question is arbitrary and as a result of misuse of powers vested in the Authority.

3. In the counter affidavit filed on behalf of respondent no. 1 & 2, which has been sworn by an Office Assistant of the Development Authority, the deposits made by the petitioner for the purposes of residential flat has been admitted. It has however, been asserted that merely because of the principle of first come first served the petitioner was not entitled to the allotment rather she is required to complete formalities; the allotment order of the disputed house was issued in compliance to the direction made by the Commissioner, Moradabad Division who is Chairman of the Moradabad Development Authority; there has been no arbitrariness in allotment of the house in favour of respondent no. 3; she has an alternative remedy for seeking redressal of her grievances from the civil court; and that the writ petition is misconceived.

4. The petitioner has filed a rejoinder to the aforementioned counter affidavit denying the stand taken in the Counter.

5. No counter has been filed by respondent no. 3.

6. Sri B.B. Rai, the learned counsel for the petitioner contended that in view of the fact stated in the counter it is crystal clear that the allotment of the house in question was made at the instance of the Commissioner, Moradabad Division, who happens to be also Chairman of the Moradabad Development Authority and not on the principles evolved for allotment of the house under the scheme in question. Respondent no. 3, who is wife of the gunner of the Commission, does not fall in any category whatsoever and accordingly, the allotment in her favour is fit to be quashed and/or mollified by this Court and respondent nos. 1& 2 be commanded to allot the house in question in favour of the petitioner who has fulfilled all the necessary terms and conditions and has also admittedly deposited the amount as claimed by her.

7. Learned counsel appearing for Respondent Nos. 1 & 2 in reply contended as follows :-

Since directions were made by the Chairman of the Moradabad Development Authority for allotting the house in favour of the wife of his gunner its officials were obliged to allot that house to Respondent No. 3 and in doing so no irregularity and/or impropriety has been committed. It is a fact, however, that the wife of the gunner of the Commissioner of Moradabad Division – cum- Chairman of the Moradabad Development Authority does not figure in any of the specialised category.

He however, very fairly admitted of the applicability of the principle of first come first served and of the fact that the petitioner had deposited the amount from time to time as per the requirement.

8. Learned counsel appearing for Respondent No. 3 contended as follows :-

Since the husband of Respondent No. 3 was serving the Chairman of the Moradabad Development Authority no wrong has been committed in allotting the house in question.

9. We are astonished to learn of the direction issued by the highest executive of the Commissionary who is the Chairman of the Moradabad Development Authority. The scheme in question never permitted an allotment of house in favour of wife of a gunner/body guard of any of the officials of the Moradabad Development Authority. Apparently the direction issued showed favouritism which is impermissible and against the constitutional philosophy enshrined under Article 14 of the constitution. Further it is indeed regrettable that the repeated cry of the destitute widow, who has lost her son and was residing in a dilapidated house on rent, had gone in vain. Admittedly she had complied with all the terms and conditions imposed for allotment of the house under the scheme in question and her learned counsel assures further compliance by her of the remaining terms and conditions. To have a house for shelter is a basic requirement of every citizen of our country. We are satisfied that her right has been breached and she has been coerced to knock the doors of this Court for securing justice. We hold that she is entitled to have the house, apart from suitable damages.

10. In the result we quash the order of allotment of the house in question in favour of Respondent No. 3 and command Respondent No. 1 & 2 to allot the house in question in favour of the petitioner provided she shows her willingness to comply with the remaining terms and conditions, and allow this writ petition with cost quantified however, to Rs. 2,000/- (Rupees two thousand) only which must be paid by Respondent Nos. 1 & 2 within three months from today.

11. The office is directed to hand over a copy of this order to Sri P.K. Singh, learned counsel for Respondent Nos. 1 & 2 for its intimation to and follow up action by them.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.2.2001

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

Civil Misc. Writ Petition No. 17594 of 1998

Smt. Raju V. John. ...Petitioners
Versus
The Regional Joint Director of Education and others ...Respondents

Counsel for the Petitioners:
Shri Ashok Bhushan

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Payment of Salary – Minority recognised institution come under the purview of U.P. High School and Intermediate College (Payment of salary) Act 1971 – Petitioner being M.Sc. Mphil and B.Ed. got appointed Asstt. Teacher on 10.7.95 persuent to advertisement published in 'Amar Ujjala'. Once the authorities found the approval – Salary not paid under the Payment of Salary Act is no significant.

Held – Para 12

Once the authority has noted in its report that the appointment of petitioner is approved, the fact that the petitioner was not paid salary under Payment of

Salaries Act is not significant Payment may be made by committee of Management from its own resources and if salary is not paid, teacher cannot be penalised for working without salary – though un lawfully withheld.

By the Court

1. The Committee of Management /respondent no. 3 is served by Dasti notice as well as R.P.A.D. through registry vide office report dated 7.2.2001 as Notice will be deemed to have been served by registered post under Chapter VIII, Rule 2 Explanation II, Rules of the Court.

Respondent no. 1,2 and 4 filed counter affidavit and rejoinder affidavit in reply there to has also come on record.

2. This petition is being finally decided at this stage as all the respondents have been adequately given suitable opportunity to contest the case.

3. The Baptist Higher Secondary School, Agra (called 'school') is a recognised institute under the U.P. Intermediate Education Act, 1921 (called as 'Act No. 22 of 1921')

4. It was recognised as Higher Secondary School (minority school) vide order dated 25.2.84 by the U.P. Board. The school came on grant –in-aid list of the State Government. The institution came under the purview of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 with effect from 1.4.1996 which became applicable to it.

5. The petitioner passed M.Sc. (Chemistry), M.Phil.(Chemistry) and B.Ed. and being fully qualified and eligible to the post advertised in the newspaper 'Amar Ujala' by the Management of the school for making appointment on the post of Assistant Teacher in the school. In pursuance to her application, she was issued interview letter dated 26.6.95. The aforesaid averments, contained from paras 1 to 6, have not been denied in the counter affidavit. According to the petitioner, she joined her duties as Assistant Teacher in the school on July 10,1995. She was confirmed vide Management order, communicated through letter dated May 30,1997 in the school and filed certain certificates dated 22.4.96 and 24.1.98 (Annexure 2 to the petition).

6. Before and after the school came under grant-in-aid list the certain formalities were to be observed. The concerned educational authority initiated process, which included financial survey and obtaining certain reports regarding actual working staff of the school on relevant date. Vide report dated 26.12.97, the Regional Joint Director of Education, Agra recommended payment of salary with respect to other teachers and staff of the school, the said report did not recommend for salary being paid under the Payment of Salaries Act to the petitioner. The aforesaid report shows that the teachers of the school had resorted to Dharna and even ceased the office of Deputy Joint director of education (Secondary). The report, however, does not indicate any role being played by the petitioner. It is also evident that the matter was lingered beyond reasonable limits and staff of the school being constrained and compelled to take resort to extreme measure.

7. At page 53 one can find the name of petitioner at Sl. No. 26 (pp No. 53 writ paper book). It is recorded that the petitioner's appointment was approved. It also refers to the register (Register no. 14 and 11). The report, however, indicates that the aforesaid register was not available to the concerned authority. This report (at page 55 of the writ paper book) mentioned that 23 posts of Assistant Teachers were justified on the basis of student strength as per financial survey of 86-87.

8. At pp No. 57 of the writ paper book the said report exhibits the name of 17 teachers at Sl. No. 1 to 17 who have approved under the Payment of Salaries Act, 1971 and other 11 persons at Sl. Nos. 18 to 30 belonged to Class III and IV non-teaching staff. It is, therefore, abundantly clear that five posts of Assistant Teachers remained to be filled either from the existing staff by promotion or otherwise justified teaching work in the school. The Regional Joint Director Education, Agra vide its order dated March 25, 1998 (at pp No. 31 of the writ paper book) found only one ground of objection with respect to the case of petitioner viz. That the name of petitioner did not find mention in the working staff list of March 30, 1996 of the school signed and counter signed by the District Inspector of Schools and Accountant Officer. It will be noted that there was no other obstacle in the way of the said authority in granting approval for drawing salary under the Payment of Salaries Act.

9. Against the aforesaid order dated 25.3.98, the petitioner filed a detailed representation dated 28.3.98 (Annexure 6 to the petition) addressed to the Regional Joint Director of Education, Agra. The said representation indicates that the petitioner categorically referred to various documents and filed copies thereof to show that she was appointed in the school, as claimed in the petition, and was continuously working therein. The said representation further contains the averment to the effect that the Management should pay salary to petitioner during 10.7.95 till the date of confirmation. The representation further contends categorical explanation to the effect that regular attendance register contains the name of confirmed teacher of the school and petitioner's signature obtained on separate register of temporary/unconfirmed teachers of the school.

10. The averments made in para 24 of the writ petition regarding filing of representation have not been denied in para 14 of the counter affidavit. The said paragraph 24 has been replied vide para 14 of the counter affidavit. There is, however, no denial in respect of the said representation nor the counter affidavit deals with the objection raised by the petitioner in the said representation. The defence taken by the petitioner in her representation is categorical and clear. No justification has been offered by the concerned authority before this Court for not deciding the representation for such a long time or for not accepting her explanation.

11. From the above it transpires that the objection taken in the report dated 26.12.97 (Annexure 5 to the writ petition) and order dated 25.3.98 (Annexure 4 to the writ petition) in not approving the name of petitioner for drawing the salary under the Payment of Salaries Act was neither a final adjudication nor whatever

doubt the said officer carried has been fully explained or finally decided by the respondents.

12. Apart from what has been stated above, the case can be considered from another aspect. Once the authority has noted in its report that the appointment of petitioner is approved, the fact that the petitioner was not paid salary under Payment of Salaries Act is not significant. Payment may be made by Committee of Management from its own recourses and if salary is not paid teacher cannot be penalised for working without salary though unlawfully withheld.

13. In view of the above, the impugned order dated 25.3.98 (Annexure 4 to the petition) is quashed to the extent it refers and relates to the petitioner. The petition stands allowed. Consequently, the petitioner is entitled to receive salary along with other approved staff and teachers.

No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.03.2001

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

Criminal Misc. Writ Petition No. 888 of 2001

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

Counsel for the Petitioner:
Shri Aditya Kumar Yadav

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226- Petition for quashing F.I.R. - offence under Section 147/323/504/506 I.P.C. read with S-3(1) (10) S.C./S.T. Act - allegations disclosed the offence- F.I.R. can not be quashed - direction for expeditious disposal of Bail application issued. Court expressed great concern about using word 'chamar' in a derogatory sense - No body's feelings be hurt.

Held - Para 7 and 8

In our country nobody's feelings should be hurt and no one should be treated as inferior. This is the modern age of democracy in which equality is a fundamental principle which must be cherished by all. Thus whoever regard themselves as superior merely because they happen to belong to the so called upper castes are feudal minded, backward persons whose mentality must be opposed by persons with modern mentality.

The present case we are not inclined to quash the impugned F.I.R. However, we direct that the bail application of the applicant Shanker Yadav in case Crime No. 4 of 2001 under section 147/323/504/506 I.P.C. read with section 3(1) 10 S.C. S.T. Act be decided by the court concerned expeditiously.

By the Court

1. This writ petition has been filed against the impugned F.I.R. dated 04.01.2001 in case crime no. 4 of 2001 under Section 147/323/504/506 I.P.C. read with section 3(1) 10 S.C. S.T. Act police station Dhanghata, district Sant Kabir Nagar, copy of which is Annexure 2 to the writ petition.

The aforesaid F.I.R. reads as follows:

सेवा में श्रीमान डी०आई० जी० महोदय, बस्ती मण्डल बस्ती,

महोदय, निवेदन है कि प्रार्थिनी शोभा देवी पत्नी श्री राम सूरत हरिजन साकिन सेमर डाडी थाना घनघटा जनपद संत कबीर नगर की निवासिनी है तथा ग्राम सभा सेमर डाडी की प्रधान है । प्रार्थिनी अनुसूचित जाति की महिला है। पूर्व प्रधान राम अशीष यादव ने प्रार्थिनी के खिलाफ अपना प्रत्याशी श्रीमती कबूतरी देवी को खडा किया था चुनाव में प्रार्थिनी की जीत हुई। चुनावी रंजिश को लेकर राजेश, दिनेश, पुत्रगण भीम नाथ पाण्डेय आदि ने मेरे लडके चन्द्र मणि को मारा पीटा जिसके सम्बंध में थाने पर मुकदमा अपराध संख्या 7/2000 पर कायम हुआ । चुनावी रंजिश को लेकर आज दिनाँक २०-१२-२००० को समय ६ बजे सांय को शंकर पुत्र पारस, राम प्रति पुत्र पारस यादव, राजेश यादव, पुत्र शंकर यादव, पूजन पुत्र अक्ष्यवर यादव, छबीले पुत्र लाला यादव, विजयी पुत्र नच्छेद यादव, राम वृक्ष पुत्र मनोहर यादव, पहाडी यादव, पुत्र शिव लोचन यादव वलिन्दर यादव पुत्र पहाडी यादव, ब्रहमा पुत्र स्वामी नाथ यादव, बैदौली, राजेश व दिनेश पुत्र श्री भीम नाथ पाण्डेय प्रभू पुत्र मुराली पाण्डेय तथा दया शंकर पुत्र विशुन पाण्डेय मेरे दरवाजे पर चढ आये और भददी गालियाँ देकर कहने लगे कि साली चमाईन अपने लडके इन्द्रमणि, चन्द्र मणि को बुलाओ मैंने कहा कि वे लोग घर पर नहीं हैं। आप लोग गाली न दें इस पर गाली देते हुए मार मार कहते हुए मुझे मारने को दौडे. । शंकर राम प्रति, राजेश, दिनेश पुत्रगण भीमनाथ, राजेश पुत्र शंकर मुझे लाठी डंडा, लात घूंसों से मारने लगे । पूजन, छबीले, विजयी मेरे घर में घुसकर मेरे लडके को खोजने लगे लडके के न मिलने पर अटैची में रखा १५०००/- एवँ सोने की सीकड, सोने के दो कंगन एक चांदी की हसुली लूट लिए। राजेश पुत्र भीम नाथ मेरे कान का कनफूल एक जोडा तथा दया शंकर ने मेरी छल्ला ये लोग छीन लिए। राम वृक्ष, पहाडी, वलिन्दा व प्रभू व ब्रहमा दरवाजे पर खडे होकर चमार सियार साले को मार डालो कहकर बराबर भददी गालियां देते रहे । मेरे घर में मौजूद मेरी लडकी शशि बाला ने सारा वाक्या देखा तथा मेरी पोतहू ने अन्दर से डरवश किवाड बंद कर लिया था । मेरे हल्ला गुहार पर रमेश पुत्र राम सवीर, छन्तीस पुत्र राम सुभर धरमरन पुत्र अयोध्या तथा गांव के बहुत से लोग आ गये जिन्होंने सारा वाक्या देखा। शंकर आदि के साथ ५-६ व्यक्ति प्रार्थिनी के दरवाजे पर कटटा लिए खडे थे परन्तु प्रार्थिनी उनका नाम पता नहीं जानती है। देखकर पहचान सकती है। मुलिजमान काफी सरकस है तथा जाति के सवर्ण है कल किसी तरह से थाने पर मेरा लडका इन्द्रमणि व मैं गई थी। दरोगा जी से सारा वाक्या बताया है उन्होंने डाक्टरी मुआइना कराकर थाने पर आने को कहा। तब मै अपने लडके के साथ घर चली आयी क्योंकि समय अधिक हो गया था । आज भी उपरोक्त मुलिजमान अपने लोगो के साथ रास्ता रोके हुए थे। किसी तरह से मैं अपने लडके इन्दमणि के साथ बस्ती आयी हूँ और अपने चोटो का मुआइना करायी हूं। मुलजिमान आतंक मचाये हुए है कभी भी कोई संगीन घटना घटित कर सकते हैं। मेरे घर तथा आस पास के लोग काफी आतंकित है । अतः प्रार्थना है कि मेरी रिपोर्ट दर्ज कराकर उचित कार्यवाही की जाए। तथा मौके पर हम लोगों तथा आस पास के लोगों के सुरक्षा का तत्काल व्यवस्था किया जाए। प्रार्थिनी शोभादेवी पत्नी श्री राम सूरत हरिजन साकिन सेमर डाडी थाना घनघटा जनपद संत कबीर नगर। दिनांक २२-१२-२००० तत्काल पुलिस अधीक्षक संत कबीर नगर को मेडिकल रिपोर्ट व मौके की जांच कराकर सत्यता के आधार पर आवश्यक वैधानिक कार्यवाही सुनिश्चित करावें। हस्ताक्षर अपठनीय पुलिस उपमहानिरीक्षक, बस्ती परिक्षेत्र बस्ती एस०ओ० धनपता ह०/ अपठनीय एस०पी० धनघटा २३-१२-२००० एच०एम० अभियोग पंजीकृत करें। हस्ताक्षर अपठनीय एस०ओ० ४-१-२००१

2. A perusal of the above F.I.R. shows that the allegations therein are that certain persons belonging to the Yadav and Brahmin community came to the house of the respondent no. 3 Shobha Devi who is a Harijan by caste at about 6 p.m. on 20.12.2000. It appears that there was previous enmity between the parties because of Panchayat election in which first informant Smt. Shobha Devi had defeated the candidate set up by the previous Pradhan Ashish Yadav. In this connection the accused Rajesh, Dinesh Pandey had previously beaten up Shobha Devi's son Chandra Mani regarding which a criminal case had also been registered on 20.12.2000 at about 6 p.m. the accused

came to the house of Smt. Shobha Devi and gave filthy abuses calling her 'sali chamaran' and asked her to call her sons Indramani and Chandramani. When Smt. Shobha Devi said that her sons were not there and they should stop giving abuses, some of the accused beat Smt Shobha Devi, the first informant with lathis and kicks and fist blows. Some of the accused entered the house and took away the box containing Rs. 15000/- and some silver and gold jewellery. Some of the accused snatched the ear-ring, chhalla (ring) etc. of Smt Shobha Devi. Some of the accused called Smt Shobha Devi 'chamar' and said that she should be killed and gave filthy abuses. The incident was witnessed by Shobha Devi's daughter & daughter-in-law who had shut the door due to fear. Some unknown persons belonging to the group of the accused were also standing with firearms at Shobha Devi's door. Even after the aforesaid incident the accused had been harassing Shobha Devi and her children.

3. We are not expressing any opinion about the correctness or otherwise of the allegations in the F.I.R. at this stage since that may prejudice the trial but we would like to make some observations in connection with atrocities on caste basis which are still going on in this country although we are now living in the 21st century.

4. The caste system is a great evil and must be destroyed quickly and ruthlessly if our country is to progress. There may have been some utility of the caste system at a certain stage of our nation's historical development, as it introduced a rudimentary kind of division labour in society at a certain stage of our social development. However, something which may have been useful at one time may become an evil subsequently. Today there can be no manner of doubt that the caste system is a great evil in our country and must be destroyed. In the modern age of science & technology the division of labour in society cannot be on the basis o birth but must be on the basis of technical skills. The caste systems is, therefore, totally outmoded and redundant in society and in fact it is a great obstacle to our nation's progress today.

5. It may be mentioned that the basis of the caste system was the feudal occupational division of labour in society. In our country in the feudal age every profession became a caste. Thus washerman (dhobi) became a caste, and similarly Badhai (carpenter) became a caste, Kumbhar (potter) became a caste, Lohar became a caste, Chamar (people who do leather work) became a caste etc. Thus in feudal society one had no choice to choose one's profession, but had to follow his father's profession. The son of a Dhobi had become a dhobi, the son of badhai had to become a badhai, and so on. This was obviously because in the feudal middle ages there were no technical or scientific institutes and hence the only way to learn a craft or trade was to sit with one's father since childhood and learn it. However, in the modern age there are technical institutions, engineering colleges etc. and hence the caste system based on the feudal occupational division of labour in society has today become totally outmoded and is a great hindrance to our nation's progress.

6. As a matter of fact what we have witnessed in our country over the last 50 years or so is that the very basis of the caste system, namely, the feudal

occupational divisional of labour in society has been largely destroyed due to the advance of technology. Thus today the son of a Dhobi does not become a dhobi. He comes to the city and may become an electrician or motor mechanic or get employment in some establishment or factory, or having got education may become a lawyer, doctor or engineer. Similarly the son of Badhai does not now a days become a badhai. The son of a Lohar does not become a lohar now a days. Thus sons are no longer following the profession of their father and hence the basis of the caste system has already been largely destroyed in our country. However, the caste system is being artificially propped up by certain vested interests for vote bank politics etc. which is very harmful to the country. Of course these attempts to perpetuate the caste system is doomed to failure because it is only artificial and in fact in Indian society today the basis of the caste system, namely, the feudal occupational divisional of labour in society, has already been largely destroyed. All patriotic and modern minded people must oppose the caste system everywhere so that this evil can be destroyed as early as possible.

7. In the present case a perusal of the F.I.R. shows that the allegations are that certain Yadavs and Brahmins misbehaved with a Harijan lady and beat up and insulted her calling her 'chamar'. No doubt the word 'chamar' is a word denoting a certain caste, but the said word is also used in derogatory sense for persons who are regarded as inferior by the so-called upper castes. In our opinion since the use of word 'chamar' is used in a derogatory sense, it should not be used by members of the so-called upper castes or O.B.Cs as it hurts the feelings of Harijans. In our country nobody's feelings should be hurt and no one should be treated as inferior. This is the modern age of democracy in which equality is a fundamental principle which must be cherished by all. Thus whoever regard themselves as superior merely because they happen to belong to the so called upper castes are feudal minded, backward persons whose mentality must be opposed by persons with modern mentality.

8. On the facts of the present case we are not inclined to quash the impugned F.I.R. However, we direct that the bail application of the applicant Shanker Yadav in case crime no. 4 of 2001 under Section 147/323/504/506 I.P.C read with section 3(1) 10 S.C. S.T. Act be decided by the court concerned expeditiously. The observations in this judgement shall not influence the Court hearing the bail application or the trial.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 22.02.2001

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

Civil Misc. Writ Petition No. 6168 of 2001

Bhagirath ...Petitioner
Versus
Smt. Gyatri Devi & others ...Respondents

Counsel for the Petitioner:
Shri Vipin Sinha
Shri Navin Sinha
Shri Yatindra Sinha

Counsel for the Respondents:
Shri Pankaj Naqvi
S.C.

U.P. Act No. 13 of 1972-Section 21(I)A - Release Application - suffering of land lord due to cession of his employment - has substantive right to claim ejectment - authorities under the Act should enforce such right - Subsequent event - Held-Immaterial.

Held - Para 20

The right conferred under section 21 (1-A) to the landlord who is suffering because of cessation of his employment contemplated in that section, is a substantive right created by statue and such a right should be enforced by the authorities under the Act as it existed on the date of deciding release application. It could not be taken away by subsequent event as otherwise the averment now to delay release proceeding so as to create situation for the land lord to make arrangement for expending need and settled grown up sons and daughters. Cessation of employment for any reason, whatsoever, does not visit an employee sufferance of his own accommodation sufferance of various accounts.

Case Law discussed:
1982 ARC - 363

By the Court

1. Heard Sri Yatindra Sinha, Advocate on behalf of the tenant - petitioner and Sri Pankaj Naqvi, Advocate on behalf of the landlord - respondent nos. 1,2 and 5 (being the widow and sons of original deceased - landlord Nagdish Saran Agarwal). The parties have already exchanged rejoinder and counter affidavits. Consequently, this writ petition is being heard and decided finally at the admission stage.

2. The accommodation in question is admittedly governed by provisions of Section 21 of the U.P. Act No. XIII of 1972 (Called the 'Act'). The accommodation in question is the first floor of 12, Zulfiqarganj (Shyamganj), Bareilly, of which admittedly, the petitioner was tenant. The ground floor accommodation was in the tenancy of one Satya Prakash.

3. Jagdish Saran Agarwal, landlord who was employed in the Excise Department, U.P. Government, filed an application, initially both under sections 21(1)(a) and 21(1-A) of the Act. The landlord claimed that his need was bona fide. He was to suffer more hardship than the tenant if his release application was rejected. The landlord further claimed eviction of the tenant on the ground that he retired from Government Service on 30th June, 1984 and had to live at Bareilly in a tenanted accommodation, hence the case was covered under the aforesaid section 21(1-A) of the Act. The release application filed by the landlord was registered as P.A.Case No. 107 of 1984. It appears that the landlord also filed an application for release against another tenant on the ground floor of the accommodation of the premises and it was registered as P.A. Case No. 108 of 1984.

4. The petitioner has filed a copy of judgement and order dated 10.04.88 passed by the VI Addl. District Judge, Bareilly (Annexure XII to the petition), which shows that the release application against Satya Prakash was allowed. Rent Control Appeal No. 27 of 1988 filed by the tenant (Satya Prakash) was allowed by means of the aforementioned judgement and order dated April 10,1988. Sri Pankaj Naqvi, Advocate, learned counsel for the contesting respondent informs that a writ petition was filed by the landlord in this

Court and the same is pending disposal and the facts of the case culminating in the present proceedings are also it might has been stated that the Prescribed Authority allowed the release application (P.A. Case no. 107 of 1984) vide judgement and order dated February 2,1993 (Annexure VI to the petition). The Prescribed Authority decided the case in favour of the landlord both under Section 21(1)(a) and Section 21(1-A) of the Act. The tenant being aggrieved filed Rent Control Appeal No. 31 of 1993 a copy of the memorandum of appeal is Annexure VII to the petitioner. During the pendency of the appeal Jagdish Saran Agarwal, landlord died and his legal representative were substituted. The tenant also incorporated para 11A in the memorandum of appeal contending that sons and daughter of the deceased Jagdish Saran Agarwal (landlord) had no need of the accommodation in question as they are already living in their own built houses. The memorandum of appeal clearly indicates that the main thrust of appeal is to the effect that the case of landlord, in the fact of the instant case, did not fall under section 21(1-A) of the Act because of the landlord possessed another accommodation. The tenant does not assail finding of the appellate court regarding ancestral property of the landlord.

5. Commissioner's report paper no. 61 Ga (Annexure Viii to the petition), shows that the said Commissioner Report contains description of (house no. 291, Mohalla Gangapur, Bareilly). The said Advocate Commissioner vide report dated January 10, 1986 (with reference to application no. 40 B - of para 5 (III) the Advocate Commissioner) found that the house built of old bricks had fallen roof and terrace were suppored on beams, floor was Kachcha no plaster was there on the walls and in the sketch map at place C of the room 'A' there is a door. The Commissioner concluded that the house was old and in dilapidated condition.

6. Another Commissioner Report was obtained on 24.7.87 (Annexure IX to the petition). The said report indicates that the petitioner's counsel showed unwillingness the map prepared in respect to the accommodation in Mohalla Gangapur (Annexure 5 to the writ paper book). During pendency of the appeal, a Commissioner was again appointed and he submitted report regarding the houses which were in possession of two sons of the landlord namely Uttam Prakash and Rakesh Kumar, who were living with their own families separately and recorded that the information was gathered from Smt. Manju Agarwal wife of Uttam Prakash and Smt. Niru Agarwal wife of Rakesh Kumar Agarwal (daughter-in-lawa of the landlord). This Commissioner Report indicates that two houses at Patel Nagar were in possession of the two sons of the landlord who had their own families and were living separately. In respect of the other accommodation, situate at Mohalla Madhowadi, Nai Basti (Annexure XI to the petition), the Advocate Commissioner found that Smt. Gayatri Devi wife of Late Jagdish Saran Agarwal (landlord) was found in possession.

7. During pendency of the appeal, the deceased - landlord restricted his release application under Section 21(1-A) of the Act. Learned Appellate court found that Smt. Gyatri Devi wife of Jagdish Saran Agarwal had purchased open piece of land (140 Sq.Yd.) from Hulasi and

Gauri Shankar vide sale deed dated 6.3.60 and 24th July 1961 regarding Madhowadi accommodation (282 Sq.Yd.). It is observed that after constructing the house thereon Uttam Kumar Agarwal and Rakesh Kumar (sons of deceased-landlord-respondent nos.2 and 3 in the writ petition) were in possession. It was also held that the other two sons, Sushil Kumar and Manoj Kumar, respondent nos. 4 and 5 were living in another house along with their mother. Smt. Gyatri Devi built in recent past. Lower Appellate Court observed that there was no difference in the circumtances of the case, which at the time of filing of prevailed while the appeal was sending.

8. The Lower Appellate Court considered contention of both the sides and dismissed the appeal holding that the provision of Section 21(1) has been squarely applied to the fact of the case.

9. The learned counsel for the petitioner seeks to challenge the judgment and order of Lower Appellate Court on the following grounds :- accommodation in question was used for commercial purposes whereas the release of the said accommodation were sought by landlord for his personal residential need.

10. Finding recorded by court below show that the building in question was meant to be used as residential and it was not built as commercial building and hence it cannot be said to be commercial building. Even otherwise the Court below dealt with this respect and held that the release application of the landlord was maintainable.

11. The next submission of the learned counsel for the petitioner is that the landlord was in possession of one room (10 x 10 feet) on the ground floor of the premises whereas accommodation in question exists on second floor exist. According to the tenant, apart from one room there was latrine and common courtyard. The landlord, however, denied existence of latrine and courtyard. According to the tenant the ancestral house at Gangapur was also available.

12. The question whether one room accommodation on the ground floor in the premises in question and the other in the ancestral property actually existed and/or were adequate and suitable is a question of fact.

13. The court below had considered the evidence and came to the conclusion that these premises could not be said to be alternative of suitable/adequate accommodation for the landlord. The court below came to the conclusion that they were in possession of about sons of landlord- who had their families and living therein.

14. Learned counsel for the petitioner submitted that the landlords had sufficient accommodation with them and hence provision of section 21(1)(a) of the Act were not applicable to the fact of the instant case.

15. The petitioner, as mentioned above, also referred to the P.A. Case No. 108 of 1994 (Jagdish Saran Vs. Satya Prakash). The judgement passed in the aforesaid case in appeal is under challenge in writ petition before this Court. It has no relevance for deciding the case. So far as ancestral property and at Mohalla Madhobari are concerned, two courts below have recorded concurrent

findings of fact and it is not open for this court, in exercise of jurisdiction under Article 226, Constitution of India to reappraise evidence and interfere with the judgments of the Courts below.

16. More over, I do not find any error apparent on the face of record and come to a conclusion and recorded own finding.

Learned counsel for the petitioner, howver, submitted and placed reliance on the decision in the case of Kalyan Rai Saxena Vs. II Addl. District Judge, Bulandshahr and others-1982 ARC page 363. Para 12 of the said judgement reads:

"In our opinion Section 21(1-A) was enacted for providing an immediate shelter to a landlord who is left without any accommodation in consequence of having to vacate upon cessation of his employment a public building. The legislature appears to have made this provision to meet the exigency arising out of the landlord being confronted with the serious problem of finding an accommodation for his residence after being deprived of the use of public building which was allotted to him in consequence of his employment. So that the landlord might rehabilitate himself without going through the rigorous and time consuming process envisaged under Section 21(1) the legislature thought that such a landlord to establish that the bona field required the accommodation belonging to him or that as between him and his tenant, he would suffer greater hardship. It appears that in a contingency covered by Section 21(1-A) the legislature presumed that the need of the landlord would be genuine and that his requirement must necessarily take precedence over those of the tenant."

17. Applying the ratio adopted by a Division Bench in Kalyan Rai Saxena's Case (Supra), the courts below committed no error in finding out whether the accommodations, pointed out by the tenant in the instant, were actually available, adequate and suitable. The mere fact that the landlord possesses some accommodation, irrespective of its condition (i.e. whether it is habitable or not and what is its extent) is not enough to reject the release application under Section 21(1) of the Act.

18. The language employed in Section 21(1-A) mandates that the Prescribed Authority shall, on the application of a landlord in that behalf, order the eviction of a tenant from any building at any time under tenancy, if it is satisfied that the landlord of such building was in occupation of a public holding building for residential purpose, which he had to vacate on account of the cessation of his employment.

19. The ratio adopted in the case of Kalyan Rai Saxena is only to the effect that Section 21(1-A) will not be available to the landlord, even if he has to vacate on account of cessation of employment if he possesses an alternative residential accommodation. In turn it makes it clear that such alternative accommodation must be an accommodation, which may be suitable and adequate.

20. The right conferred under section 21(1-A) to the landlord who is suffering because of cessation of his employment contemplated in that section is a substantive right created by statue and

such a right should be enforced by the authorities under the Act as it existed on the date of deciding release application. It could not be taken away by subsequent event as otherwise the averment now to delay release proceedings so as to create situation for the landlord to make arrangement for expending need and settled grown up sons and daughters. Cessation of employment for any reason, whatsoever, does not visit an employee sufferance of his own accommodation sufferance of various accounts.

In result, I find no manifest error apparent on the face of record, the writ petition lacks merit and is accordingly, dismissed.

21. Learned counsel for the petitioner at this stage submitted that he be allowed to vacate the premises. He states that he has instructions from his client. He submits that the petitioner shall give undertaking before the concerned Prescribed Authority for peacefully vacating and handing over the vacant possession provided that he is granted six month's time. Learned counsel for the contesting respondent has no objection to the same provided the petitioner fulfils requisite conditions and gives an undertaking for compliance of the same. Consequently, I direct that the petitioner to retain possession of the accommodation in question - subject to the strict compliance of the following :-

1. The tenant-petitioner files before concerned Prescribed Authority on or before 15th March,2001 an application along with his affidavit giving an unconditional undertaking to comply with all the conditions mentioned hereinafter:

2. Petitioner- tenant shall not be evicted from the accommodation in his tenancy for four months i.e. upto 31st July 2001. Tenant-Petitioner, representative/assignee etc. claiming through her or otherwise, if any, shall vacate without objection and peacefully deliver vacant possession of the accommodation in question on or before 31st July 2001 to the landlord or landlord's nominee/representative (if any, appointed and intimated by the landlord) by giving prior advance notice and notifying to the landlord by Registered A.D. post (on his last known address or as may be disclosed in advance by the landlord in writing before the concerned Prescribed Authority). Time and date on which Landlord is to take possession from the tenant.

3. Petitioner shall on or before 15th March 2001 deposit entire amount due towards rent etc. up to date i.e. entire arrears of the past, if any, as well as the rent for the period ending on the 31st July 13, 2001.

4. Petitioner and everyone claiming under him undertake not to 'change' or 'damage' or transfer/alienate/assign in any manner the accommodation in question.

5. In case Tenant-Petitioner fails to comply with any of the conditions/or direction/s contained in this order, landlord shall be entitled to evict the Tenant-Petitioner forthwith from the accommodation in question by seeking police force through concerned Prescribe Authority.

6. If there is violation of the undertaking of anyone or more of the conditions contained in this order, the defaulting party shall pay Rs. 25000/-

(Rupees Twenty Five Thousand Only) as damages to the other party besides rendering himself liable to be prosecuted for committing grossest contempt of the Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 15.03.2001

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

Civil Misc. Writ Petition No. 30063 of 1999

Surendra Kumar Singh and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Shri A.K. Dixit
Shri Ashok Khare

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

Constitution of India, Article 226- Relaxation in upper Age Limit - Posts of Regional Inspector (Technical Assistant) Advertised by U.P. Subordinate Service Commission - before examination subordinate commission dissolved - and brought within the perview of U.P. Public Service Commission - Petitioner can not take the benefit about their illegibility of age when the post was advertised by Subordinate Service Commission - benefit of age relaxation can not be given.

Held - Para 10

The advertisement issued by the U.P. Public Service Commission cannot be treated as continuation of the advertisement/ proceeding earlier issued/commenced by the U.P. Subordinate Services Commission. Benefit of age relaxation cannot be given to the petitioners except on pains of violating the fundamental right of equality of similarly circumstanced candidates who accepted the advertisement and did not apply being over aged.

Case law discussed
AIR 1982 SC. 1955
AIR 1972 SC. 2175

By the Court

1. These petitions are based on common cause of action and since the relief's claimed are common, these petitions were together for convenient disposal by a common judgement. Learned counsel appearing for the petitioners in each of these writ petitions as also Sri S.K. Singh, learned counsel representing the U.P. Public Service Commission and the Standing Counsel representing the State were heard for and against the relief's claimed in these petitions.

2. It appears that the U.P. Subordinate Service Commission had advertised certain posts including the post of Regional Inspector (Technical)/Assistant Regional Inspector (Technical) vide advertisement no. 2/96-97. The cut off date for the purpose of determining the prescribed age limit was 1.7.1996. The last date for submission of applications was 26.11.1996. But before it could hold any examination pursuant to the said advertisement the U.P. Subordinate Service Commission was abolished by U.P. Ordinance No. 16 of 1997 and the posts falling within the purview of the U.P. Subordinate Services Commission were brought within the purview of the U.P. Public Service Commission. The petitioner was within

the age limit as per advertisement issued by the U.P. Subordinate Services Commission but when the posts were re-advertised by the U.P. Public Service Commission vide advertisement no. 1-4/E-1/1999, he surpassed the age limit by operation of the 'cut - off- date' namely, 1st July of the calendar year in which the advertisement was issued i.e. 1.7.1999. The cut-off-date so fixed in the advertisement is statutorily provided by the U.P. State Services (Age-Limit) Rules, 1972, as amended by 5th Amendment Rules, 1984. The petitioner admittedly became over-aged on the first date of July of the Calendar year in which the vacancies for direct recruitment came to be advertised by the Public Service Commission. Since the candidature of the petitioner was liable to be rejected in terms of the advertisement itself, he filed the instant petition before he received an order of rejection of his candidature. This Court invited counter affidavit and permitted the petitioner to take the examination of Assistant Regional Inspector (Technical)/Regional Inspector (Technical) subject of course, to the ultimate decision of the writ petition. The result of the examination has been declared but so far as the petitioner is concerned, his result has not been declared ostensibly for the reason that he was permitted to appear in the examination subject to the result of the writ petition. Now the matter has come up for final disposal.

3. It has been submitted by the learned counsel appearing for the petitioner that the petitioner was well within the age limit prescribed by the relevant service rules as per advertisement issued by the U.P. Subordinate Services Commission but outran the age limit when the vacancies were re-advertised by the U.P. Public Service Commission. The petitioner it has been submitted by the counsel, cannot be fastened with any blame owing to the fact that the Subordinate Services Commission was abolished and the posts were brought within the purview of the U.P. Public Service Commission. It has been further submitted for the petitioner that in respect of the posts of Naib Tahsildar a provision was made in the advertisement itself that the candidates who had applied for the posts pursuant to the advertisement issued by the Subordinate Services Commission within the prescribed age limit as per advertisement then issued could apply pursuant to the advertisement issued by the U.P. Public Service Commission while no such benefit was given in relation to the post of Regional Inspector (Technical)/Assistant Regional Inspector (Technical) and this, proceeds the submission, is arbitrary and violates the equality clause of the Constitution.

4. For the respondents it has been submitted by Sri S.K. Singh that the rules governing recruitment to the post of Regional Inspector (Technical)/Assistant Regional Inspector (Technical) do not permit any relaxation in age limit. The petitioners , it has been submitted by Sri S.K. Singh, are not entitled to claim parity with those candidates who had applied for the post of Naib Tahsildar and other subordinate services of executive branch. It has been further submitted by Sri S.K. Singh that in writ petition no. 49699 of 1999 Ran Vijai Singh Versus State of U.P. and another a similar plea of parity was rejected by a learned Single Judge by judgement and order dated 15.12.2000. Reliance has also been placed on a Division Bench decision of this Court in

Civil Misc. Writ Petition no. 33765 of 1999 (Advocate Association Versus State of U.P. and another) decided on 11.8.1999 wherein the plea of relaxation of age was rejected by the court holding that as the Rules stood, the candidates who had become over aged were not entitled to appear in the examination. The same view was reiterated in the subsequent writ petition no. 38671 of 1999 (The Advocate Association and others Versus State of U.P. and others decided on 21.12.1999).

5. I have given my anxious consideration to the submissions made across the bar. The candidates who had applied for the posts in question pursuant to the advertisement No. 2/96-97 issued by the U.P. Public Service Commission could not take the examination due to the abolition of the U.P. Subordinate Services Commission and the posts which were earlier advertised by the U.P. Subordinate Services Commission carne to be advertised afresh by the U.P. Subordinate Services Commission wherein the cut off date for the purpose of determination of age limit was set out with reference to the year of recruitment as provided in the Rules and in the meantime the petitioner becomes over aged. Enquiry may lean in favour of such candidates but enquiry cannot prevail over statutory law which prescribes certain age limit for the post in question as also the cut-off-date for the purpose of determining the prescribed age limit. The court cannot issue a direction the compliance of which may lead to violation of such rules. I have, therefore, no option but to follow the aforesaid decision relied on by Sri S.K. Singh Concededly the Rules governing appointment to the post of Regional Inspector (Technical)/Assistant Regional Inspector (Technical) do not provide for any relaxation in the age limits and the advertisement issued by the U.P. Public Service Commission prescribed the cut-off-date as per the requisition received from the Transport Commissioner which was in accordance with the U.P. State Services (Age-limits) Rules, 1972 as amended by Vth Amendment Rules, 1984. Rule 6 inserted by the 5th amendment Rules,1984 has an overriding effect in that it provides that notwithstanding anything to the contrary contained in any service rules, for the services and posts, whether within or without the purview of the Public Service Commission, a candidate must have attained the minimum age and must not have attained the maximum age as prescribed from time to time on the 1st day of July of the calendar year in which the vacancies for direct recruitment are advertised by the Public Service Commission or any other recruiting authority or as the case may be such vacancies are intimated to the Employment Exchange. The U.P. Subordinate Services Commission had advertised these vacancies in the year 1996-97 and as per the advertisement issued by the U.P. Subordinate Services Commission the petitioners herein were, perhaps, within the prescribed age limit but the U.P. Subordinate Services Commission Act, 1988 came to be repealed by the U.P. Ordinance No. 16 of 1997 which in turn came to be repealed and replaced by U.P. Act 5 of 1998 with the result that the Uttar Pradesh Subordinate Services Commission came to be abolished. The repealing Act does not contain any saving clause in respect of the vacancies advertised by the U.P. Subordinate Services Commission. Section 6 of the U.P. General Clause Act, 1904 will be unavailing inasmuch the

petitioners acquired no right or privilege to appear in the examination pursuant to the subsequent advertisement issued afresh by the U.P. Public Service Commission merely because they had applied pursuant to the advertisement earlier issued by the U.P. Subordinate Services Commission.

6. The view I am taking finds support from the decision of the Supreme Court in **I.J. Divakar Vs. Government of Andhra Pradesh**[1]. In that case the Andhra Pradesh Service Commission had invited applications for filling posts of Junior Engineers and in response to the advertisement several candidates applied for the said posts and appeared at the viva-voce test. While the Commission was in process of finalising the select list, the Government of Andhra Pradesh issued a Government Order under the proviso to Article 320(3) of the Constitution excluding the posts of Junior Engineers from the purview of the Public Service Commission. The Government regularised the services of the Junior Engineers without subjecting them to any test written or oral. The candidates who had applied in response to the advertisement issued by the Commission challenged the validity of the Government Order excluding the post of Junior Engineers from the purview of the Commission and also the validity of the decision by the Government to regularise the services of the temporary employees. While conceding the Government's power of framing Regulations excluding any post under the proviso to Article 320 (3) it was urged before the Supreme Court that since the advertisement had been issued by the Commission inviting applications for the post of Junior Engineers and Commission was in process of selecting candidates, the power under the proviso to clause (3) of Article 320 of the Constitution could not be exercised. The Hon'ble Supreme Court rejected the contention with the following observation:

"The only contention urged was that at the time when the advertisement was issued the post of Junior Engineer was within the purview of the Commission and even if at a later date the post was withdrawn from the purview of the Commission it could not have any retrospective effect. There is no merit in this contention and we are broadly in agreement with the view of the Tribunal that inviting the applications for the post does not by itself create any right to the post in the candidate who in response to the advertisement makes an application. He only offers himself to be considered for the post. His application only makes him eligible for being considered for the post. It does not create any right in the candidate to the post".

7. Reliance was, however, placed for the petitioners on a decision of the Supreme Court in **State of Andhra Pradesh Vs. T. Ramakrishna Rao and others**[2]. The respondents therein were candidates for the post of District Munsif in Andhra Pradesh State Judicial Services which were to be filled in by direct recruitment as distinguished from recruitment by promotion. Rule 5 of the Andhra Pradesh Judicial Service Rules empowered the Commission to prepare a list of persons considered fit for appointment to the post of District

[1] AIR 1982 SC 1955

[2] AIR 1972 SC 2175.

Munsifs "after holding such examination, if any, as the Governor may think necessary". Rule 5 thus conferred on the Governor a discretion to decide whether an examination should be held or not or if held, whether it should be written or oral. The question arose as to whether Rule 5 was a conditional legislation properly promulgated in exercise of power under Article 234 and after consulting the High Court and the Commission. The Andhra Pradesh High Court held that Rule 5 in so far as it empowered the Government to determine whether an examination was necessary or not and the pattern of such an examination contravened Article 234 and was therefore, void, it further held that the said Government orders made under Rule 5 were also void having been issued under an invalid rule. In substance the High Court held that the Commission could not hold the examination under the said Government orders and issued a direction upon the Commission to that effect. The Governor subsequently issued an amended Rule 5 after consultation with the High Court. The commission then proposed to call fresh applications and hold the examination for the purpose of filling in the vacancies of District Munsifs. Before the High Court a question was raised that the candidates who had applied before the amended Rules could not be subjected to written examination under the amended Rule as it was prospective and therefore, it was urged that their applications should be proceeded with on the basis of oral test only. The High Court rejected the contentions as regards the written and oral test and held that the Commission was entitled to make a selection by first screening the candidates through the written test and make selection by oral test from amongst those who qualified for being called for interview. The High Court, however, directed the Commission to hold a separate examination for those who had applied under the amended Rule in respect of original 60 vacancies and to call separate applications and hold a separate examination for the remaining 140 vacancies. The reason given for such a direction was that if the respondents were required to file fresh applications and made to appear in the examination alongwith the rest of the applicants there would be violation of Article 14. The Supreme Court held that the direction given by the High Court was unsustainable. The Supreme Court further held that the Commission and State were perfectly justified in fixing a date for examination and calling for fresh applications for all the vacancies to enable the Commission to prepare an approved list under amended Rule 5 and observed thus :

"The only direction which becomes necessary is that if any of the respondents or other candidates who had applied in 1968 has by this time become age barred by reason of the delay in holding the examination, he should not be disqualified from appearing in the examination if he was of the qualified age at the time when he had filed his application."

8. These observations, in my opinion, were made by the Apex Court under Article 142 of the Constitution. This Court has no such power and cannot issue a direction which may lead to violation of statutory Rules if the direction is carried out. The Supreme Court has very clearly held that the candidates who had applied under unamended Rules did not acquire any right by merely applying for the post

either under that Rule or otherwise to be selected for the posts.

9. It is true that the respondents have given age relaxation in respect of certain posts even though under the Rules there exists no provision for age relaxation unlike Rule 9 of the U.P. Subordinate Executive Services (Naib Tehsildar) Rules, 1978 which enables the relaxation in age limit. There being no enabling provision in the Rules governing appointment to the post in question and even the requisition received by the Public Service Commission from the Transport Commissioner did not visualise for age relaxation to candidates who were within the prescribed age limit as per advertisement no. 2/96-97, relaxation in age limit if granted will be illegal. If the respondents granted age relaxation illegally that by itself is no ground to direct them to repeat the same illegality in respect of the petitioners as well. Article 14 of the Constitution is attracted in such cases.

10. So far as argument based on Section 6 of U.P. General Clauses Act, 1904 is concerned, suffice it to say that it saves "any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed" and "any remedy or any investigation or legal proceeding commenced before the repealing Act in respect of any such right privilege, obligation, liability ……". As stated (Supra) the petitioners acquired no right to be considered by the U.P. Public Service Commission merely because they had applied pursuant to the advertisement issued earlier by the U.P. Subordinate Services Commission. "What is unaffected by the repeal of a Statute is a right 'acquired' or 'accrued' under it and not a mere 'hope or expectation of' acquiring a right or liberty to apply for it. It is true that right to be considered for appointment is a fundamental right but right to be considered means right to be considered according to Rules. The petitioners became over-aged on the cut-off-date namely, 1.7.1999 as prescribed in the advertisement no. A-2/E-1/98-99 issued by the U.P. Public Service Commission on 6.9.1998 and as laid down in the U.P. Transport (Subordinate) Technical Service Rules, 1980 which defines 'year of recruitment' to mean 'the period of 12 months commencing from 1st day of July of a calendar year' and rule 10 of the said rule provides that a candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of more than 28 years on January 1 of the year in which recruitment is to be made, if the posts are advertised during the period January 1 to June 30 and on July 1 if the post are advertised during the period July 1 to December 31. The upper age limit has been enhanced to 32 years and Rules 10, to the extent of inconsistency with the U.P. State Services (Age Limit) Rules, 1972 as amended by Vth Amendment Rules, 1984, ceased to operate. The advertisement issued by the U.P. Public Service Commission cannot be treated as continuation of the advertisement/proceeding earlier issued/commenced by the U.P. Subordinate Services Commission. Benefit of age relaxation cannot be given to the petitioners except on pains of violating the fundamental right of equality of similarly circumstanced candidates who accepted the advertisement and did not apply being over aged.

11. In view of the above discussion, I find no merits and the writ petitions are

accordingly dismissed. I make no order as to cost.

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. 13847 of 1999

Dr. Anirudh Pradhan ...Petitioner
Versus
Chancellor, Purvanchal University, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Shri Gajendra Pratap

Counsel for the Respondents:
Shri S.P. Singh

Constitution of India, Article 226 - Power of Review - Vice Chancellor has no power to review its earlier order in absence of such power in statute - No power Review prescribed.
Held - Para 6
The Vice Chancellor has no power to review an order passed on merit except where the order sought to be reviewed was obtained by 'fraud or misrepresentation'. The petitioner was earlier declared by the Vice Chancellor vide order dated 18.07.1995 to be the senior most teacher of the college. The U.P. State Universities Act, 1973 and the Statutes made thereunder do not confer any power in the Vice Chancellor to review his decision.

Case Law discussed:
1997 ACJ - 908(FB)
JT 2000(3) SC 151
1994 RD 59

By the Court

1. The petitioner, a Reader in Hindu Degree College, Jamania, District Ghazipur staked his claim of being senior most teacher in the college. His claim came to be obligated by the Vice Chancellor, Purvanchal University as well as the Chancellor, Jaunpur by means of the orders impugned herein. The college is affiliated to the Purvanchal University, Jaunpur and the provisions of the U.P. State Universities Act, 1973 and those of the First Statutes of the Gorakhpur University are admittedly applicable to this college.

2. The case has a chequered history. The minimal facts necessary to highlight the controversy involved in the case may be stated thus. The petitioner was appointed Lecturer (Mathematics) in the college 21.02.1977 on the recommendation dated 27.05.1992 of a duly constituted selection committee he was appointed Reader pursuant to resolution dated 18.05.1992 of the Committee of Management. The petitioner took charge of the post of the Reader by submitting as application is respect thereof to the Principal of the college on 19.05.1992. The petitioner was so promoted in accordance with Government Order No. 91/G.I./15-11-88-14(5)/87 dated 07.01.1989. It is alleged in the petition that at the relevant time, the petitioner happened to be the only Reader in the college staking his name to be placed at S. No. 1 in the seniority list of the teachers of the college in view of Statute 18.05 read with Statute 11.16 of the Statutes of the First Statutes of the Deen Dayal Upadhyay University, Gorakhpur in short 'the Gorakhpur University' which are admittedly applicable to the Purvanchal University, Jaunpur. The Principal declined the request of the petitioner to be treated as the senior most teacher of the college by

order dated 14.08.1992 against which the petitioner preferred an appeal to the Vice Chancellor, Purvanchal university, Jaunpur. It appears that the said appeal remained pending for a long tine and feeling aggrieved by the failure of the Vice Chancellor to take decision within a reasonable time, the petitioner preferred a writ petition which came to be disposed of vide judgement and order dated 25.01.1995 directing the Vice Chancellor to decide the petitioner's appeal within a period of two months. The Vice Chancellor vide his order dated 22.08.1995 decided the appeal in favour of the petitioner and declared him senior to other teachers of the college in view of the Statute 18.05. But on receipt of representations from respondents teachers the Vice Chancellor by his subsequent order dated 31.08.1995 stayed the operation of the earlier order dated 22.08.1995. However, in a writ petition filed by the petitioner this Court by its interim order dated 24.01.1996 directed that the order of the Vice Chancellor dated 31.08.1995 would remain inoperative until further orders. The Vice Chancellor by his order dated 27.06.1996 directed the Principal of the College who was due to retire w.e.f. 30.06.1996 to hand over the charge of his post to Rama Shankar Singh, respondent no. 4.

3. The petitioner felt aggrieved and filed writ petition no. 21412 of 1996 challenging the order of the Vice Chancellor dated 27.06.1996. This court by a common judgement dated 23.07.1996 finally disposed of the two writ petitions thereby relegating the petitioner to avail of the alternative remedy under Section 68 of the U.P. State Universities Act, 1973 by means of representation to the Chancellor. As an interim measure, the court, however, directed that the order of the Vice Chancellor in favour of Dr. Rama Shankar Singh would be confined only for the time allowable under the statute depending upon final outcome of the reference under Section 68 of the State Universities Act, 1973. Statute 13.20, it may be observed gives a discretion to the Vice Chancellor to direct "any teacher" to act as officiating Principal for a period of three months. Thereafter the senior most teacher is to officiate as Principal in case regular Principal is not appointed in the meantime. In view of the judgement of the Court, the University by letter dated 02.08.1996 directed Sri Rama Shankar Singh to hand over the charge of post of the Principal to the petitioner who would act as such until assumption of charge by regularly appointed Principal or until an order was passed by the Vice Chancellor. Consequently upon said order the petitioner, it is stated, acquired charge of the post of Principal on 03.08.1996. Rama Shankar Singh preferred a Special Leave Petition against the judgement and order dated 23.07.1996 of the Court. It may be observed that on behalf of Shri Rama Shankar Singh an argument was advanced before the Supreme Court that the order of the Vice Chancellor dated 22.08.1995 was an ex-party order and therefore, it must be set aside. On behalf of the petitioner it was urged that the Vice Chancellor had no jurisdiction to review or recall his order. The Special Leave Petition came to be disposed of by the Supreme Court vide judgement and order dated 26.08.1996 with the direction that since the Vice Chancellor had entertained the application of Sri Ram Shankar Singh seeking review or recall of the order dated 22.08.1995 and had also passed an order of stay dated 31.08.1995, he must dispose

of the application filed by Rama Shankar Singh. The Supreme Court while disposing of the Special Leave Petition, however, made it clear that the question as to power of the Vice Chancellor to review or recall the order 22.08.1995 could be "raised by Sri Anirudh Pradhan before the Vice Chancellor himself".

4. Pursuant to the aforesaid direction of the Supreme Court the Vice Chancellor took up the matter and declared by his order dated 18.11.1996 that Sri N.N. Srivastava happened to be the senior most teacher of the college while Sri Rama Shankar Singh and the petitioner were held to be 2nd and 7th in the order of seniority. The Vice Chancellor, however, did not decide the question as to whether he had the jurisdiction to review his order dated 22.08.1995. The petitioner thereafter filed a writ petition being Civil Misc. Writ Petition No. 38916 of 1996 which came to be disposed of finally vide judgement and order dated 03.12.1996 with the direction that the petitioner had an alternative remedy under Section 68 of the U.P. State Universities Act and in the event of his availing the said remedy, the Chancellor would decide the representation "positively within a period of four months in accordance with law after hearing the parties by a speaking order". The Chancellor by his order dated 29.12.1997 remanded the matter to the Vice Chancellor for decision afresh after taking into consideration the issue as to whether he had the power to review/recall his earlier order dated 22.08.1985. The Vice Chancellor by his order dated 23.03.1998 maintained his earlier order dated 18.11.1996 and rejected the petitioner's application dated 10.01.1998 whereby he had sought for direction to be handed over charge of the post of Principal. The petitioner again challenged this order before the Chancellor by means of representation under Section 68 of the U.P. State Universities Act, 1973. The representation came to be rejected by Chancellor by means of the impugned order dated 11.03.1999.

We have heard **Sri Gajendra Pratap** for the petitioner and **Sri S.P. Singh** for the contesting respondents.

5. The Vice Chancellor in his order dated 23.3.1998 while maintaining his earlier order dated 18.11.1996 has heavily relied on Government order dated 16.12.1994 in which it has been provided that conferment of the designation of Reader to a Lecturer under the Government order would not affect his seniority. The Government order to the extent of repugnancy has however been held vide judgement dated 15.05.1997 to be ultra vires the provisions of Statute 18.05 of Deen Dayal Upadhyay University, Gorakhpur according to which Reader is to be treated senior to Lecturer. The Government Order dated 16.12.1994 having been held to be ultra vires, stands obliterated and therefore the decision taken by the Vice Chancellor relying upon the Government Order dated 16.12.1994 stands vitiated. Even the Chancellor has accepted this legal position in the impugned order but then instead of setting aside the order passed by the Vice Chancellor, the Chancellor relegated the matter to the State Government as in his opinion it involved a policy decision. The Chancellor, in our opinion, fell in to error in not giving effect to the law as declared by the High Court declaring the Government Order dated 16.12.1994 as ultra vires the Statutes to the extent of its repugnancy. Seniority of teachers in the

same cadre and same grade is to be determined with reference to the date of appointments and according to Statute 18.05 the Professor shall be deemed to be senior to every Reader and the Reader shall be deemed to be senior to every Lecturer. Concededly the petitioner was conferred the designation and grade of Reader earlier in point of time than the contesting respondents and therefore according to the Statute 18.05 he would be deemed to be senior to the contesting respondent albeit as Lecturer he was junior to the contesting respondents.

6. The impugned order passed by the Vice Chancellor cannot be sustained on yet another ground. The Vice Chancellor has no power to review an order passed on merit[1] except where the order sought to be reviewed was obtained by 'fraud or misrepresentation"[2]. The petitioner was earlier declared by the Vice Chancellor vide order dated 18.07.1995 to be the senior most teacher of the college. The U.P. State Universities Act, 1973 and the Statutes made thereunder do not confer any power in the Vice Chancellor to review his decision. The Vice Chancellor was not justified in recalling his earlier order dated 22.08.1995 in the absence of a clear cut finding that the earlier order was obtained by "fraud or misrepresentation of such a dimension as would affect the very basis of the claim". Mere fact that the interested persons were not heard before passing the order dated 22.08.1995 was not sufficient to recall it, if it was not "wrangled through fraud or misrepresentation of such a dimension that would affect the very basis of the claim". The Chancellor having accepted the petitioner's contention that the Government Order dated 16.12.1994 would not override the statutory provision contained in the Statute 18.05 ought to have set aside the order passed by the Vice Chancellor instead of referring the matter to the Government. Statutory obligation cast upon the chancellor under Section 68 of the U.P. State Universities Act, 1973 cannot be delegated to the Government even if the decision involves a policy decision. The observation that the question as to whether the Vice Chancellor had the power to review/recall his earlier order dated 22.08.1995 has become insignificant and subordinate is based on misconstruction of the judgement dated 15.05.1997 rendered by the Court in writ petition no. 5078 of 1995.

7. In the result the writ petition succeeds and is allowed. The impugned orders dated 13.11.1996 and 23.03.1998 passed by the Vice Chancellor and the one dated 11.03.1999 passed by the Chancellor are quashed. Respondents are directed to treat the petitioner as senior most teacher of the college and permit him to work as officiating Principal till selection and appointment of a regular Principal or till he attains the age of superannuation whichever is earlier.

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[1] Smt. Shiv Raji V. Deputy Director of Consolidation, 1997 ACJ 908 (F.B.)

[2] United India Insurance Co. Ltd. Versus Rajendra Singh, JT 2000(3) SC 151: Shafiq Versus Deputy Director of Consolidation, 1994 R.D.59.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2001

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

Civil Misc. Writ Petition No. 11939 of 1998

Jai Shanker Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Shri Kamlesh Kumar
Shri Siddarth Srivastava
Shri Shaileesh Verma

Counsel for the Respondents:
S.C.
Shri R.K. Tewari

Constitution of India-Article 226-person should not be allowed to be irreparably injured compelling him to starve by forestalling hearing of the case merely because respondents do not choose to file their reply.
Held - Para 13
Perusal of the impugned order dated 18th March 1998 (Annexure-2 to the Writ Petition) does not refer to any 'Particular document' or 'Act' in connection with the appointment the petitioner, which have been alleged to be fabricated or forged. Even if the First Information Report was lodged, the petitioner could not be thrown out of job unless he was made to face disciplinary enquiry as may be contemplated under law and finally after opportunity being afforded his services terminated. Asking a Government employee not to discharge his duty and throw him on the street, is not warranted under law.

By the Court

1. Heard Sri Siddarth Srivastava, learned counsel for the Petitioner, Sri R.K. Tewari, learned counsel for the Respondent and perused the record.

2. Jai Shanker Mishra (petitioner) filed this petition under Article 226, Constitution of India in March,1998 after serving a copy this petition, as required under Rules of Court in the office of Chief Standing Counsel.

3. No Counter Affidavit has been filed in spite of opportunity to the respondent.

4. Perusal of the order passed by the concerned Government authority dated 18th March, 1998 shows that petitioner was restrained from discharging his duties on the allegation that some First Information Report (no details given) was lodged against him on the ground of obtaining initial appointment with the help of alleged forged document (no details given). In pursuance, thereof, impugned order dated 24th March, 1998 (Annexure-1 to the Writ Petition) has been consequently issued by Prabhari Chikitsa Adhikari/Medical Officer, Rajkiya Homeopathic Chikitsylay Kathari Maharajganj on the ground that appointment of the petitioner was suspicious and he was not an employee of the Department.

5. Earlier Petitioner was asked not to discharge his duties till conclusion of an alleged enquiry on the allegation of his appointment being doubtful. This compelled him to file writ petition no. 11917 of 1993 (Jai Shankar Mishra Versus State of U.P. and others). In the said petition an interim order was passed, which reads:-

"It is decided that the respondent shall decide and dispose of the representation of the petitioner dated 01.02.1993 pending before the respondent no. 2 within two months from the date a copy of this order is presented before him. The petitioner is entitled to salary and employment admissible to him under Rules be paid regularly meanwhile."

6. Petitioner contends that in pursuance of the said interim order his salary was paid initially till August 1997 but it was stopped arbitrarily and illegally. There is no explanation as to why the respondents did not approach in the earlier writ petition for modifying interim order. Respondents thus acted in Contempt and their conduct was nothing short of an attempt to over reach interim order in that case. This is not having been done an action of the respondents in stopping the salary and the impugned orders cannot be justified, which obviously suffer from malice on record.

7. Petitioner as raised grievance for non-payment of salary by filing several representations (Annexure Nos. 7,8 and 9 to the writ petition). There being no respite, he was constrained to file petition in March,1998.

8. As noted above, no Counter Affidavit has been filed by the Respondents and learned Standing Counsel is not in a position to assist the court and inform the court as to what has been the fate of the enquiry/proceedings initiated on the basis of First Information report - referred to in the impugned order dated 18th March, 1998 (Annexure-2 to the Writ Petition),

9. Petitioner has stated in Para 3 of the writ petition that the impugned orders dated 24.03.1998 and 18.03.1998 were passed illegally and arbitrarily without giving proper opportunity of hearing. From the documents annexed with the petition, particularly the impugned orders (Annexure-1 and 2 to the Writ Petition), it is apparent that petitioner was given no opportunity before aforesaid orders were passed. More than two years have elapsed.

10. I sent for the file of above mentioned writ petition no. 11917 of 1993, Jai Shankar Mishra versus State of U.P. and others. The record, placed before the court today, of the said petition shows that no Counter Affidavit has been filed on behalf of the respondents. This petition is also decided along with this petition.

11. Learned counsel for the Parties (in both the petitions) are present and agree to it. With their consent both the petitions are finally decided. No doubt, it is a serious matter and Court cannot ignore that an employee, who has obtained appointment on the basis of fraud by manufacturing or forging/fabricated documents should be dealt severely, he deserves no leniency and in no case entitled to relief by invoking this Court extra-ordinary discretionary jurisdiction under Article 226, Constitution of India.

12. But at the same time, a person should not be allowed to be irreparably injured compelling him to starve by forestalling hearing of the case merely because respondents do not choose to file their reply.

13. Perusal of the impugned order dated 18th March 1998 (Annexure-2 to the Writ Petition) does not refer to any 'Particular document' or 'Act' in connection with the appointment the petitioner, which have been alleged to be fabricated or forged. Even if the First Information Report was lodged, the petitioner could not be thrown out of job unless he was made to face disciplinary enquiry as may be contemplated under law and finally after opportunity being afforded his services terminated. Asking a Government employee not to discharge his duty and throw him on the street, in not warranted under law.

14. In view of the above, the impugned orders dated 24.03.1998 and 18.03.1998 (Annexure-1 and 2 to the Writ Petition) cannot be sustained and liable to be quashed.

15. Consequently, the aforesaid impugned orders are hereby quashed and directions are issued to the respondents to allow the petitioners to join duties on his post, pay future salary month by month in accordance with law alongwith other staff and arrears of salary as may be found due to him, within two months.

16. It is made clear that this judgement does not preclude the respondents from taking suitable action, in accordance with law and hold disciplinary enquiry as may be permissible and warranted in the facts of the case.

17. Writ Petition stands allowed subject to direction and observation made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 20.03.2001

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

Second Appeal No. 1748 of 1988

Bekaru ...Petitioner
Versus
Shri Shiv Murat & others ...Respondents.

Counsel for the Petitioner:
Shri Jokhan Prasad

Counsel for the Respondents:
Shri V.P. Mathur
Shri R.N. Tripathi
Shri Markandey Rai

U.P. Consolidation of Holdings Act, SS. 5(2) and 4 read with Contract Act - Void and Voidable Contracts - Abatement of suit and appeal - Suit for cancellation of void sale deed - Appeal - Second Appeal - Notification under S.4 issued during the pendency of appeal - Appeal, held, abates.

Held - Para 5 and 6

A distinction can be made between cases where a documents is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to right or interests in land which are the subject - matter of consolidation proceedings.

Case Law :
(1973)2 SCC 535

By the Court

1. The respondent of the appeal has moved an application for abatement of the appeal under Section 5 (2) of U.P. Consolidation of Holdings Act (Hereinafter called the Act) mainly on the ground that during pendency of the appeal notification under Section 4 of the Act has been issued and by virtue of Section 5 (2) of the said Act, the appeal stands abated.

2. Heard learned counsel for the parties and perused the pleadings of the parties and judgement of the Courts below.

3. It is not disputed that notification under Section 4 of the Act has been issued in respect of the village in which land in suit is situate. The respondent has also filed the photocopy of the gazette notification dated 16.2.1991.

4. The suit out of which this Second Appeal arose was filed for cancellation of sale deed dated 9.9.1979. The case of the plaintiff was that the plot in suit originally belonged to Tamma @ Tamai. Smt Balraji was wife of Tamma @ Tamai. Tamma had no issue and therefore he had adopted plaintiff Bekaru. After the death of Tamma @ Tamai, the plaintiff inherited his property as his heirs. The defendant wrongly obtained sale deed of the land in suit from Smt. Balraji widow and Tamma @ Tamai, who had no right to execute sale deed.

5. It is not disputed that cancellation of sale deed was sought on the basis that Smt. Balraji executor of the sale deed had no authority to execute the sale deed. Therefore, according to the plaintiff the sale deed was void. Thus, the suit was filed for cancellation of void deed. IT was held by Apex Court in the Case of Gorakh Nath Dube vs. Hari Narain Singh and others, (1973) 2 SCC, 535 as below :-

"Questions relating to the validity of sale deeds, gift-deeds and wills can be gone into in proceedings before the consolidation authorities, because such questions naturally and necessarily arise and have to be decided in the course of adjudication on rights or interests in land which are the subject matter of consolidation proceedings.

A distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any court or authority and one where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be to the extent of the excess of power, invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to right or interests in land which are the subject - matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the dead and therefore, it must be held to be binding on

them so long as it is not cancelled by a court having the power to cancel it."

6. In this way, the Consolidation Authorities are competent to decide right, title and interest of the land in suit ignoring the sale deed, which is admittedly void and therefore the suit stands abated under Section 5(2) of the Act. The application is, accordingly, allowed and the appeal as well as suit stands abated under Section 5 (2) of U.P. Consolidation of Holdings Act.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 20.03.2001

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

First Appeal Form Order No. 420 of 1990

New India Assurance Co. and another
...Defendant/ Appellants
Versus
Lekhraj Singh Verma
...Claimant/ Respondent

Counsel for the Petitioner:
Shri A.K. Banerji

Counsel for the Respondents:

Motor Vehicles Act, 1988 Section 140 - No fault liability vis a vis Rule of strict liability - Award of Compensation even in the absence of negligence on part of ownere or driver of the Vehicle.

Held - Para 6 and 7

'No Fault Liability' envisaged in Section 140 of the MV Act is distinguishable from the Rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the Rule can be applied. It is statutory liability created without which the claimant should not get any amount under that count.

Case Law:
JT 2000 (1) SC 375
1861 - 1873 All ER 1

By the Court

1. This appeal has been directed against the judgement and award dated 21.2.1990 passed by Motor Accident Claims Tribunal/IInd A.D.J. Meerut in motor accident claim case no. 27 of 1988 awarding a sum of Rs. 80,000/- alongwith interest at the rate of Rs. 12% per annum on account of injury sustained by claimant in motor accident.

2. On 18.10.1985 claimant, Ex. Captain of military Service was coming from Begum Bridge side on a cycle and going towards Shastri Nagar in Merrut City. At about 12 noon near Prayag Nurshing Home Car No. UHO 131 owned by appellant no. 2 and insured with appellant no. 1 due to rash and negligent driving of the driver dashed against the claimant due to which he fell down on the road and sustained injuries. He was treated in the hospital till 14.12.1985, but still could not be cured. His hip bone was fractured and one of leg has shortened by 2 1/2 inches. He also took prolonged treatment in B.H.U. and another hospital.

The claimant filed claim petition for Rs. 3,05,000/-.

3. The Tribunal on considering the evidence of the parties held that accident took place due to rash and negligent driving of the car in question and there was no negligence on the part of the claimant. On the quantum of compensation the Tribunal awarded a sum of Rs. 5,000/- for medicines purchased by

the claimant, Rs. 5,000/- for medicines to be taken in future, Rs. 5,000/- for mental shock, Rs. 10,000/- for pain and mental pain, Rs. 50,000/- for pains and suffering and Rs. 5,000/- incurred in special diet, total Rs. 80,000/-.

The above finding has been challenged in this F.A.F.O.

4. Heard the learned counsel for the appellants and perused the judgement.

5. The learned counsel for the appellants contended that there was no negligence on the part of the driver of the car and therefore, claimant was not entitled to any compensation. The Tribunal on considering the evidence of the parties has recorded a finding of fact that accident took place due to rash and negligent driving of the driver of the car. Assuming that there was no negligence, according to recent judgement of the Apex Court in Smt. Kaushnuma Begum and others Vs. The New India Assurance Co. Ltd. and others J.T. 2001 (1) SC 375, it must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the motor vehicles. There are other premises for such cause of action. A question was posed in the said case even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident ? Held that this question depends upon how far the Rule in Rylands V. Fletcher (1861-1873 All England Reports 1) can apply in motor accident cases. The said Rule is summarised as below :-

"The true rule of law is that the person who for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or perhaps that the escape was the consequence of vis major, or the act of God, but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient".

6. It was further held that 'No Fault Liability' envisaged in Section 140 of the MV Act is distinguishable from the Rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the Rule can be applied. It is statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the MV Act permits that compensation paid under 'No Fault Liability' can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from Section 140 of the MV Act, a victim in an accident which occurred while using a motor vehicle is entitled to get compensation from a Tribunal unless any one of the exceptions would apply. The

Tribunal and the High Court have, therefore gone into error in divesting the claimants of the compensation payable to them.

7. In this way, the claimant was entitled to claim compensation even in the absence of negligence on the part of owner or driver of the vehicle.

8. Regarding compensation it was contended that the Tribunal had doubly allowed the compensation on same count. I have gone through the judgement of the Tribunal and found that compensation has rightly been allowed on separate counts which are permissible under Motor Vehicles Act.

There is no force in the appeal and the appeal in dismissed accordingly.

Stay order dated 27.8.1999 stands vacated.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 04.04.2001

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

Criminal Misc. Writ Petition No. 1969 of 2001

Ram Paita Kanaujia, Constable No. 1769 ...Petitioner

Versus

State of U.P. through Senior Superintendent of Police, Varanasi and others ...Respondents.

Counsel for the Petitioner:
Shri R.C. Upadhyay
Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226-Writ by Police Constable Challenging the FIR under section 376/452/506 I.P.C.-FIR showing prima facie case - Petition dismissed.

Held - Para 3 and 4

A large number of petitions are coming up before this Court with allegations against the Police that they are behaving like bandits, thieves, rapist and petty criminals. In similar Crl. Misc. writ Petition No. 1629 of 2001 (Mahesh Chandra, Hd. Constable V. State) decided on 26.03.2001 and Crl. Misc. Writ Petition No. 894 of 2001 (Rama Kant Misra V. State) decided on 01/03/2001 we condemned this sad state of affairs prevailing in our country. The way in which a large number of Police personnel are behaving reminds us of the days of the later Mughals when Thugs and Pindaris were looting the public and terrorizing them in many ways. The Police are supposed to protect the people and not to rape, black mail or loot them. We do not mean to say that there are no good policeman but it seems that they are in the minority. The majority of the policemen are not behaving properly at all. The Director General of Police must look into this and pass appropriate orders to check these kinds of criminal activities of policemen. We are living in a civilised society where the rule of law prevails and it is high time that the police also start behaving in a civilised manner.

Since the allegation in the FIR make out a prima facie case we cannot interfere. The petition is dismissed. However, the observations in this judgement will not influence the Court hearing the petitioner's bail application or trail.

By the Court

1. Heard learned counsel for the petitione.

The petitioner has challenged the impugned FIR dated 15.03.2001 (Annexure-1 to the petition) relating to Case Crime No. 33 of 2001 under section 376/452/506 IPC, Police Station Sarnath, dictrict Varanasi. The FIR reads as follows :-

सेवा में,

श्रीमान थानाध्यक्ष,

सारनाथ, वाराणसी ।

महोदय,

निवेदन है कि प्रार्थिनी आशा देवी पुत्री पुन्नी लाल राजभर ग्राम बरडपुर थाना सारनाथ जिला वाराणसी की रहने वाली हूं गत दिनांक १०-३-२००१ को भोर में तीन बजे थाना सारनाथ सिपाही जिसको लोग कन्नौजिया कहते हैं शराब पीकर हाथ में कट्टा लिये हुये घर का दरवाजा तोडकर प्रार्थिनी के घर में घुस गया और जबरदस्ती कट्टे के बल पर प्रार्थिनी के साथ बलात्कार किया प्रार्थिनी के पास उसकी दो छोटी बहने भी सोती थी जिनका नाम रेखा उम्र ग्यारह साल व कल्लो उम्र सात साल भी जाग गयी थी उक्त सिपाही उनको भी कट्टा दिखाकर डराना धमकाना और चिल्लाने से रोका । उसी समय प्रार्थिनी का भाई अशोक भी अपनी चाय की दूकान से घर वापस आया था घर में हो रही आवाज को सुनकर अन्दर आया तो उसको भी मुलजिम कन्नौजिया कट्टा दिखाकर बाहर भगा दिया और बलात्कार करने के बाद प्रार्थिनी को धमकी देते हुये चला गया कि अगर तुम चिल्लाओगी और थाने में रिपोर्ट करोगी तो तुम्हारे सहित पूरे परिवार को जान से मार देंगे । घटना के समय प्रार्थिनी के घर में डिबरी जल रही थी जिसकी रोशनी में प्रार्थिनी एवं उसके दोनों छोटी बहनें एवं भाई अशोक ने मुलजिम सिपाही कन्नौजिया को देखा व पहचाना । मुलजिम सिपाही कन्नौजिया की धमकी की वजह से प्रार्थिनी समय के अन्दर रिपोर्ट दर्ज नहीं करा सकी ।

अतः श्रीमान जी से प्रार्थना है कि घटना के सम्बन्ध में रिपोर्ट दर्ज कर मुलजिमान सिपाही कन्नौजिया के खिलाफ उचित कार्यवाही करने की कृपा करें प्रार्थिनी आशादेवी ।

दिनांक १५-३-२००१ लेखक अतुल सिंह सारनाथ वाराणसी ।

2. A perusal of the FIR shows that the allegations therein are that on 10.03.2001 at 3.00 a.m. the petitioner who is a Police Constable came to the house of the first informant in a drunken state with a Katta in his hand, broke the door of the house of the first informant and entered the house and raped the first informant at the Katta point. The two sisters of the first informant namely Rekha aged about 11 years and Kallo aged about 7 years who were sleeping there woke up, and the petitioner threatened both the girls with his Katta. The first informant's brother Ashok came there and he was also threatened by the petitioner by showing him the Katta. The petitioner then threatened the first informant saying that if she reported the matter then her entire family will be killed.

3. A large number of petitions are coming up before this Court with allegations against the Police that they are behaving like bandits, thieves, rapist and petty criminals. In similar Crl. Misc. Writ Petition No. 1629 of 2001 (Mahesh Chandra, Hd. Constable V. State) decided on 26.03.2001 and Crl. Misc. Writ Petition No. 894 of 2001 (Rama Kant Misra V. State) decided on 01/03/2001 we condemned this sad state of affairs prevailing in our country. The way in which a large number of Police personnel are behaving reminds us of the days of the later Mughals when Thugs and Pindaris were looting the public and terrorizing them in many ways. The Police are supposed to protect the people and not to rape, black mail or loot them. We do not mean to say that there are no good policemen but it seems that they are in the

minority. The majority of the policemen are not behaving properly at all. The Director General of Police must look into this and pass appropriate orders to check these kinds of criminal activities of policemen. We are living in a civilised society where the rule of law prevails and it is high time that the police also start behaving in a civilized manner.

4. Since the allegation in the FIR make out a prima facie case we cannot interfere. The petition is dismissed. However, the observations in this judgement will not influence the Court hearing the petitioner's bail application or trial.

5. Let the Registrar General of this Court send a copy of this judgement to the Director General of Police, U.P. who will issue stern directions to all police personnel that strong action will be taken against those policemen committing such crimes.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.4.2001

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

Civil Revision No. 109 of 2001.

Ram Babu Jain ...Defendant-Revisionist
Versus
Virendra Kumar Gupta and others
...Plaintiff-Respondents

Counsel for the Revisionist:
Shri Manoj Misra

Counsel for the Respondents:
Shri A.K. Gupta

(A) U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, Section 2 Explanation 1 (a) – Applicability

Held – Para 10.

As against this, the first assessment of the building in question was filed by the respondents, which shows that the shop was first assessed to the tax on 1.10.81. Therefore, according to the Explanation mentioned above for the purposes of this Act, the date of completion of the constructions shall be deemed to be 1.10.81. The suit having been filed within ten years i.e. on 30.5.91, U.P. Act No. 13 of 1972 does not apply to the premises in suit. Therefore, the court below has rightly held that U.P. Act No. 13 of 1972 does not apply to the premises in suit. There is no reason to interfere in the finding.

(B) Notice – of termination of Tenancy – Validity.

Held – Para 12

It has not been pleaded in the W.S. that the notice of termination of tenancy is not of the entire premises. It is also not specifically pleaded in the W.S. as to which portion of the premises the notice does not relate or it relates to some portion not in the tenancy of the revisionist. The notice cannot be held to be invalid on this ground.

By the Court

1. This is a revision under Section 25 of the Provincial Small Cause Courts Act, 1887 against the judgment and decree dated 25.1.2001 passed by the J.S.C.C./ IV Additional District Judge, Aligarh in S.C.C. Suit No. 38 of 1991.

2. The premises in dispute is shop no. 1786-B situated within the limits of

Nagar Palika Hathras. The respondents filed the suit for eviction against the revisionist mainly on the ground that the shop was imposed tax for the first time on 1.10.81. That the suit was filed on 30.5.91 and therefore, U.P. Act No. 13 of 1972 does not apply to the premises in suit. That the tenancy has been terminated by the notice.

3. The revisionist contested the suit alleging that the shop in dispute is an old construction. Previously Jwala Prasad was the tenant of the shop and thereafter the revisionist is a tenant. That the notice is invalid.

4. The trial-court framed necessary issues and recorded the findings in favour of the respondents on all issues and decreed the suit. Aggrieved by it, the present revision has been preferred.

5. I have heard Sri Manoj Misra, learned counsel for the revisionist and Sri A.K. Gupta, learned counsel for the respondents.

6. The first contention in this revision is that the premises in dispute is an old construction and U.P. Act 13 of 1972 applies to the same. The learned counsel for the revisionist in support of the argument has referred to the assessment of the Municipal Board Annexure – 5 to the affidavit in which in columns nos. 13 and 14 it is mentioned that the assessment has been done form 1st April, 1981. It is contended that this document shows that the shop was first assessed on 01.10.81 and therefore, the suit being filed after ten years on 01.10.81, U.P. Act No. 13 of 1972 applies to the premises. It is further contended that the applicant moved an application before the trial court for summoning the records concerning the construction and assessment of the building in question. The copy of that application is annexure – 9 to the affidavit. It is mentioned in this application that the building in question was assessed to house-tax much before 01.10.81 and its construction was reported and recorded in the Municipal record much before 01.10.81. That it is necessary to summon those records. His application was wrongly rejected by the trial court.

7. Learned counsel for the revisionist in support of his argument regarding the date of construction has referred to Section 2 of U.P. Act No. 13 of 1972 which provides that the Act shall not apply to a building during the period of ten years from the date on which its construction is completed. The Explanation 1 (a) is regarding the date of completion of the construction, which reads as follows:

"Explanation –1 for the purposes of this section:

(a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect, and where the said dates are different, the earliest of the said date, and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purpose of supervising the construction or guarding the building under construction) for the first time."

8. It is contended that Annexure – 5 shows that the completion of construction was recorded from 1st April, 1981 and therefore, the building is covered by U.P. Act No. 13 of 1972. It is also contended that this document was not considered by the court below, and has also erred in rejecting the application of the revisionist to summon the records of the Municipal Board.

9. I have considered the arguments of the learned counsel for the revisionist. It appears that in columns nos. 13 and 14 of the assessment Annexure-5 effective from 1st April, 1981 has been mentioned. However, these columns are regarding electric connection and the tax. They are not regarding the date of completion of construction or report of completion of construction. The application Annexure-9 for summoning the record is a vague application. It has not been mentioned as to what papers exist in the record of the Municipal Board and whether the revisionist has seen that papers. A vague application was moved to summon the entire records regarding the building in dispute. It was also not supported by the affidavit that the copy of the said document cannot be issued to the applicant. Therefore, that application was rightly rejected and there was no question for summoning the entire records of the Municipal Board of the building in question. The suit was filed in the year 1992 and the application was moved after a long delay on 25.2.99 with the purpose of delaying the disposal of the case. The revisionist could have filed the certified copy. The application was, therefore, rightly rejected.

10. As against this, the first assessment of the building in question was filed by the respondents, which shows that the shop was first assessed to the tax on 01.10.81. Therefore, according to the Explanation mentioned above for the purposes of this Act, the date of completion of the constructions shall be deemed to be 01.10.81. The suit having been filed within ten years i.e. on 30.5.91, U.P. Act No. 13 of 1972 does not apply to the premises in suit. Therefore, the court below has rightly held that U.P. Act No. 13 of 1972 does not apply to the premises in suit. There is no reason to interfere in the finding.

11. Now coming to the second question, it has been argued that the notice is invalid firstly for the reason that the tenancy was not terminated by the said notice. Copy of the notice, dated 5.1.91 has been filed, which is Annexure-4 to the affidavit. In this notice it is clearly mentioned that the respondents are in need of the premises and that they do not want to keep the revisionist as tenant any more. The tenancy has been terminated on the expiry of thirty days. The revisionist was asked to deliver the possession of the shop in dispute after expiry of thirty days, which shows that the revisionist was permitted to occupy the premises for thirty days and therefore, the notice were not invalid.

12. The last contention of the learned counsel for the revisionist regarding the validity of the notice is that in para 4 the plaint it is pleaded by the respondents that the revisionist surrendered a portion measuring 2’6” wide land towards south and remained tenant of the remaining portion. It is contended that the notice of termination of tenancy is of the entire premises and therefore, it is invalid. This argument of

the learned counsel can not be accepted. It has not been pleaded in the W.S. that the notice of termination of tenancy is not of the entire premises. It is also not specifically pleaded in the W.S. as to which portion of the premises the notice does not relate or it relates to some portion not in the tenancy of the revisionist. The notice cannot be held to be invalid on this ground.

13. After considering the entire arguments, I do not find any ground to interfere in the judgment and decree of the court below. The revision is fit to be dismissed. However, it may be mentioned that it has also been argued by the learned counsel for the revisionist that the revisionist is an old tenant of the premises in dispute and is carrying on his business.

14. In view of this, the revision is dismissed. However, the revisionist is allowed three months' time to vacate the premises in dispute.

CRIMINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.4.2001

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

Criminal Misc. Writ No. 2096 of 2001.

Pawan Kumar Gupta ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Shri A.D. Giri (Snr Advocate)
Shri Shashank Shekhar Giri

Counsel for the Respondents:
Shri Sanjay Kumar Singh

Constitution of India – Article 21 – there cannot be any absolute proposition in law that a person challenging a detention order under the N.S.A. or COFEPOSA must in all cases surrender before he can file a petition. (Held in para – 5).

There cannot be any absolute proposition in law that a person challenging a detention order under the N.S.A. or COFEPOSA must in all cases surrender before he can file a petition.

By the Court

1. The petitioner in this petition has challenged the impugned detention order dated 16.2.2001 passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

2. Heard Sri A.D. Giri learned Senior Advocate, for the petitioner and Sri Sanjay Kumar Singh for the Union of India at length and perused the petition and annexures thereto.

3. Learned counsel for the respondents is granted three weeks time to file counter affidavit. Connect with Criminal Misc. Writ Petition No. 2040 of 2001, Ashwani Kumar Jain Vs. Union of India and other and list immediately thereafter.

4. Sri A.D. Giri has prayed that the petitioner should not be arrested during the pendency of this petition. On the other hand learned counsel for the respondents has relied upon a decision of the Supreme Court in Additional Secretary to the Government of India vs. Smt. Alka Subhash Godia and another. 1992 Supp. (1) SCC 496 and has submitted that

unless the petitioner surrenders he cannot challenge the impugned detention order.

5. In our opinion there cannot be any absolute proposition in law that a person challenging a detention order under the N.S.A. or COFEPOSA must in all cases surrender before he can file a petition. In our country Article 21 of the Constitution guarantees the right to life and liberty and this is the most Important of all fundamental rights provided in the Constitution. Hence, individual liberty is not to be lightly interfered with, and hence, there cannot be any absolute proposition that a detention order can never be challenged without first surrendering before the authorities. It all depends on the facts of each case and no absolute proposition can be laid down in this connection.

6. Learned counsel for the respondents then submitted that a person sought to be detained has no right to get a copy of the grounds of detention before his arrest and detention. Since we have already observed that there cannot be any absolute legal proposition that a detention order can never be challenged without first surrendering before the authorities, it follows as a corollary that the ground for detention can be communicated by annexing the same in the counter affidavit to be filed by the Government in such cases. Since copy of the counter affidavit will be served on the learned counsel for the petitioner this itself will tantamount to communication of the grounds to the detenu because the learned counsel for the petitioner can communicate these grounds annexed to the counter affidavit, to the petitioner.

7. On the facts and circumstances of the case we direct that till the next date of listing the petitioner shall not be arrested in pursuance of the impugned detention order dated 16.2.2001.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30 MARCH, 2001

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE U.S. TRIPATHI, J.

First Appeal No. 257 of 2001

Ravi Saran Prasad alias Kishore
...Defendant-Appellant
Versus
Smt. Rasmi Singh
...Plaintiff-Respondent

Counsel for the Appellant:
Shri Anupam Kulshreshtha

Counsel for the Respondent:

Family Court Act-Section (195)- No appeal is maintainable against the order allowing the application u/s 24/26 of Hindu Marriage Act.

Held- Para 8

A conjoint reading of Sub-section (1) and Sub-section (5) makes us crystal clear that only one appeal lies to the High court, that no appeal or revision lies except as provided under Sub-section (1) from any judgement, order of decree of a Family Court, and further that no appeal lies against such judgement or order which is interlocutory. It cannot be said that the Legislature has created an appellate form in 1984 against the orders passed under Section 24 of the Hindu Marriage Act nulifying Section 28 of that Act contrary to the object of enactment of the Act as stated in the Bill.

By the Court

In this Appeal under Section 19 (1) of the Family Courts Act, 1984, the husband assails validity of an order dated 5th March,2001 passed by Sri R.B. Pandey, Judge, Family Court, Agra in Suit No.446 of 1998 allowing the application dated 3rd May, 1999 filed by the Respondent-wife under Sections 24/26 of the Hindu Marriage Act, 1955 commanding the Appellant to pay a sum of Rs. 1200/- (Rs. 800/- per month for her and Rs. 400/- per month for their son) for maintenance with effect from the date of her application, besides a lump sum of Rs. 1500/-towards litigation expenses.

2. The office has raised an objection that in view of Section 19 (5) of the Family Courts Act this appeal is not maintainable.

3. Sri Anupam Kulshrestha, learned counsel for the Appellant, contests the objection aforementioned by submitting the true it is that the impugned order was passed under Section 24 of the Hindu Marriage Act but in view of the Division Bench decision of the Madhya Pradesh High Court in Raghvendra Singh Choudhary Versus Smt. Seema Bai AIR 1989 Madhya Pradesh 259 holding that an appeal will lie against an interlocutory order, if it is a judgement and that the order passed under Section 24 of the Hindu Marriage Act is a judgment as it decides the question of maintenance during the pendency of the suit, therefore, there is a final adjudication.

4. Having regard to the provisions as contained in Sections 28 of the Hindu Marriage Act, 1955 and 19 (1) and (5) of the Family Courts Act, 1984 and the object of this Act as stated in the Bill that only one appeal shall lie and that too before the High Court we respectfully differ from the ratio laid down by the Madhya Pradesh High Court which in its turn has placed reliance on a Bombay High Court Judgment in Dinesh Gijubhai Mehta Versus Smt. Usha Dinesh Mehta AIR 1979 Bombay 173 and the Hon'ble Supreme Court's decision in Shah Babulal Khimji V. Janyaben D. Kania AIR 1981 S.C. 1786, the last one is clearly distinguishable.

5. Section 24 of the Hindu Marriage Act, under which the order in question has been passed, reads thus :-

"24. Maintenance pendente lite and expenses of proceedings – Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding,it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable."

6. It is well settled that appeal and/or revision is a creature of statute. Section 28 of the Act aforementioned reads thus :-

"28. Appeals from decrees and orders – (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil

jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily from the decisions of the court given in the exercise of its original civil jurisdiction.

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

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

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

Apparently the Legislature has excluded preference of an appeal under the Act aforementioned against an order passed under Section 24 of the Act.

7. The Bill for enactment of the Family Courts Act, interlia, stated providing of only one right of appeal which shall lie to the High Court and the parliament enacted the Family Courts Act in 1984, Section 19 of which Act reads thus:-

"19. Appeal – (1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);

Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.

(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court

(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.

(6) An appeal preferred under sub-section (1) shall be heard by a Bench consisting of two or more judges."

A conjoint reading of sub section (1) and Sub-Section (5) makes us crystal clear that only one appeal lies to the High Court; that no appeal or revision lies except as provided under Sub-section (1) from any judgment, order or decree of a

Family Court; and further that no appeal lies against such judgment or order which is interlocutory. It cannot be said that the Legislature has created an appellate form in 1984 against the orders passed under Section 24 of the Hindu Marriage Act nullifying Section 28 of that Act contrary to the object of enactment of the Act as stated in the Bill.

8. Thus, we uphold the objection of the Stamp Reporter that this appeal is not maintainable under Section 19 (1) of the Family Courts Act, 1984 and dismiss it as not maintainable.

9. It is needless to clarify that it will be open for a litigant like the Appellant to knock the doors of this Court under Article 226 and /or Article 227 of the Constitution of India provided a suitable case for interference is made out against an order passed under Section 24 of the Hidnu Marriage Act.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: APRIL 9, 2001

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

Criminal Misc. Writ Petition No. 1980 of 2001

Brij Lal Verma ...Petitioner
Versus
S.P., C.B.I., STU-XV, Chandigarh and others ...Respondent

Counsel for the Petitioner :
Shri Shashi Shekhar Tiwari
Shri Shashi Nandan

Counsel for the Respondents:
S.C.

Shri Girdhar Nath

Constitution of India-Article 226-writ jurisdiction is discretionary jurisdiction and this Court is not inclined to exercise its jurisdiction in such matter where there is allegation of gross violation of Article 21 of the constitution. (Held in para 8)

By the Court

1. Heard learned counsel for the parties.

2. The petitioner is presently posted as S.O. police station Pachokhara district Firozabad. The incident in question occurred on 12/13.10.1993 when a Sikh person Harjeet Singh was killed in a police encounter by a police party and an F.I.R. was lodged on 13.10.1993 being case crime no. 327 of 1993 at police station puwayan, district Shahjahanpur. It is alleged in paragraph 5 of the writ petition that after investigation the police submitted a final report before the Magistrate concerned and the same was accepted on 29.5.1995 vide Annexure 2 to the writ petition.

3. It appears that a writ petition was filed in the Punjab and Haryana High Court by the father of deceased Harjeet Singh asserting that his son had been picked up by the Punjab Police which handed him over to the U.P. Police and thereafter he was killed in Shahjahanpur in U.P. in a false encounter. True copy of the judgment of the Punjab High Court dated 27.5.1998 is Annexure 3 to the writ petition. The Punjab High Court directed an investigation by the C.B.I. to enquire and investigate the circumstances leading to the killing of Harjeet Singh and to submit a report before the High Court

within a period of six months. The States of Punjab and Uttar Pradesh were also directed to render all necessary assistance in the investigation. Thereafter on 1.8.1998 an F.I.R. was lodged, copy of which is Annexure 4 to the writ petition. The petitioner's name was not in the F.I.R. but he was asked to appear before the C.B.I. Admittedly the petitioner was one of the police party which is said to have killed Harjeet Singh in Shahjahanpur vide paragraph 12 of the petition. The petitioner was asked to appear before the C.B.I. for a lie detection test but he refused alleging that his statement under Section 161 Cr.P.C. had already been recorded. True copy of the letter of the petitioner dated 1.3.2000 is Annexure 8 to the writ petition.

4. The Special Judicial Magistrate, C.B.I., Patiyala issued a notice dated 14.5.2000 to the petitioner to appear on 25.5.2000. True copy of the notice is Annexure 10 to the petition. However, the petitioner did not appear in that Court and hence bailable warrant was issued on 24.8.2000 against him directing the C.B.I. authorities to arrest him and produce him on 14.9.2000. The petitioner appeared before the Court of the Spl. Judicial Magistrage, Patiyala on 14.9.2000 and the case was adjourned to 20.9.2000 vide Annexure 11 to the writ petition. On 20.9.2000 an application was submitted by the C.B.I. for directing the petitioner to give his handwriting/signature. However, the same was dismissed vide Annexure 12. On 29.1.2001 the S.P., C.B.I. wrote a letter to the S.P. Firozabad requesting him to direct the petitioner to attend the C.B.I. office at Chandigarh on 8.2.2001 for the purpose of investigation vide Annexure 13. However, the petitioner did not appear alleging that he was afraid of being killed by encounter by terrorists. On 19.3.2001 a wireless message was received in the office of the S.P., Firozabad to instruct the petitioner to appear in the C.B.I. office on any working day in the last week of March 2001 vide Annexure 15 to the petition. Since the petitioner did not appear a warrant of arrest has been issued by Spl. Judicial Magistrate, C.B.I., Patiyala with a direction to produce the petitioner on 30.3.2001 as he stands charged for offences under Section 120B read with Section 364, and 302 I.P.C. True copy of the warrant of arrest is Annexure 16 to the writ petition.

5. It is alleged in paragraph 25 of the petition that the entire proceeding drawn by the C.B.I. at Chandigrah is without jurisdiction as no part of the offence has been committed within the State of Punjab and Harayana as admittedly the alleged encounter took place in district Shahjahanpur in U.P. It is further alleged that the Punjab High Court had no jurisdiction to entertain the writ no. 1118 of 1996 as no part of the cause of action arose in the State of Punjab.

6. We are not in agreement with the submission of the learned counsel for the petitioner. The allegations regarding the killing of Harjeet Singh are that he was dragged form his house in his native village in Punjab and brought to district Shahjahanpur in U.P. where he was killed in the alleged encounter. Since the allegations are that Harjeet Singh was caught in Punjab and forcibly brought to Shahjahanpur where he was killed in our opinion part of the cause of offence certainly arose in Pubjab State. Had Harjeet Singh not been caught in Punjab he could obviously not have been brought to Shahjahanpur and killed there.

7. Learned counsel for the petitioner relied on the decision of the Supreme court in Navinchandra N. Majithia vs. State of Maharashtra 2000 (7) S C C 640. In our opinion this decision does not help the petitioner. This decision itself says that the High Court will have jurisdiction if any part of the cause of action arises within the territorial limits of its jurisdiction. Since admittedly Harjeet Singh was caught and forcibly brought away from Punjab, in our opinion part of the cause of action does arise within the territorial jurisdiction of the Punjab High Court. Moreover this decision of the Punjab High court does not seem to have been challenged in the Supreme court and hence it is not open to the petitioner to challenge that decision in a collateral proceeding. In our opinion, the Court of Special Judicial Magistrate, C.B.I., Patiyala certainly has jurisdiction in the matter as part of the cause of action admittedly arose in Punjab.

8. Hence we are not inclined to exercise our discretion under Article 226 in this case. Moreover writ jurisdiction is discretionary jurisdiction and this Court is not inclined to exercise its jurisdiction in such matter where there is allegation of gross violation of Article 21 of the Constitution.

9. We are pained to say that the police in this country is often behaving in an illegal manner. While not commenting on the facts of the present case we would certainly like to say that often innocent persons are murdered by the police in the name of encounter. These so called encounters are nothing but murder by the police, and the police have no right to commit murder. A large number of cases have been coming to this Court where the allegations are that the police persons are indulged in committing dacoity, theft, forcible extraction of money (vasuli), rape, black-mail and even murder in the name of false encounters.

10. If crimes are committed by ordinary people no doubt ordinary punishment should be given but if the offence is committed by the police persons much harsher punishment should be given to them, because they are doing an act contrary to their duties.

11. The police is supposed to protect the people and uphold the law, but if they themselves become criminals then that is the end of civilized society. As the Bible says "If the salt has lost its flavour, wherewith shall it be salted", or as the ancient Romans used to say "who will guard the Praetorian guards." No doubt there are some good policemen in the police force but they appear to be in the minority.

12. We are of the view that in cases where false encounter is found proved against police persons in a trail they must be given death sentence treating it as rarest of the rare cases.

13. We also warn all police personnel in the country that they will not be excused for committing murder in the name of encounter on the pretext that they were carrying out orders of superior officers or politicians, however high. In the Nuremberg Trails the Nazi war criminals took the defence or 'orders are order', nevertheless they were hanged. In our opinion if a policemen is given an illegal order by any superior to do an encounter it is his duty to refuse to carry out such illegal order, otherwise he will

be charged for murder, and if found guilty sentenced to death. The 'encounter' philosophy is a criminal philosophy, and all policemen must know this. Trigger happy policemen who think they can kill innocent people in the name of 'encounter' and get away with it should know that the gallows await them.

There is no force in this petition. It is dismissed.

14. Let a copy of this order be sent to the Director General of Police, U.P. forthwith and the Director General will send copy of this judgment to all I.G., D.I.G., S.S.P. and S.P.s in the State with the stern direction to comply with this judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 27.3.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. JAIN, J.

Civil Misc. Writ Petition No. 22586 of 2000

Dvijendra Singh and others...Petitioners
Versus
State of U.P. and others ...Respondents

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

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

Constitution of India, Article 226 – appointment – Selection for the Post of Assistant– Prosecution Officer completed – all 99 candidates joined but 9 persons out of them resigned – within one year– petitioner being lower in rank can be appointed.

Held – Para 3

In our opinion, the ratio of that decision will apply to the facts of the present case. The only difference between that case and the present case is that in civil misc. writ petition no. 32077 of 2000 four vacancies remained on account of non-joining of four selected person, whereas in the present case all the person selected jointed but five persons later resigned within one year of the life of the panel. In our opinion, this distinction will make no difference and hence the ratio of the decision of Ved Prakash Tripathi's case will apply to this case also.

Case law relied on:
W.P. 32077 of 2000 decided on 20.12.2000

By the Court

1. Heard learned counsel for the petitioners and learned standing counsel.

2. Petitioners have prayed that a mandamus should be issued for appointing them as Assistant Prosecuting Officers. It appears that an advertisement was issued on 23.12.1998 for the said post vide Annexure –1. The petitioners appeared in the said examination and they passed in the written test and then they appeared in the interview. The final result was prepared vide Annexure – 3 containing the names of 99 persons, who were selected against 99 vacancies.

3. It has been submitted that five of these 99 persons joined their posts but they resigned within one year of the life of the list and hence five persons lower down in the select list should have been offered appointments on those posts. Learned counsel for the petitioners relied

on a Division Bench decision of this Court in Ved Prakash Tripathi vs. State of U.P. and others, Civil Misc. Writ Petition No. 32077 of 2000, decided on 20.12.2000. In our opinion, the ratio of that decision will apply to the facts of the present case. The only difference between that case and the present case is that in Civil Misc. Writ Petition No. 32077 of 2000 four vacancies remained on account of non-joining of four selected persons, whereas in the present case all the persons selected joined but five persons later resigned within one year of the life of the panel. In our opinion, this distinction will make no difference and hence the ratio of the decision of Ved Prakash Tripathi's case will apply to this case also. Hence we issue a mandamus to the U.P. Public Service Commission, Allahabad to recommend the names of five persons in accordance with merit as per the select list and those, person will be appointed forthwith.

The writ petition is, accordingly allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 9.4.2001

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

Crl. Misc. Writ Petition No. 2046 of 2001.

Shri Prakash Singh & another...Petitioner
Versus
State of U.P. through Superintendent of Police and others ...Respondents

Counsel for the Petitioner:
Shri Zafar Abbad
Counsel for the Respondents:
A.G.A.

Constitution of India Article 226 – a perusal of the F.I.R. shows that the allegations are that the petitioner No. 2 Vijay Pratap Singh is running an allegedly non-existent School alongwith his son, Petitioner No. 1 Shri Prakash Singh and they have embezzled Rs.1,28,000/- of the Scholorship fee of Scheduled caste students (held in para 4)

By the Court

1. Heard learned counsel for the Petitioner and learned Government Counsel.

2. This case discloses a shocking state of affairs as it shows what is happening in our country in large scale.

3. The Petitioner has challenged the impugned F.I.R. dated 20.2.2001 Annexure 1 to the writ Petition in case crime no. 43 of 2001 under Section 467, 468, 471, 420, 409 I.P.C. police station Meh Nagar, district Azamgarh. The aforesaid F.I.R. reads as follows:

"कार्यालय जिला समाज कल्याण अधिकारी आजमगढ पत्रांक ३७२० आब्लिक २८ आब्लिक सक आब्लिक एफ०आई०आर०/२०००-२००१/दिनांक २०-२-२००१ थानाध्यक्ष थाना मेहनगर आजमगढ अवगत करना है कि जिला विद्यालय निरीक्षक कार्यालय आजमगढ के पत्र क्रमांक छात्रवृत्ति ११७३१/९९-२००० दिनांक ६-३-२००० द्वारा श्री गोविन्द सिंह उ० मा० वि० रामपुर तथा सहीद रघुनाथ सिंह उ० मा० वि० कादीपुर आजमगढ के अनुसूचित जाति के छात्रों की सूची प्रति हस्ताक्षरित करते हुए अधोहस्ताक्षरित के कार्यालय को उपलब्ध करायी गयी थी । जिसके आधार पर उपरोक्त विद्यालय को क्रमशः ७०,००० यू० पी० आई सिंह पुर खाता सं० ५००५ में तथा सं० ५८,००० मुख्य शाखा डाकघर आजमगढ में खाता सं० ३९७२५७ में भेजी गयी थी । खण्ड विकास अधिकारी बिलदिया गंज उप जिलाधिकारी निरीक्षक आजमगढ से उपरोक्त दोनों विद्यालय अस्तित्वहीन पाये गये । उपरोक्त विद्यालयों में

से गोविन्द सिंह उ० मा० वि० रामपुर के तथा कथित प्रधानाचार्य श्री विजय प्रताप सिंह तथा इनका परिचय बैंक में श्री प्रकाश सिंह पुत्र श्री शिव पूजन सिंह निवासी ग्रा० पो० सिंहपुर जनपद आजमगढ द्वारा किया गया है । इसी प्रकार शहीद रघुनाथ सिंह उ०मा०वि० कारीपुर आजमगढ तथा कथित प्रधानाचार्य स्वयं श्री प्रकाश सिंह हैं । जिनका परिचय मुख्य डाकघर में श्री अध्यवर यादव निवासी डकडौरा पो० हाफिजपुर आजमगढ ने दिया है । चूँकि उपरोक्त दोनों विद्यालय अस्तित्वहीन हैं अतः उपरोक्त दोनों व्यक्तियों द्वारा प्राप्त किया धनराशि क्रमशः रू०७०,००० तथा ५८,००० कुल मिलाकर रू० १२८०००का पत्रों प्रपत्रों के आधार पत्र किया गया है । तथा तत्कालीन जिला विद्यालय निरीक्षक आजमगढ उनके पटल सहायक के विरूद्ध प्रथम सूचना रिपोर्ट दर्ज कर विधिक कार्यवाही करने का कष्ट करें । सम्बन्धित अधिकारियों की जाँच आख्या बैंक तथा पो० आफिस से प्राप्त तथा श्री अध्यवर यादव का बयान तथा निरीक्षक कार्यालय से प्राप्त प्रति प्रपत्रों की छाया प्रति संलग्न कर आप के पास प्रेषित की जा रही है । संलग्नक उपरोक्त अनुसार २८ पन्ने भवदीय एस०डी० अंग्रेजी अपठनीय । (आर०पी० शुक्ल) जिला समाज कल्याण अधिकारी आजमगढ, पृष्ठांकन संख्या (६ या ९) दिनांक"

4. A perusal of the F.I.R. shows that the allegations are that petitioner no. 2 Vijay Pratap Singh is running an allegedly non-existent school alongwith his son, petitioner no. 1 Shri Prakash Singh and they have embezzled Rs.1,28,000/- of the scholarship fee of scheduled caste students. It is shocking that though there is no school in existence yet the scholarship funds are being given to a non-existent school, and it is only after an enquiry by the B.D.O., Bildiaganj, A.D.M. Azamgarh and the D.I.O.S. that this great fraud was discovered. What 'tehalka' type scandles are happening at the national level mini tehalka scandals in thousands of cases are accurrind at the lower level. This is not an isolated case but a large number of cases are coming before this Court against Principals and teachers etc. who embezzled the scholarship fees and other school funds. The principals and teachers are supposed to be ideals for the students but today they are often regarded as thieves. This just shows the level of degradation to which this country has sunk.

5. We are not inclined to interfere in this matter as the allegations in the F.I.R. certainly discloses committing of an offence. The Petition is dismissed. However the observation made herein will not influance the court hearings the bail application or the trail.

6. We were inclined to pass a detailed direction to the Chief Secretary to hold a thorough enquiry into the allegations where the funds were issued to non-existent institutions and where the school fees, funds etc. were embezzled by the Principals, managers or teachers of the educational institution but we are informed by Sri Arvind Tripathi learned Addl. Govt. Advocate that in another writ Petition such enquiry has already been ordered by another bench of the court and the enquiry is still going on. Hence it is not necessary to pass a similar order for holding enquiry in the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.3.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 8954 of 2001

Chandi Prasad and others ...Petitioner
Versus
The Additional District and Sessions Judge and others ...Respondents

Counsel for the petitioner:
Shri Pankaj Mithal

Counsel for the Respondents:
S.C.
Sri Pramod Kumar Jain

Indian Limitation Act-136-doctrine of Merger – Explained – Execution of partition Decree – Started within the period of 12 years. – held – proper.

Held – Para 12

In view of the above application filed by defendant respondents for execution of the partition decree was within time as it was filed within 12 years from the date of judgement of the High Court in Second Appeal referred to above.

Case Law Discussed
AIR 2000 SC-2587
AIR 1955 SC-633
AIR 1962 SC-361
AIR 1999 SC 738

By the Court

1. The writ Petition is directed against the order dated 22.11.2000 whereby the appellate court held that the execution application filed by the contesting respondents was within time.

2. Briefly stated that facts are that the petitioners filed suit no. 260 of 1959 for partition against defendant-respondents no. 2 to 8. The Court passed a preliminary decree on 25.4.1962. The final decree was prepared on 7.5.1968.

3. The defendant-respondents applied for execution of the final decree on 6.8.1968, which was registered as Execution Case No. 279 of 1968. The plaintiff-petitioners filed Civil Appeal No. 502 of 1968 against the judgement of the trail court. The appeal was dismissed on 21.3.1969. The petitioners preferred Second Appeal against this order. The High Court allowed the appeal and remanded the case to the appellate Court to decide the appeal afresh. The lower appellate Court after remand of the matter, again dismissed the appeal on 4.1.1974. During the pendency of the above appeal the execution application no. 279 of 1968 was rejected by the executing court on 19.4.1971.

4. The petitioners preferred Second Appeal No. 281 of 1974 against the judgement of the lower appellate court dated 4.1.1974. The second appeal was dismissed by the High Court on 18.4.1985. The decree in pursuance of the judgement of the High Court was drawn on 30.10.1986.

5. The defendant-respondents filed application for execution of the decree, passed by this Court, on 26.3.1997. The petitioners filed objection to this application on the ground that it was barred by the limitation. The executing court rejected the application vide order dated 1.5.1999 on the ground that the application was barred by time. The respondents preferred appeal against the said order before the court below. Respondent no. 1 has allowed the appeal by the impugned order dated 21.11.2000 holding that the execution application filed by the defendant-respondents was within time.

6. I have heared Shri Pankaj Mithal learned counsel for the petitioners and Sri Pramod Kumar Jain learned counsel for the contesting respondents.

7. The final decree in the partition suit no. 260 of 1959 was prepared on 7.5.1968. The provisions of Limitation

Act 1963 will be applicable for the purpose of counting the limitation. Article 136 shall be applicable for submitting execution application before the executing court. Article 136 reads as under:

"136.For the execution of any decree (other than a decree granting a mandatory injunction) or order or any civil court.	Twelve years	When the decree or order becomes enforceable or where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making the payment of delivery in respect of which execution in sought, takes place: Provided that an Application for the Enforcement or Execution of a Decree granting a Perpetual injunction shall not to subject to any period of limitation.

8. The contention of the learned counsel for the petitioner is that lower appellate court had dismissed the appeal on 4.1.1974. The petitioners preferred Second Appeal No. 481 of 1974 against the judgement of the lower appellate court. The High court dismissed the second appeal on 18.4.1985. the High Court had not passed any order staying the operation of the decree passed by the courts below and therefore the limitation started running from 4.1.1974 for filing the execution application and as the execution application was filed on 26.3.1997 it was barred by time.

9. The question is whether the decree drawn in pursuance of the judgement of the High Court passed on 18.4.1985 shall be taken as the date when the decree becomes enforceable or the date of the judgement of the lower appellate court delivered on 4.1.1974. Similar controversy was raised in M/s Banshidhar Durga Dutta Vs. Loonkaran Sethia, 1983 ALJ 557, where the execution application was filed after the judgement of the appellate court, the Division Bench of this Court held that the decree becomes enforceable after the judgement of the lower appellate court. In this case the appeal was dismissed as not pressed and the judgement debtor raised the contention that as the appeal was not pressed and the judgement was affirmed and as there was no stay of the operation of the decree of the trail Court, the execution application became time barred. This contention was not accepted on the reasoning that once the appeal has been filed against the decision of the lower appellate court it is open to the decree-holder to wait for the decision of the appeal and thereafter to file application for execution of the decree. It was observed:

"It follows from the law laid down by the Privy Council that if the court's order furnishes a cause of action then similarly the lower court's decree also furnishes a cause of action. The time from which the limitation begins to run is the point when the decree or order becomes enforceable. The expression

"enforceable" means "to put into execution, to cause to take effect". In case of a decree of the trail court being affirmed, the appellate decree becomes enforceable and that can be put into execution. The judgement debtors's contention that since there was no stay order, the decree holder could not take advantage of the time spent in prosecution of the appeal, does not appeal to us to be tenable. A judgement-debtor does not lose by the decree holder's not putting his decree into execution. The decree holder has the choice to wait for the decision of the appeal. The law does not cast any duty on him to put the decree into execution immediately after its being passed it had not been denied that in case of a decree being modified or varied, the period of limitation would start from the date of passing of the decree in the appeal. If that so, there is no reason to take contrary view in respect of a decree which is confirmed in appeal. There is no logic in holding a decree of the latter category to have become barred by time if the execution of the same is not made immediately after its being passed by the trail court. If the principle of merger applies, the decree of the trail court would get merged with that of the appellate court and it is that decree which will become enforceable".

10. The principle of doctrine or merger was applied by the Supreme Court in Kunhayammed and others Vs. State of Kerala and another, AIR 2000 SC 2587. It was clarified that so far as principle of merger is concerned, on principle there is no distinction between order or reversal or modification and order of confirmation passed by the appellate court. As in all the three cases the order passed by the lower authority shall merge in the order passed by the appellate authority whatsoever be its decision – whether of reversal or modification or only confirmation. The Court relied upon the following observation of the Supreme Court in UJS Chopra Vs. State of Bombay, AIR 1955 SC 633:

"A judgement pronounced by a High Court in exercise of its appellate or revisional jurisdiction after issue of a notice and a full hearing in the presence of both the parties would replace the judgement of the lower court, thus constituting the judgment of the High Court the only final judgement to be executed in accordance with law by the Courts below".

11. The learned counsel for the respondents has placed reliance on the decisions Ramlal and other Vs. Rewa Coalfields Ltd., AIR 1962 SC 361, and Calcutta Municipal Corporation Vs. Pawan Kumar Saraf, AIR 1999 SC 738, wherein the Apex Court laid down the principles which should be taken into consideration while deciding an application to condone the delay. These decisions have no application to the facts of the present case.

12. In view of the above the application filed by defendant respondents for execution of the partition decree was within time as it was filed within 12 years from the date of the judgement of the High Court in Second appeal referred to above.

The writ Petition fails and is hereby dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.3.2001

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE S.K. JAIN, J.

Criminal Misc. Writ Petition No. 1359 of 2001.

Jitendra alias Jeetu ...Petitioner
Versus
District Magistrate, Gautambudh Nagar and another ...Respondents

Counsel for the Petitioner:
Shri Sushil Kumar

Counsel for the Respondents:
S.C.

U.P. Control of Goondas Act, 1971, S.3-Notice under – No FIR against petitioner – No Criminal Case pending against him on date of notice – However general nature of material allegations mentioned in the impugned notice – Notice, held, valid.

Held – para 4 and 7

A Careful perusal of the impugned notice shows that the general nature of material allegations against the petitioner have been mentioned therein. These general nature of material allegations are that the petitioner is notorious goonda who has created terror in the locality by his criminal activities. He forcibly extracts money from the public of the locality and in fact this is his source of livelihood. People are terrorised by him and even the police is not able to catch hold of him and nobody is willing to file a first information report or give evidence against him.

We are, therefore, of the view that the decision in Bhim Sain Tyagi's case (supra) is clearly distinguishable. The general nature of the material allegations have been mentioned in the impugned notice and hence we find no illegality in the same. The Supreme Court in Executive Engineer V. B.K. Singh 1995 (B) J.T. 331 and this court in Bhupesh Misra Vs. state, 1995 (35) A.C.C. 355, have held that the court should not ordinarily interfere with a show cause notice Accordingly, this Petition is dismissed.

Case Reference
1999 (2) JIC – 192
1981 ALJ. 897
1972 ALUJ. 752
1972 ALJ. 83
1995 (8) JT. 331
1998 (36) ACC 355

By the Court

1. Heard learned counsel for the petitioner and learned Government Advocate. The petitioner has challenged the impugned notice dated 25.1.2001, under Section 3(1) of the U.P. Control of Goondas Act, 1971, a copy of which has been annexed as Annexure-1 to the writ Petition.

जितेन्द्र उर्फ जीतू पुत्र श्री लक्खी निवासी कस्वा व थाना रघुपुरा थाना रबुपुरा जनपद गौतमबुद्ध नगर ।

(क) मेरे समक्ष यह सूचना प्रस्तुत की गई है कि जितेन्द्र उर्फ जीतू पुत्र श्री लक्खी निवासी कस्बा रबुपुरा थाना रबुपुरा जनपद गौतम बुद्ध नगर एक शातिर किस्म का बदमाश है, आस पास के क्षेत्र में संगीन अपराध करके आतंक फैला कर जनता को भयभीत करता है । इसके कार्य समाज के भले एवं क्षेत्र के प्रमुख प्रतिष्ठानों को धमकी देकर धन वसूल करके अपना जीवन यापन करता है इसके डर से जनता भयभीत है पुलिस द्वारा पकडने का प्रयास करने पर वह भाग जाता है इसके भय के कारण जनता का कोई भी व्यक्ति इसके विरूद्ध रिपोर्ट लिखाने व साक्ष्य देने को तैयार नहीं है ।

(ख) उपरोक्त जितेन्द्र उर्फ जीतू की जिला गौतम बुद्ध नगर अथवा जिले की सीमाओं एवं गतिविधियों एवं कार्यवाहियों जन साधारण व माल के लिये अपार हानिकारक है । ऐसा विश्वास करने का मेरे समक्ष

उचित कारण है कि यह जिले या उसके किसी भी भाग में भारतीय दण्ड संहिता के अध्याय १६,१७ व २२ अधीन दण्डनीय अपराध करने अथवा किसी ऐसे अपराध को करने में व्यस्त है ।

(ग) उपरोक्त जितेन्द्र उर्फ जीतू से साक्षीगण अपनी जान व सम्पत्ति के भय के कारण साक्ष्य देने को तैयार नहीं है ।

(घ) उपरोक्त जितेन्द्र उर्फ जीते समय-समय पर अपराध करने का आदी है और गुण्डा किस्म का अपराधिक व्यक्ति है । इसका जनता में भय व आतंक व्याप्त है ।

उपरोक्त के सम्बन्ध में खण्ड क,ख,ग व घ के सम्बन्ध में अपराधों का विवरण निम्न हैः-

(1) मु०अ० सं०३०/२००० धारा ३०२ भा०दं०सं० थाना रबुपुरा

(2) मु०अ०सं० ४७/२००० धारा ५०४/५०६ आई०पी०सी० थाना रबुपुरा ।

उपरोक्त वर्णित अपराधों के विवरण से स्पष्ट है कि विपक्षी एक शातिर किस्म का गुण्डा व्यक्ति है । इसका मुख्य पुशा लूट करना, प्रतिष्ठानों को धमकी देकर धन वसूल करना तथा क्षेत्र में आतंक व भय फैलाना है । इसके भय व आतंक से जनता का कोई भी व्यक्ति इसके द्वारा किये गये अपराधों में गवाही देने को तैयार नहीं होता है तथा यह बहुत से अपराध ऐसे करता है जिनकी साधारणतः जनता इसकी शिकायत थाना व अन्य कहीं पर करने की हिम्मत नहीं करती है । इसका जनता में इतना आतंक बना हुआ है कि इसके विरूद्ध कोई भी व्यक्ति साक्ष्य देने का साहस नहीं करता है ।

अतः एतद्द्वारा आपको नोटिस दिया जाता है कि आप दिनांक ९-२-२००१ को प्रातः १० बजे मेरे न्यायालय में उपस्थित होकर कारण बताये कि गुण्डा नियंत्रण की धारा ३ की उप धारा ३ के अन्तर्गत आपको जनपद गौतम बुद्ध नगर अथवा उसके किसी भी भाग से निष्कासित क्यों न कर दिया जाये । आपको यह भी निर्देश दिया जाता है कि यदि आपको कोई आपत्ति हो तो अपना स्पष्टीकरण प्रस्तुत करना चाहें उनके नाम व पते भी स्पष्टीकरण के साथ प्रस्तुत करें । ऐसा न करने की स्थिति में यह समझा जायेगा कि आपको इस सम्बन्ध में कुछ नहीं कहना है तथा प्रस्तावित आदेश पारित करने की एकतरफा कार्यवाही प्रारम्भ कर दी जायेगी ।

यह नोटिस आज दिनांक २९-१-२००१ को मेरे हस्ताक्षरित एवं दिनांकित इस न्यायालय की मोहर से जारी किया ।

थानाध्यक्ष थाना रबुपुरा को इस निर्देश के साथ दो प्रतियां प्रेषित है कि नियत तिथि से पूर्व तामील कराकर तामीली रिपोर्ट सहित इस न्यायालय को समय से भिजवाना सुनिश्चित करें ।

2. Learned counsel for the petitioner has relied on the Full Bench decision of this Court in Bhim Sain Tyagi vs. State of U.P. through D.M., Mahamaya nagar, 1999 (2) JIC 192 and has submitted that in view of the said decision the impugned notice is invalid. We are not in agreement with the submission.

3. We have carefully perused the decision of the full Bennch in Bhim Sain Tuagi's case (supra) and we are of the view that the said decision is distinguishable. In our opinion, all that the above Full Bench decision as well as the decision in Ramji pandey vs. State of U.P. 1981 A.L.J. 897 say is that mere mention of some first informaiton reports in the show cause notice is not sufficient compliance of the requirements of Section 3 of the Act, since that Act requires that the general nature of the material allegations must also be given. In our opinion, this only means that it is not sufficient to merely mention the case crime number, Section of I.P.C. and name of the Police Station relating to an F.I.R. in the show cause notice. In addition to the above, the show cause notice must also mention briefly what has been alleged in the F.I.R. (though it is not necessary to reproduce the entire F.I.R.).

Section 3(1) and (2) of the Act state:

"(1) where it appears to the District Magistrate-

(a) that any person is a Goonda; and

(b) (i) that his movements or acts in the district are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged, or about to engage, in the district or any part thereof, in the commission of any offence punishable under chapter XVI, chapter XVII, or chapter XIII of the Indian Penal Code, 1860 or under the suppression of Immoral Traffice in Women and Girls Act, 1955, or under the U.P. Excise Act, 1910, or in the absetment of any such offence; and

(c) that witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property –the District magistrate shall by notice in writing inform him of the general nature of the material allegations against him in respect of clauses (a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this Section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witnesses that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District magistrate is of opinion that the request is made for the purpose of vexation or delay."

4. A careful perusal of the impugned notice shows that the general nature of material allegations against the petitioner have been mentioned therein. These general nature of material allegations are that the petitioner is a notorious goonda who has created terror in the locality by his criminal activities. He forcibly extracts money from the public of the locality and in fact this is his source of livelihood. People are terrorised by him and even the police is not able to catch hold of him and nobody is willing to file a first information report or give evidence against him.

5. Learned counsel for the petitioner submitted that there must be a criminal case pending against the petitioner before a notice under Section 3 of U.P. Control of Goondas Act, 1971 could be issued. We do not agree with this submission. There are goondas who create such terror that nobody is willing to file a first information report against them and hence obviously no case will be pending against them. In Harsh Narain v. D.M. Allahabad, 1972 A.L.J. 752, a Division Bench of this Court held that it is not necessary that there should be a criminal case pending against a goonda to invoke the provisions of the U.P. Control of Goondas Act. In fact it is to deal with such bad elements that U.P> Control of Goondas Act, 1971 was enacted. If people were willing to give evidence and file first information reports against such persons, there would have been no need to enact the U.P. Control of Goondas Act, and the ordinary criminal law i.e. Cr. P.C. and I.P.C. would have been sufficient to deal with the situation. It is only because in our society there are such elements who terrorise the public and commit all kinds of crimes and

forcibly extract money from the public and the ordinary law was found to be inadequate to deal with them that a special law was required to deal with such situations.

6. The validity of the U.P. Control of Goondas Act has been upheld by this court in Raja v. State, 1972 A.L.J. 83.

7. We are, therefore, of the view that the decision in Bhim Sain Tyagi's case (supra) is clearly distinguishable. The general nature of the material allegations have been mentioned in the impugned notice and hence we find no illegality in the same. The Supreme Court in Executive Enginner v R.K. Singh 1995 (8) J.T. 331 and this court Bhunesh Misra V. State, 1998 (36) A.C.C. 355, have held that the Court should not ordinarily interfere with a show cause notice. Accordingly, this Petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.4.2001

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE S.K. JAIN, J.

Habeas Corpus Writ Petition No. 2462 of 2001.

Billa @ Birla ...Petitioner (In jail)
Versus
Superintendent District Jail, Basti and others ...Respondents

Counsel for the Petitioner:
Shri Days Shanker Misra

Counsel for the Respondents:
G.A.

Constitution of India – Article 21 – the grounds of detention are verbatim reproduction of the report of the sponsoring authority-on this ground the impugned detention order deserves to be quashed.

Held –(para 8)

"दिनांक21-10-2000 को समय करीब 8=00 बजे प्रातः" **is a verbatim reproduction of the sponsoring authority's report from paragraph 4 onwards of the said report. Hence this argument of the learned counsel for the petitioner is also correct and on this grounds also the impugned detention order deserves to be quashed.**

By the Court

1. These habeas corpus Petitions challenge the impugned detention order dated 15.11.2000 Annexure 1 to the writ Petitions passed under the National Security Act.

2. We have heard learned counsel for the petitioners and learned Government Advocate. Several arguments have been advanced before us. Firstly it is alleged that there was delay by the Central Government in deciding the petitioners' representation. In paragraph 26 of the petition it is alleged that on 22.11.2000 the petitioner gave several copies of his representation to the jail authorities requesting them to forward them to the State and Central Governments In paragraph 17 of the counter affidavit of the District Magistrate it is stated that the petitioners submitted their representations to the jail authorities on 27.11.2000 but it was not addressed to the Central Government nor any request was made to send it to the Central Government. The District Magistrate received the representation on 28.11.2000

and sent it to Superintendent of Police, Sant Kabir Nagar who sent it to the S.O., Bakhira. The superintendent of Police sent his comments on the representation to the District Magistrate on 1.12.2000 and the District Magistrate sent the same to the State Government on 3.12.2000 through special messenger. Copy of the representation was also sent to the Central Government. The State Government rejected the representation of the petitioner and sent a message on 13.12.2000 to this effect. In paragraph 18 of the said counter affidavit it is stated that the detention order was approved by the State Government on 23.11.2000.

3. In paragraph 7 of the counter affidavit of Sri S.K. Pandey, Deputy Jailer, district Jail Basti, it is stated that the Central Government rejected the representation vide message dated 3.1.2001 which was received in jail on 4.1.2001.

4. In our opinion, even assuming that the representation was not addressed to the Central Government, admittedly the same was sent to the Central Government by the District Magistrate on 3.12.2000 and the Central Government should have decided the same expeditiously. But is appears that the Central Government decided it only on 3.1.2001. Thus these was recoverable delay by the Central Government in deeding the representation.

5. No counter affidavit has been filed by the Central Government although three weeks' time was granted by the court on 19.1.2001.

6. In our opinion the delay in deciding the presentation by the Central Government is itself sufficient to allow the writ petition. However, we may consider other grounds also advanced by the learned counsel for the petitioner.

7. Learned counsel for the petitioner submitted that there was causal exercise of power by the detaining authority and in this connection he has relied on the Divison Bench decision of this court in Tunnu vs. State 2000 (4) A.C.C. 729 and the Division bench deciosn in Habeas Corpus Petiition no. 41994 of 1993 Alim vs. Superintendent, District Jail, Bulandshar decided on 11.1.1994 as well as the decision of the Supreme Court in Jai Singh Vs. State of Jammu and Kashmir A.I.R. 1985 S.C. 764. He has submitted that the ground of detention are a verbatim reproduction of the report of the sponsoring authority.

8. We have carefully perused the ground of detention copy of which is Annexure 2 to writ petition as well as the proposal of the sponsoring authority which is Annexure 4. In Annexure 2 the words: "दि० 21-10-2000 को समय करीब 8-00 बजे प्रातः" is a verbatim reproduction of the sponsoring authorities report from paragraph 4 onwards of the said report. Hence this argument of the learned counsel for the petitioner is also correct and on this ground also the impugned detention order deserves to be quashed.

9. Learned counsel has further submitted that a copy of the bail application of the petitioner which was pending before the court concerned was not placed before the detaining authority concerned as staed in paragraph 22 of the petition. This fact has not been denied by the respondent. Hence in view of the decision of the Supreme Court in State of

U.P. Vs. Kamal Kishore Saini 1998 S.C.C. (Crl.) 107 and M. Ahmedkutty vs. Union of India 1990 S.C.C.. (Crl.) 258 this argument has also to succeed.

10. We need not go into other arguments of the learned counsel as the writ petitions succeeds on the above grounds.

11. The petitions are allowed. The impugned detention orders dated 15.11.2000 are quashed. The petitioners shall be released forthwith unless he is required in some other criminal or preventive detention case.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10 APRIL, 2001

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

Second Appeal No. 1662 of 1998

Ratan Pal Singh ...Defendant-Appellant
Versus
Kunwar Pal Singh and another
...Plaintiffs-Respondents

Counsel for the Appellant:
Shri K.K. Arora

Counsel for the Respondents:
Shri Harish Chandra

Code of Civil Procedure, 1908 S. 100 read with specific Relief Act, 1963-Suit for specific performance of agreement to sell-Suit decreed-Appeal dismissed-Second Appeal-Concurrent findings of fact-No preversity in findings-No substantial question of law in-volved-Second Appeal dismissed.

Held – (para 9)

The first Appellate Court on reappraisal of the evidence concurred with the above finding of the evidence recorded by the Trail Court. Both the Courts below have disbelieved the case of the defendant that he had executed only surety bond. The above findings of fact recorded by the courts below are based on evidence on record and do not suffer from perversity. Therefore, the above concurrent findings of fact can not be interfered with in this Second Appeal.

Case Law Referred
1996 (28) ALR 111

By the Court

1. This Second Appeal has been directed against the judgement and decree dated 24.8.1998 passed by 2nd Additional District Judge, Moradabad in Civil Appeal No. 70 of 1995 dismissing the appeal and confirming the judgment and decree of 1st Additional Civil Judge, Moradabad dated 25.04.1994 passed in Original Suit No. 1062 of 1991 decreeing the suit of respondents for specific performance of contract.

2. Kunwar Pal Singh and Chandra Pal Singh respondents (herein after called plaintiff) jointly filed Original Suit No. 1062 of 1991 against the appellant (here in after called 'defendant') for specific performance of contract dated 20.11.1990 after receiving remaining sale consideration amounting to Rs.5000/- and in the alternative refund of earnest money amounting to Rs.35000/- along with interest at the rate of Rs.17% P.A. The case of plaintiffs in brief, was that the defendant was owner Bhumidhar of plot no. 124/1 area 3.13 acre. He agreed to sell the above plot in favour of plaintiffs for a consideration of Rs.40,000/- and in lieu of it executed a registered agreement to sell on 20.11.1990 after receiving a sum of

Rs.35,000/- as earnest money. He promised to execute the sale deed by 30.11.1991 after receiving remaining sale consideration. The plaintiffs reminded the defendant several times to execute sale deed by appearing on 30.11.1991 before the office of the Sub Registrar, Chandausi. But the defendant did not appear to execute the sale deed in pursuance of agreement, hence the suit.

3. The defendant filed written statement and contested the suit. His defence was that he never executed any agreement to sell nor received any sale consideration from the plaintiffs. He also denied receipt of any notice. He further contended that the plaintiffs were well known to him from before. They approached him on 19.11.1990 to become surety of one of their relative and in that connection extract of Khatauni relating to him (defendant) was also required. The defendant went to Tahsil. Chandausi alongwith plaintiffs on 20.11.1990. Gajju Singh and Jodha Singh also met him there. They got seated him in the Office of Munsif, Chandausi and after some time brought a written paper and obtained his signature on it and also got affixed his photograph over it. The contents of document had not been read over and explained to him. They also took him before an officer and obtained his thumb impression there. Thereafter they sent him to his house saying that the bail had been granted. The defendant had no necessity to sell his plot and the price of land in the area at relevant time was not less than of Rs. One lac.

4. It was further contended that defendant had taken loan from UCO Bank for plantation of Popular plants and had mortgaged /hypothecated the plot in suit with the above bank in lieu of the said loan and therefore, no agreement to sell in respect of land in suit could be executed.

5. The learned Additional Civil Judge framed necessary issues arising out of pleadings of the parties and on considering the evidence of the parties held that the plaintiffs has successfully proved that the defendant agreed to sell the plot in suit in their favour for a consideration of Rs.40,000/- and in lieu of it executed agreement to sell on 20.11.1990 after receiving a sum of Rs.35,000/- as earnest money. The plaintiffs were ready and willing to perform their part of agreement. He further held that though it had been shown that the land in suit was hypothecated with the UCO Bank, but there was no evidence on record to show that the plaintiffs had knowledge about it and the said hypothecation was also not registered and this fact was concealed from the plaintiffs. With these findings the Trail Court decreed the suit for specific performance of contract.

6. Aggrieved with the above judgement and decree the defendant preferred Civil Appeal No. 70 of 1995. The learned 2nd Additional District Judge, Moradabad, who decided the appeal, concurred with findings recorded by the Trail Court holding that the above findings were based on evidence on record. Accordingly, he dismissed the appeal.

7. The above judgement of the Appellate Court has been challenged in this Second Appeal.

8. Heard learned counsel for the parties and perused the record.

9. The first contention of the learned counsel for the appellant was that the agreement ot sell was obtained by fraud under the pretext that the defendant was executing a surety bond. In order to prove the execution of agreement deed the plaintiffs had examined Kunwar Pal Singh plaintiff (P.W.11) attesting witnesses of the deed Gajju Singh (P.W.2) and Jodha Singh (P.W.3) and also relied on registered agreement to sell dated 20.11.1990. The Trail Court meticulously scrutinised the evidence of above witnesses as well as the evidence of defendant Ratan Pal (D.W.3). He had also taken into consideration the facts and circumstances of the case. He relied on the evidence of the plaintiff Kunwar Pal Singh (P.W. 1) and his witnesses Gajju Singh (P.W.2) and Jodha Singh (P.W.3) and also had taken into consideration the fact that the agreement to sell was produced before the Sub Registrar who made enquiry about payment of earnest money from the defendant who accepted the same and recorded a finding of fact that defendant executed deed dated 20.11.1990 knowing that he was executing agreement to sell his property for a consideration of Rs.40,000/- and received earnest money amounting to Rs.35,000/-. The First Appellate Court on reappraisal of the evidence concurred with the above finding of the evidence recorded by the Trail Court. Both the Courts below have disbelieved the case of the defendant that he had executed only surety bond. The above findings of fact recorded by the Courts below are based on evidence on record and do not suffer from perversity. Therefore, the above concurrent findings of fact can not be interfered with in this Second Appeal.

10. The next contention of the learned counsel for the appellant was that the land in suit was previously hypothecated with the UCO Bank in lieu of loan taken by the defendant for plantation of Popular plants and this fact had been proved by his witnesses Tej Narain Mehrotra (D.W.1) and therefore, no agreement to sell could be executed as the property was already under the mortgage. The Trail Court has held that the factum of mortgage was not known to the plaintiffs nor there was any evidence to show that the defendant disclosed this fact to them. It further held that mortgage deed was not registered and therefore, there could be no presumption of its notice to the plaintiffs. The first Appellate court held that the alleged pledge of the land with the UCO Bank prior to alleged agreement to sell had no effect on the agreement to sell.

11. The mortgage has been defined under Section 58 of the Transfer of Property Act, which read as under:

" A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability."

The mortgage may be a simple or by conditional sale or by deposit of title-deed.

12. According to evidence of Tej Narain Mehrotra, Manager of UCO Bank (D.W.1) the defendant had taken loan of Rs.78650/- on 13.08.1990 and in lieu of it

hpothecated his plot nos. 115 and 124/1. There is nothing on record to show that the plaintiffs had knowledge about the above mortgage. Assuming that the property in question was hypothecated or mortgaged with the UCO Bank in lieu of loan, the title or property in question was not transferred to the bank and it remained with the defendant. The above hypothecation or mortgage simply created a charge over the property and it's effect was that the UCO Bank had 1st charge over the property for realisaiton of debt and nothing more that it. The above hypothecation mortgage in any way did not create any bar in execution of agreement to sell or transfer of the property by the defendant. More over the plaintiffs had no knowledge of the said hypothecation and obtained agreement to sell for consideration. The learned counsel for the appellant also could not show any provision of law under which the defendant was debarred from executing agreement to sell in view of the previous hypothecation of the property in favour of UCO Bank. Therefore, hypothecation was no bar to execute agreement to sell.

13. Lastly, it was contended by the learned counsel for the appellant that the plaintiffs had sought an alternative relief for refund of earnest money and therefore, the relief for specific performance which was a discretionary relief should have not been granted and instead of it the plaintiffs would have been granted alternative relief for refund of earnest money. In support of the above contention he placed reliance of Apex Court decision in **"Kanshi Ram Vs. Om Prakash Jawal and others, 1996 (28) A.L.R. 111".**

14. I have gone through the above decision. It was held in the said case that the rise in prices of the property during the pendency of the suit may not be the sole consideration of refusing to decree the suit for specific performance. But it is equally settled law that granting decree for specific performance of a contract of immovable property is not automatic. It is one of discretion to be exercised on sound principles. When the court gets into equity jurisdiction, it would be guided by justice, equity, good conscience and fairness to both the parties. Considered from this perspective, in view of the fact that the defendant had claimed alternative relief for damages to be thanked. The Apex Court held that the court would have been well justified in granting alternative decree for damages of Rs.10 lacs, while the sale consideration was Rs.16,000/-. In the above case law no principle was laid down that the decree for specific performance should not be granted and only the relief for damages will be equitable relief in a suit for specific performance. In view of peculiar facts and circumstances of the said case the Apex Court granted alternative relief for damages for a sum of Rs.10 Lac, while sale consideration was only Rs.16,000/-. The appellant in this case could not show any circumstance by which the relief for specific performance could be refused and instead of it relief for refund of earnest money only be granted. The contention of the learned counsel for the appellant was that since alternative relief of refund of earnest money has been sought therefore, only that relief could be granted has no force in view of the facts and circumstances of the case. No basis of above contention could be shown and therefore this Court is not persuaded to accept the above contention.

15. In this way, I find that point in controversy in this appeal have been concluded by concurrent findings of the fact. No substantial question of law is involved in this appeal. The second appeal has, therefore,, no force and liable to be dismissed.

16. The appeal is, accordingly, dismissed summarily. There is no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2001

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

Second Appeal No. 1142 of 2000

Shamim Ahmad ...Appellant
Versus
Smt. Rashida Begum and others ...Respondents

Counsel for the Appellant:
Shri G.N. Verma

Counsel for the Respondents:
Shri Ajeet Kumar

Code of Civil Procedure- Section-100- Second Appeal-mixed question of law and fact can not be permitted for the first time in appeal.

Held- Para 16

In the present case both the questions are mixed questions of fact and law and therefore, they can be permitted to be raised for the first time in appeal. I accordingly, find that the appellant can not challenge the gift deed in the appeal on the above ground. I find that the gifts are valid.

Case law discussed
1999 (2) SCC 471
1997 (7) SCC 288
AIR (32) 1945 Bombay 438
9 (Indian Decisions) Alld.-357
ILR 1917 238
AIR 1941 58
AIR 1951 SC-16
(1892) AC 472
AIR 193 SC-2155
CWN 79 P.153
ARC 1986(2) 376
1998 (2) AWC 946
AIR 1986 SC 2197
AIR 1969 SC 78
1993 (3) SCC 161
AIR 1963 SC 1547

By the Court

1. This second appeal has been filed against the judgment and decree dated 29.08.2000 passed by XIIIth Additional District Judge, Allahabad in Civil Appeal No. 88 of 1998. The facts giving rise to this appeal are as follows:

2. The suit was filed by the respondent no. 1 against the appellant and other respondents for the relief of declaration and cancellation of sale deed dated 20.02.1981 registered on 05.06.1981 executed by the respondent no. 4 in favour of the appellant regarding house no. 262 (New), 247 (Old) situated in Dondipur, Allahabad. In brief the facts of the case are as follows:

3. One Abdul Khaliq had two sons, namely, Abdul Sadiq and Abdul Mazeed. The respondent no.1 is the wife of Abdul Mazeed, Maqbool Alam was son of Abdul Sadiq. It is alleged by the plaintiff that Abdul Sadiq remained in India during his life time and died on 03.01.1961. Maqbool Alam alongwith his family migrated to Pakistan in the year 1951 and died in Pakistan in the year 1980. That Abdul Sadiq was living with his brother

Abdul Mazeed. His family having been migrated to Pakistan, he gifted the house in dispute to his brother Abdul Mazeed on 01.12.1960. A memo in writing regarding it was prepared on 01.01.1961. Abdul Mazeed gifted this house to his wife plaintiff on 12.05.1974. That therefore, the plaintiff/respondent no.1 is the owner of the house.

4. That a collusive sale deed dated 20.02.1981 has been obtained by the appellant from District Magistrate, Allahabad mentioning that the house is enemy property. That this house was never vested in the custodian and was not an enemy property. That the respondent no.1 is the owner of the same and District Magistrate, Allahabad has no right tot execute the sale deed. That mutation was also done in favor of the respondent no. 1. Therefore, the suit was filed.

5. The appellant contested the suit and denied the oral gifts. It is contended that the respondent no.1 has no interest in the house in suit and no right to file the suit. That the property belongs to abdul Sadiq and after his death was inherited by Maqbool alam, who migrated to Pakistan and it became enemy property. That he has rightly purchased it from the District Magistrate, Allahabad. It was further pleaded that the court has no jurisdiction to try the suit.

6. The trial court after recording the evidence held that plaintiff/respondent no.1 is not the owner of the house by virtue of oral gift. That the sale deed executed by the District Magistrate is valid. The trial court therefore dismissed the suit with costs. However, the first appellate court has reversed the finding. It has accepted the contention for the respondent no.1 became the owner of the house by oral gift. That the house was never an enemy property and the sale is void. That the court has jurisdiction to try the suit. He has accordingly decreed the suit with costs. Aggrieved by it, the present appeal has been preferred.

7. I have heard Sri G.N. Verma, learned counsel for the appellant and Sri Ajeet Kumar, learned counsel for the respondent no.1 and have perused the judgments.

The first argument of the learned counsel for the appellant is that the oral gift have not been proved and the first appellate court has erred in recording a finding that the house in dispute was gifted by Abdul sadiq and then by abdul Mazeed. The oral gift according to Mohammadan Law are valid. In order to prove the oral gift by Abdul Sadiq to Abdul Mazeed the respondent no.1 examined herself and Habib, Hanif Khan and Salim as PW-1 to 3 and to prove the oral gift by Abdul Mazeed in favour of the respondent no.1, the respondent no.1 examined herself and one Moinuddin. Their evidence was categorically examined by the first appellate court and he also considered the circumstance that Abdul Sadiq remained in India all alone with his brother Abdul Mazeed, that his family was migrated to Pakistan. The first appellate court therefore held that Abdul Sadiq gifted the property to his brother. On the basis of the scrutiny of the evidence the first appellate court has recorded a finding and it is not open in this appeal to again scrutinize the evidence and to arrive at a different conclusion on the question of fact specially, in view of the fact that it has not been shown by the appellant that a

particular evidence was not considered by the first appellate court.

8. Learned counsel for the respondent no.1 has referred to **Dnvanoba Bhaurao Shemade Versus Maroti Bhaurao Marnor, 1999 (2) SCC, 471.** Where the Apex Court has held that in second appeal only substantial question of law can be considered. It was further observed that the finding of fact even if against the weight of the evidence does not project a question of law,. Similar view was taken by the Hon'ble Supreme Court in the case **Hari Singh Versus Kanhaiya Lal, 1997 (7) SCC, 288 and other cases.** In view of the above there is no reason to interfere in the findings of facts of the first appellate court regarding the oral gift.

9. The second argument of the learned counsel for the appellant is that even if the factum of the gift is admitted. The gift is invalid as it was made during illness while the donee was in the apprehension of his death. It is also contended that the gift of more than one third share of the property is also invalid according to the Mohammedan Law unless the other heirs consents to the said gift. Learned counsel in support of the argument has relied on the provisions of the Mohammedan Law and has also referred to **Safia Begum and others Versus Abdul Rajak and others, A.I.R. (32) 1945 Bombay, 438.** In this case it was held that the gift in favour of the one of the heirs where other heirs have not given their consent is incapable of being enforced. Similar view was taken in the case of **Wazir Jan Versus Saiyyid Altaf Ali 9 (Indian decisions) Alld, 357.** It was held that the gift in contemplation of death and distribution of property in favour of heirs without consent of the other heirs is invalid. The other cases referred to is **Fazi Ahmad and another Versus Rahim Bibi and others, I.L.R. 1917, 238.** It was held that where the gift is made during the last illness the doctrine of marzul-maut will apply and the gift will be invalid.

10. The last authority on this referred to is **Mt.Sakina Begum Versus Khalifa Hafiz-ud-din and others, A.I.R., 1941, 58.** It was held that the gift is invalid if at the time of execution of deed of gift, the donor was suffering from a serious disease which it was known would in all probability terminate falatly.

11. In this connection, it has been argued by the learned counsel for the appellant that the respondent no. 1 has admitted in her statement that Abdul Sadiq was seriously ill since 2-3 months before the gift. The PW-2, Mohd. Habib has also stated that Abdul Mazeed died on second or third day of the oral gift. He has also stated that at the time of the gift he was confined to bed. On the basis of this evidence it has been argued that in view of the law laid down in the above cases and Mohammedan Law the gift is invalid.

12. Regarding this, the only argument advanced on behalf of the respondent no. 1 is that no such plea was taken in the written statement, that the gift is invalid because of being executed during marzul-maut or because of the fact that it is in favour of one of the heirs and other heirs have not consented to it. It is therefore contended that this point can not be raised for the first time in this appeal.

13. In reply to this argument, the learned counsel for the appellant has referred to **Yashwant versus Walchand Ram Chand, A.I.R. 1951 SC, Page 16.** In this connection reliance was placed on the following observation made in **Connectient Fire Insurance Company Versus Karanagh, (1892) AC, 472.** It was observed that :

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea can not be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below."

14. On the basis of this authority it was observed that if the fact proved and found as established are sufficient to make out a case of fraud within the meaning of Section 18, this objection may not be serious, as the question of applicability of the section will be only a question of law and as such a question could be raised at any stage and also in the final court of appeal.

15. However, it has been argued on behalf of the respondents that the question whether the gift is exceeding one third share and whether the other heirs has consented to it or not is a question of fact and can not be raised in this second appeal. It has also been argued that whether the donee was suffering from marzul-maut is also a mixed question of law and fact and these questions can not be raised for the first time in appeal. Learned counsel in support of his argument has referred to **Rattan Lal Sharma Versus Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others, A.I.R. 1993 SC 2155.** The Apex Court in this case has held that the pleading not raised before the Tribunal or administrative authorities can not be permitted to be raised for the first time in appeal.

16. The facts of the case referred to above by the learned counsel for the appellant were different. In the present case both the questions are mixed questions of fact and law and therefore, they can not be permitted to be raised for the first time in appeal. I accordingly, find that the appellant can not challenge the gift deed in the appeal on the above ground. I find that the gifts are valid.

17. Now the second question is whether the District Magistrate had any authority to execute the sale deed of the disputed house in favour of the appellant. It does not appear from the evidence on record that the property was ever an enemy property. Regarding this only one document, paper no. 30-C is on the record, in which certain enquiry has been made by the custodian of enemy property regarding this house. This house is not declared as enemy property under any provision of law. On the other hand, a report was obtained from the Tehsildar that the property is a enemy property and on its basis the sale deed was executed by the District Magistrate. No enquiry was ever conducted nor any person was ever heard. The entire proceedings appears to be collusive. Another circumstances to show the same is that stamp for execution

of the sale deed were purchased on 4.5.1981 whereas the sale deed has been signed by the District Magistrate on 20.02.1981. It was presented for registration on 20.05.1981.

18. The enemy and enemy property have been defined in Enemy Property Act, 1968. According to clause (b) of Section 2 enemy means a person or country who or which was enemy, an enemy subject or an enemy firm, as the case may be , under Defence of India Act, 1962 and the Defence of India Rules, 1962. The learned counsel for the respondents has also referred to the provisions of Defense of India Act, 1962 and Defence of India Rules, 1962. It has been argued that Pakistan was never declared as enemy country nor Abdul Sadiq or Maqbool Alam as enemy. The property is not an enemy property. It has not been decided by any authority that the house in dispute is enemy property. That therefore, the sale by the District Magistrate as custodian of any enemy property is without jurisdiction.

19. Learned counsel for the respondent no. 1 in support of the argument has also referred to certain authorities. The first is **Asadulla Chowdhury and others versus State of West Bengal, CWN, 79, Page 153.** It was held in this case by Calcutta High Court that an order vesting certain properties alleged to be enemy property in the custodian of enemy property made on January 7, 1969 after the expiry of period of emergency on July 10, 1968 is without jurisdiction and is invalid. Section 5 the Enemy Property Act has no application. The other authority referred is Division Bench decision in **Rameshwar Dayal and others Versus Custodian of Enemy Property for India and others, A.R.C. 1986 (2), 376.** It was held by the Division Bench of this court that the custodian of enemy property can not adjudicate on point in controversy. The custodian also can not take forcible possession of property which he claims to have vested in him. The other decision referred to is **Buniyad Husain and others Versus Zila Adhikari, Barabanki and another, 1998 (2) A.W.C.,946.** In this case, the District Magistrate directed a property to be recorded as and enemy property. No opportunity of hearing was given. It was held that the property is not an enemy property.

20. In the present case that the District Magistrate secretly obtained a report from the Tehsildar that it is an enemy property and executed the sale deed in favour of the appellant. No objections were ever invited nor any body was heard. No procedure was followed. Therefore, the property in dispute can not be held as an enemy property and the sale deed by the District Magistrate in favour of the appellant is without jurisdiction as invalid.

21. The last argument of the learned counsel for the appellant is that the suit of the respondent no. 1 was not cognizable by Civil Court and is barred by Section 19 of Enemy Property Act, Section 19 reads as follows:

19. Protection of action taken under the Act- No suit, prosecution or other legal proceeding shall lie against the Central Government or the Custodian or an Inspector of Enemy Property for anything which is in good faith done or intended to be done under this Act.

22. It is contended that the sale deed has been executed by custodian in good faith and therefore, the suit is barred under this provision. That the remedy has also been provided by Section 18 of the Act and therefore, that remedy should be availed and the suit is barred. Learned counsel in support of the argument has referred to the following cases:

23. The first is **Ram Singh and others Versus Gram Panchayat, Mehal Kalan and others, A.I.R., 1986 SC, 2197.** In this case Section 13 of Punjab Village Common Lands (Regulation) Act was considered. It was observed that the plaint can not be drawn cleverly by not claiming a declaration that the land in question was not a shamlatdeh to avoid jurisdiction of Section 13 by the Civil Court to make a declaration. The other case referred to is **Dhulabhal versus State of Madhya Pradesh and another, A.I.R., 1969, SC, 78.** It was observed that ' Where there is an express bar of jurisdiction of the court, as examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court'.

24. I have considered both these authorities and is of the view that considering of the language of Section 19 and the remedy provided in Section 18 the jurisdiction of the civil court is not barred. Section 19 only provide regarding the protection of the action taken under it. It does not bar the jurisdiction of the civil court.

25. In this connection, I may refer to **Shiv Kumar Chadha Versus Municipal Corporation of Delhi and others, 1993 (3) SCC 161.** It was observed that the jurisdiction of the civil court in any matter is not barred by creating any right or liability and providing uno flatu final remedial forum. In Firm **Seth Radha Kishan and others versus Administrator Municipal Committee, Ludhiana, A.I.R., 1963 SC, 1547.** It was held that the jurisdiction of the civil court under section 9 C.P.C. should be either expressely or impliedly bared.

26. In the present case, I find that the jurisdiction to decide the question whether the property was enemy property or not is not barred under section 10 of Enemy Property Act. This argument of the learned counsel is therefore, also fails.

After considering the entire arguments, I am of the view that there is no reason to interfere in the judgement and decree of the first appellate court.

The appeal therefore fails and is hereby dismissed.
