ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD SEP. 27, 2000

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

Civil Misc. Writ Petition No. 41665 of 2000

Dr. M.P. Joshi, Professor History Department & others ...Petitioners
Versus
University of Kumaon, Nainital through its. Registrar & others ...Respondents

Counsels for the Petitioners:
Shri V.B. Singh
Shri P.S. Baghel

Counsels for the Respondents:
Sri M.C. Tripathi
S.C.

Article 226 of the Constitution of India- Personal promotion can not be claimed as a matter of right merely because the teacher concerned is possessed of the requisite qualifications and has put in the prescribed length of service. (Held para 10).

The relevant provisions particularly clauses (7), (9) and (10) of Statute 11.12 B have not been taken into reckoning which in no delphic terms, point to the fact that personal promotion under section 31-A of the Act is not like automaton to a teacher becoming eligible for personal promotion and lay down that personal promotion shall have effect from the date of taking over charge. Assessment of work is required to be made by the Selection Committee and thereafter positive order granting personal promotion is required to be passed by the Executive Council. In view of the plain language employed in Clause (7) of Statute 11.12, the view that personal promotion shall take effect not from the date of taking over charge of the post but from the date on which the teacher concerned become eligible for consideration for grant of personal promotion, does not stand to reason. The contention on of Sri V.B. Singh that personal promotion under Section 31-A shall take effect from the date of the teacher becoming eligible is against all known principles of service jurisprudence.

By the Court

1. Petitioners who are professors in different department of University of Kumaon, Nainital, have approached this Court under Article 226 of the Constitution for the relief of a writ of certiarari quashing the Government order dated 4.4.2000 and the consequential order dated 2.9.2000 (annexures 8 and 9 respectively). Impugned Government Order dated 4.4.2000, though addressed to Finance Officer, Lucknow University, Lucknow in response to his letter dated 28.2.2000 encapsulates there is the two fold decision of the Government Order dated 27.9.1994 will be effective from the date of talking over the charge and not earlier; secondly, as to cancellation of paragraph 5 of the earlier Government Order dated 27.9.1994. So far as the order contained in the letter dated 2.9.2000 (annexure no. 9 to the petition) is concerned, the same is in fact a notice to the petitioner T.C. Pant, calling upon him to show cause as to why the double promotion granted to him first on the post of Reader and later on the post of Professor, be not rescinded the same being in antogonism of the Government Orders dated September 27, 1994 and 4.4.2000. Similar notices are said to have been issued to other petitioners as well.

2. We have heard Sri V.B. Singh, Senior Advocate assisted by Sri P.S. Baghel for the petitioners, Sri M.C. Tripathi for the respondents 1 and 2 and Standing Counsel for the State authorities.

3. The foremost questions that call for determination in this case are: firstly, whether a Reader appointed as such by promotion from the post of lecture under personal promotion scheme envisioned under Section 31-A of the Act is entitled to promotion to the post of Professor?; and secondly, whether personal promotion to the teachers of University given under Section 31-A of the U.P. State Universities Act, 1973 is to take effect from the date of taking over the charge on the post of Reader or Professor, as the case may be, or with effect from the date, the Lecturer or the Reader, as the case may be, becomes eligible for being considered for grant of personal promotion to the post of Reader or Professor, as the case may be? Section 31-A of the Act being relevant is excerpted below :

> "31-A – Personal promotion to Teachers of University: - (1) Notwithstanding anything to the contrary contained in any other provision of this Act, a Lecturer or Reader with the University substantively appointed under Section 31, who has put in such length of service and possesses such qualifications, as may be prescribed, may be given personal promotion, respectively to the post of Reader or Professor.
>
> (2) Such personal promotion shall be given on the recommendation of the Selection Committee, constituted under clause (a) of sub-section (4) of Section 31 in such manner and subject to such condition as may be prescribed.
>
> (3) Nothing contained in this section shall effect the post of the teachers of the University to be filled by direct appointment in accordance with the provisions of Section 31."

4. Section 31-A was inserted in the Act by U.P. Act No. 9 of 1985 with effect from 10.10.1984. It envisages that a Lecturer or Reader substantively appointed under Section 31, who has put in such length of service and possesses such qualification as may be prescribed, may be given personal promotion respectively to the post of Reader or Professor. The requisite length of service and qualifications are prescribed in the Statute 11.12 B inserted by notification no. 1126/XV-1-85-9(6)80 dated 28.3.1985 in the first Statute of Kumaon University and the same being germane of the controversy is quoted below:

> "11.12-b (1) Notwithstanding anything to the contrary contained in Statute 11.02 or in any other Statute the following categories of teachers of the University shall be eligible for personal promotion to the post of Readers or Professors, as the case may be: -
>
> Readers post –
>
> Lecturers who are, Ph.D. and have put in at least 13 years fulltime continuous service, as such.
>
> (ii) Lecturers who are not Ph.D. but have put in at least 16 years full time continues services, as such.
>
> Professors post –

Readers who have put in at least 10 years fulltime continuous service as such.

Explanation – Reader shall mean a teacher who has worked as Reader in a University.

(2) The service, referred to in clause (1), must have been rendered on an approved post –

in permanent, temporary or ad-hoc capacity;

in this University or in any other University, Post Graduate or Under-Graduate college or Institute, so however that at least five years permanent service must have been rendered in this University after regular selection through the selection committee constituted under clause (a) of sub-section (4) of Section 31 of the Act.

(3) The teacher of the University who is eligible for personal promotion shall submit a Self-Assessment Report in the proforma given in Appendix E, containing information relating to his satisfactory work, to the Registrar.

Explanation – Satisfactory work shall mean the work done with reference to the work expected from a number of the University Regulations, Statutes or Ordinances.

(4) The Selection Committee, constituted under clause (a) of the sub-section (4) of Section 31 of the act, shall consider the Self-Assessment Report, service Record (including Character Roll) and such other relevant records as may be placed before, or as considered necessary, by, it. The meeting of the Selection Committee for considering cases of personal promotion shall be held at least once every year.

(5) The Selection Committee shall submit its recommendation to the Executive Council and the Executive Council shall, subject to the provisions of clause (6), grant personal promotion on the basis of such recommendation.

(6) The benefit of personal promotion shall be admissible to lecturers for promotion to the post of Reader only and the Reader so appointed by Promotion shall not be entitled to promotion on the post of Professor.

(7) Personal promotion on the post of Reader or Professor, as the case may be, shall take effect from the date of taking over charge of the said post.

(8) As a result of personal promotion, there shall be no reduction in the work load of the teacher of the University.

(9) In case a teacher of the University is not found suitable for personal promotion he may offer himself again for such Promotion after two years and he shall be considered by the Selection Committee along with the teacher of the University who have since become eligible.

(10) In case the Selection Committee does not find a teacher of the University suitable for personal promotion, it shall state the reasons.

(11) (i) The post of Reader or Professor, to which personal promotion is made, shall be deemed to temporary addition to the cadre of Professor or Reader, as the case may be, and the post shall stand abolished

on the incumbent ceasing to occupy it.

(ii) On the Reader ceasing to occupy the post of Professor to which he was given personal promotion, new appointment, if any, shall be made on the post of Reader and similarly on the Lecturer ceasing to occupy the post of Reader, new appointment, if any, shall be made on the post of Lecturer."

5. A conspectus of Section 31-A of the Act and Statute 11.12 B of the Statutes would evince that the benefit of personal promotion is admissible only once. Personal promotion under Section 31-A of the Act is given on the recommendation of the Selection Committee under clause (a) of subsection (4) of Section 31 in such manner and subject to such condition as may be prescribed, to a Lecturer or Reader, as the case may be, "Who has put in such length of service and passesses such qualifications as may be prescribed". Statute 11.12 B prescribes the manner/procedure for grant of personal promotion as also the conditions subject to which it is granted. One of the conditions subject to which personal promotion is granted is visualised by clause (6) of Statute 11.12 B which reads as under: -

" (6) The benefit of personal promotion shall be admissible to lecturers for promotion to the post of Reader only and Reader so appointed by Promotion shall not be entitled to promotion on the post of Professor".

6. The language employed in clause (6) of Statute 11.12 B is clear and unambiguous. Double promotion under the scheme of Section 31-A of the Act is not comprehended. Petitioners who were concededly given benefit of personal promotion from the post of Lecturer to the post of Reader in their respective disciplines were not entitled to further promotion to the post of Professor under the scheme visualised by Section 31-A of the Act read with Statute 11.12 B of the Statutes. Double promotion under Section 31-A of the Act is not comprehended that is to say a Reader appointed as such under Section 31-A is not entitled to further promotion to the post of Professor. In the circumstances no exception can be taken to the impugned orders.

7. Personal promotion can not be claimed as of right merely because the teacher concerned is passessed of the requisite qualifications and has put in the prescribed length of service. A teacher of University who is eligible for personal promotion under Section 31-A of the Act is exacted to submit self-assessment report in the proforma given in Appendix 'E' furnishing information respecting his satisfactory work to the Registrar. The term satisfactory work as nailed down in the Explanation to Statute 11.12 B (3) signifies the work done with reference to the work expected from a member of the University under the Act, Rules and Regulations. Executive Council is clothed with the power to grant personal promotion on the basis of recommendation made by the Selection Committee. The selection, in our opinion, is not an empty ritual or formality to be gone into. Selection for personal promotion involves objective assessment to be made by the Selection Committee of satisfactory work of the concerned teacher on the basis of self-assessment report which is required to be submitted in the

proforma given in Appendix 'C'. Mere fact that a teacher is eligible and possessed of the requisite qualification for the post of Reader or Professor, as the case may be, is not enough to grant personal promotion unless the Selection Committee, on the basis of appraisal of satisfactory work of the teacher concerned, finds him suitable and recommends to the Executive Council for grant of personal promotion. In case the work of a teacher who is eligible and possessed of the requisite qualifications for grant of personal promotion, is not found by Selection Committee to be satisfactory he may be denied personal promotion on the ground of unsuitability.

8. The apart, personal promotion from the post of Lecturer to the post of Reader and from the post of Reader to the post of Professor is admissible only to those eligible and qualified teachers who opt for personal promotion in accordance with paragraph 9 of the Government Order dated September 10, 1987. The dividend of personal promotion will not be forthcoming to teachers who are covered by Career Advancement Scheme. It would be evident both from clause (9) of Statute 11.12 B and para 7 of the Government order dated September 27, 1994 that in case a teacher of University is not found suitable for personal promotion, he may offer himself again for such promotion after two years and upon such offer being given, the case of such teacher "shall be considered by the Selection Committee again alongwith the teachers of the University who have since become eligible". Such promotion, it has been expressly provided in paragraph 6 of the Government Order dated September 27, 1994, and clause (7) of Statute 11.12 B of the Statute, shall have effect from the date of taking over the charge of the post concerned. The expression taking over charge of the said post refers to taking over charge after grant of personal promotion on the basis of "such recommendation". The term "such recommendation" means recommendation by the Selection Committee as the concerned teacher being suitable for grant of personal promotion to the Post of Reader or Professor, as the case may be.

9. The submission made by Sri V.B. Singh, Senior Advocate that a teacher on being found suitable for grant of personal promotion under Section 31-A of the Act is entitled to be promoted with effect from the date a teacher becomes eligible can not be countenanced except on pains of violating express & stipulation in Statute 11.12 B (7) of the First Statutes that personal promotion shall have effect from the date of taking over charge on the post concerned and the rules of inter-seniority embodied in Statute 18.05 (b) according to which seniority of teachers in the same cadre is to be determined on the basis of the length of continuous service in substantive capacity in the order. Intention of the Legislature is expressed in clear and unambiguous language. There is no room for any speculation as to what was the intention of the law makers. In this context it would be apt and eliminating to quote the following passage from the "Principles of Statutory Interpretation" by justice G.P. Singh, 6th Edition, page 33:

> "When the words of a statute are clear, plain or unambiguous, i.e. they are reasonably susceptible to only meaning irrespective of

consequences. [1]The rule stated by Tindal, C.J. in Sussex Peerage case is in the following form: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver.[2] The rule is also stated in another form "when a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act Speaks for itself".[3] the results of the construction are then not a matter for the court,[4] even though they may be strange or surprising,[5] unreasonable or unjust or oppressive.[6] "Again and again", said VISCOUNT SIMONDS, L.C. "this Board has insisted that in constructing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used"[7] And said Gajendragadkar, J. ""If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.[8]

10. The ratio of Division Bench decision in Dr. Ashok Kumar Kalia Vs. Chancellor, Lucknow University and others[9] reliance on which has been placed by the learned counsel for petitioners, is not quotable as binding precedent inasmuch on the same appears to have been decided without considering the effect of Clause (7) of Statute 11.12 B and para 6 of the Government Order dated September 24, 1994. The decision appears to be per incuriam and is liable to be ignored in view of the law laid down by the Apex Court in State of U.P. and another[10] Vs. Synthetics and Chemicals Limited and another wherein relying on Lancaster Motor Company (London) Ltd. Vs. Bremith Ltd[11]. It has been clearly expounded that a decision rendered "without reference to the crucial words of the rule and without any citation of the authority" is of no binding efficacy. The relevant provisions particularly clauses (7), (9) and (10) of Statute 11.12B have not been taken into reckoning which in no delphic terms, point to the fact that personal promotion under Section 31-A of the Act is not like automaton to a teacher becoming eligible for personal promotion and lay down that personal promotion shall have effect from the date of taking over charge. Assessment of work is required to be made by the Selection

1 Nelson Motis V. Union of India, AIR 1992 Supreme Court 1981, p. 1984
2 Sussex Peerage case, (1844) 11 Constitution of India & F85, p. 143
3 State of Uttar Pradesh V. Vijay Anand maharaj, Air 1963 Supreme Court 946.
4 A.W. Meads v. Emperor, AIR 1945 FC 21, p. 23.
5 London Brick co. Ltd. V. Robinson, (1943) 1 All Er 23 (HL), p. 26.
6 IRC V. Hinchy, (1960) 1 All ER 505 (HL) pp. 508-512.
7 Emperor V. Benoarilal Sarma, AIR 1945 PC 48, p. 53.
8 Kanailal Sur V. Paramnidhi Sadhu Khan, AIR 1957 Supreme Court 907, p. 910.
9 1995 (II) A.W.C. 832
10 (1991) 4 SCC 139
11 (1941) 1 KB 675

Committee and thereafter positive order granting personal promotion is required to be passed by the Executive Council. In view of the plain language employed in Clause (7) of Statute 11.12B, the view that personal promotion shall take effect not from the date of taking over charge of the post but from the date on which the teacher concerned became eligible for consideration for grant of personal promotion, does not stand to reason. The contention of Sri V.B. Singh that personal promotion under Section – 31A shall take effect from the date of the teacher becoming eligible is against all known principles of service jurisprudence.

11. Before parting, we may, however, observe that it would be open to the petitioners to claim protection of the salaries and emoluments paid to them as Professors on the basis of illegal promotions granted to them. In case petitioners move any such application claiming protection of the salaries and emoluments already paid to them for the post of Professors, it would be open to the respondents to take appropriate decision in that regard in accordance with law without being prejudiced by any observation made in this judgement.

12. In the result, the writ petition fails and is dismissed in limine subject to the observations aforestated.

Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.9.2000

BEFORE
THE HON'BLE J.C. GUPTA, J.
THE HON'BLE M.A. KHAN, J.

Criminal Appeal No. 2480 of 1980

Salim ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant :
Sri P.N. Lal
Sri N.K Rastogi
Sri Sunil Singh

Counsel for the Respondent:
Shri A.D. Prabhakar
Sri A.K. Jain
A.G.A.

Section 304 Part (1) of Indian Penal Code - If the evidence and circumstances of the case indicate or create a reasonable doubt in the presence of the required intention, the offence would be culpable homicide not amounting to murder. (Held in para 14).

After having given our thoughtful consideration to the entire matter and on consideration, of facts and circumstances appearing in the case, we are of considered opinion that it will not be safe to hold the appellant guilty for the offence of murder and accordingly we find him guilty only under Section 304 Part–1 of the I.P.C. and convict him accordingly.

By the Court

1. Appellant Saleem has been convicted and sentenced to imprisonment for life under Section 302 of the Indian Penal Code for having caused the death of

Hafiz Ahmad on 13.11.78 at about 4.30 P.M. at Ramlila Ground in Village Ghatamapur within Police Circle Kotwali, Rampur.

2. Undisputedly on 13.11.78 'Kite Flying' games were going on in Ramlila Ground between Moradabad and Rampur districts. Appellant, Saleem and deceased Hafiz both were present in the said ground for looting kites and Manjha/dor (Cord of Kite) At about 4.30 P.M. the accused Saleem started looting Manjha of the side of deceased Hafiz, which was objected by the deceased. An altercation then ensued between the accused and Hafiz. The accused was having a stick in his hand, which was being used for collecting Manjha/Dor. He tried to strike the same on Hafiz which he warded off with his hand. Thereafter both deceased and accused grappled with each other and during grappling accused whipped out a dagger from the phainth of his payjama and inflicted injuries on Hafiz, as a result where of he fell down. Rais P.W.3, brother of Hafiz carried Hafiz to the Police Station Kotwali, Rampur where Hafiz himself dictated oral report (Ex. Ka. 5) which was reduced to writing in Chik register by Clerk Constable, Prem Pal Singh, P.W. 7 and a case under Section 324 I.P.C. was registered, injured Hafiz was sent to Hospital for his medical examination and his injuries were examined on the same evening at 5.45 P.M. by Dr. O.N. Gupta, P.W. 6 and following injuries were found: -

1. Incised wound 1 cm x 0.5 cm x skin deep on upper 1/3 left upper.
2. Incised wound 2 cm x 1 cm x muscle deep on left mid scapular region back, horizontally placed.
3. Incised wound 2 cm x 0.5 cm x skin deep on backside left hand just below the space between left little finger & ring finger, vertically placed.
4. Incised wound 2.5 cm x 0.8 cm x depth not probed, on left iliac fossa of abdomen, horizontal and oblique. Some fat bodies coming out of would measuring 3 cm in length.

3. In the opinion of the Doctor all the injuries were simple excepting No. 4, which was kept under observation and Xray of abdomen was advised. Injuries were caused by some sharp edged object and were fresh in duration. Injury report of Hafiz is Ex. Ka. 4. Dying declaration (Ex. Ka. 8) of Hafiz Ahmad was also recorded by Sri S.K. Nigam, P.W. 5, Executive Magistrate, Rampur. Hafiz died in Hospital on 15.11.78 at 2.45 A.M. The autopsy on the dead body was conducted by Sri M.N. Agrawal, P.W. 4. Since we have already described the injuries of Hafiz, it is not necessary to reproduce the ante-mortem injuries. In the opinion of Doctor only injury No. 4 was the cause of death of the deceased.

4. The case was converted into Section 304 I.P.C. from 324 I.P.C. Investigation of the case was carried out by Sub-Inspector, K.K. Singh, who during the investigation interrogated witnesses, prepared site plan and after completion of other formalities, charge sheet was submitted against the appellant, who was duly tried by the learned Sessions Judge, Rampur

5. At the trial prosecution produced nine witnesses, of whom P.W. 1, Mohammad Siddique, P.W. 2 Tahir and P.W. 3 Rais Ahmad are witnesses of fact.

6. The appellant in his statement under Section 313 Cr. P.C. admitted that he and the deceased were both present in Ramlila ground and were engaged in looting Manjha Dor in the Kite Flying games. However, according to him when he had looted Dor, Hafiz came there and started abusing him to which he protested, but he did not stop and slapped him and grappled with him. Hafiz even snatched the stick from the hand of the accused which was meant for looting dor and also put his hand on his neck and therefore, in order to save himself he took out knife and when Hafiz gave pressure during the grappling the knife pierced into his abdomen. The accused however, did not examine any witness in defence.

7. We have heard Sri Sunil Singh, amicus curie for appellant Saleem, Sri A.K. Jain A.G.A. for the State and Sri A.D. Prabhakar for complainant.

8. The factum of death of Hafiz due to ante-mortem injury No. 4 has neither been disputed nor challenged before us by the learned counsel for the appellant.

9. Sri Sunil Singh, learned counsel appearing for the appellant however, submitted that the circumstances of the case which have appeared in the evidence of the witnessed do not rule out the possibility of appellant acting in self defence or under grave and sudden provocation. We have made careful examination of evidence of the prosecution witnesses with whom appellant had no enmity nor the said witnesses had any grudge against the appellant and we do not find any such material in their evidence on the basis of which benefit of right of private defence could be extended to the appellant. There is nothing also in their statement which may probabilise the theory that the deceased had given provocation. As far as prosecution case is concerned, it has been established beyond any reasonable doubt not only from the evidence of three witnesses, but also from the First Information Report which was lodged by victim Hafiz himself. This F.I.R. is admissible as a dying declaration of the deceased under Section 32(1) of the Evidence Act. In this F.I.R. the deceased has clearly mentioned that it was the appellant who had caused knife injuries on him in the Ramlila ground at about 4.30 P.M. on 13.11.78. It is also pointed out by the learned A.G.A. that on the very next day declaration of Hafiz was also recorded by Executive magistrate, P.W. 5, Sri S.K. Nigam. Before dying declaration was recorded the physical and mental condition of Hafiz was examined by the Doctor and he reported that Hafiz was in a state of mind to make statement. Sri Nigam then proceeded to record the dying declaration of Hafiz which has been proved as Ex. Ka. 3. We have minutely examined the evidence relating to the dying declaration and find that the dying declaration is truthful and was voluntarily made. It is now well nigh settled that Dying Declaration alone can be the basis of conviction and need of corroboration arises only where the dying declaration is not found reliable and the same suffers from any infirmity. The Dying Declaration in question does not suffer from any infirmity or weakness. Besides this, the averments made in the dying declaration are fully supported by evidence of three eye witnesses and the medical evidence, and as such can be made basis of appellant’s conviction.

10. On a close examination of the evidence on record we find that the prosecution has succeeded in establishing that it was the appellant, who inflicted knife injuries upon deceased Hafiz on the date, time and place as alleged by the prosecution.

11. It has to be seen next as to for what offence the appellant can be held guilty? The trial court has convicted the appellant for the offence of murder punishable under Section 302 I.P.C. Sri Sunil Singh, however, argued before us that it was admitted case of the prosecution that there was no previous enmity between the deceased and the appellant and that they both were present in the Ramlila Ground for looting Manjha/Dor and kites. It has also come in the evidence of P.W. 1 that it was the appellant who first looted Manjha/Dor which was objected by the deceased and thereafter abuses were exchanged and both appellant and deceased grappled with each other. Sri Sunil Singh therefore, submitted that in this fact situation it can not be said with certainty that the appellant had intended to cause that particular bodily injury in the abdomen of Hafiz which ultimately proved fatal. We find substance in this submission of the learned counsel for the appellant. In the case of **Virsa Singh Versus State of Punjab A.I.R 1958 S.C. 465,** the Apex Court held that in order to bring a case under Clause Thirdly of Section 300 I.P.C. the prosecution must prove with cogent evidence the following facts: -

Firstly, it must be established quite objectively, that a bodily injury is present.

Secondly, the nature of the injury must be proved.

These are purely objective investigations: -

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury that is to say, it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present the inquiry proceeds further and,

Fourthly, it must be proved that the injury of the type, just described made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature.

This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender.

12. It is thus clear that in order to bring a case within the mischief of clause. Thirdly there should be a bodily injury on the deceased which is sufficient in the ordinary course of nature to cause death and the accused had intended to cause that particular injury. If the evidence and circumstances of the case indicate or create a reasonable doubt in the presence of the required intention, the offence would be culpable homicide not amounting to murder.

13. In the present case the circumstances which have emerged in the prosecution evidence itself indicate that on account of appellant having looted Manjha which could have gone to the deceased, some annoyance must have been caused to the deceased, who feeling aggrieved started abusing the accused and then both of them exchanged abuses and

grappled with each other. In such a factual situation it can not be said with certainty that the appellant had aimed the blow on a particular part of the body of the deceased and thereby had intended to cause injury no. 4 which ultimately proved fatal.

14. After having given our thoughtful consideration to the entire matter and on consideration of facts and circumstances appearing in the case, we are of considered opinion that it will not be safe to hold the appellant guilty for the offence of murder and accordingly we find him guilty only under Section 304 Part-1 of the I.P.C. and convict him accordingly.

15. Now coming on the question of sentence we find that the learned Sessions Judge has not made strict compliance of the mandatory provisions of Section 235 (2) Cr. P.C. which contemplates that an opportunity of hearing is to be given to the accused on the question of sentence. The learned Sessions Judge in his judgement has simply observed that the accused has been heard on the question of sentence. This was not sufficient. It has been repeatedly emphasised by the Hon'ble Supreme Court that hearing contemplated under Section 235 (2) is not confined merely to hearing oral submissions and the requirement of law is that the accused should be given an opportunity to place before the court material and evidence relating to various factors bearing on the question of sentence. Neither the judgement of the trail court nor the record indicates that such an opportunity was afforded to the appellant. This salutary provision satisfies a dual purpose. It satisfies the rule of natural justice by affording to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. The provision is mandatory and should not be treated as a mere formality. The opportunity so given, entitles the accused to place before the court his antecedents, social and economic background mit gating and extenuating circumstances etc.

16. We ourselves gave that opportunity to the appellant's counsel and he stated before us that no material or evidence is to be placed on record. However, it was pointed out by the learned counsel for the appellant that the appellant was a young lad of about 16 years of age when this incident occurred, and therefore, a lenient view be taken while according punishment.

Sentencing an accused is a sensitive exercise. For selecting an appropriate and just sentence the court has to weigh aggravating and mitigating circumstances always keeping in mind that the object of sentencing is to see that the crime does not go unpunished and the victim of the crime as also the society has the satisfaction that justice has been done. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting to the crime so that courts reflect public abhorrence of the crime. The personality of the offender as revealed by his age, character and antecedents so also the circumstances in which the crime was committed play an important part in determining a just and appropriate sentence.

17. In the present case even as per the prosecution evidence the incident had occurred at a spur of moment without any premeditation on a trivial issue of Manjha looting. It is true that the deceased was a young boy of 18–19 years of age but the appellant was also a young boy. In his statement recorded on 29.9.80 under Section 313 Cr. P.C. before the trial court the appellant disclosed his age as 16 years. The learned Sessions Judge, however, made an observation that in his opinion the appellant appeared to be about 18 years old. May that as it be, even as per the estimate made by the learned Judge, the appellant was just above 16 years of age on the date of occurrence, i.e. 13.11.1978. The injuries of the deceased were caused when the deceased and appellant had grappled with each other and we have already found above that it can not be said with certainty that the appellant intended to cause particular injury (injury no. 4) which ultimately proved fatal.

18. With the passage of long period of 22 years the socio-economic conditions of the appellant must have also gone a radical change and on account of this long interval passions of both the sides must have cooled down. There is nothing on record to indicate that during the pendency of appeal the appellant made any attack on the witnesses or members of the deceased family or had indulged himself in any other criminal activity.

19. Considering the entire facts and circumstances and having regard to the age of the appellant, his character, antecedents and other factors, we are of the opinion that a sentence of four years R.I. and fine of Rs.5,000/- shall meet the ends of justice. In default of payment of fine the appellant shall undergo further R.I. of one year.

20. For the reasons assigned above, this appeal is partly allowed. The appellant is convicted under Section 304 Part-1 instead of Section 302 I.P.C. and instead of life imprisonment he shall undergo rigorous imprisonment for four years and pay a fine of Rs.5,000/-. In default of the payment of fine he shall undergo further R.I. of one year.

21. The appellant is on bail. He shall be taken into custody forthwith to serve our the sentence as modified by this Court. The trial court will now take appropriate steps for the arrest of the appellant so that he may serve out the same as has been imposed upon him by this Court. Compliance report shall be sent to this Court within three months.

22. Sri Sunil Singh, who argued the appeal admirably well, shall be paid Rs.2,100/- as his fee.

Partly Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD AUGUST 11, 2000

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

Criminal Appeal No. 164 of 1997

Raghubeer ...Appellant.
Versus
State of U.P ...Opposite party

Counsels for the Appellant:
Shri Amar Saran
Shri B.d. Shukla
Shri Molvi Nasruddin.

Counsel for the Respondents:
A.G.A.
Shri A.K. Shukla.

N.D.P.S. Act Section 19 –the rules for carry forward further indicates that prosecution is not a must in every case, specially where prosecution has initially came with the case of variation is weigh and subsequently took a case that the deposited opium was adulterated. (Held Para 14)

In the result, this appeal is allowed. The conviction of the appellant under Section 19 of the Narcotic Drugs & Psychotropic. Substances and consequent sentence of 10 years as also fine of Rs. 1 lakh are hereby set aside.

By the Court

1. Heard learned counsel for the appellant and learned A.G.A. Sri A.K. Shukla.

2. The present appeal arises out of a judgment and order dated 31.1.1997 passed by Sri Nalin Mohan Lal IV Additional Sessions Judge, Budaun, in S.T. No. 28 of 1992 convicting the appellant under Section 19 of Narcotic Drugs and Psychotropic Substances Act,1985 (hereinafter referred to as the Act only) and sentencing him to undergo 10 years R.I .and a fine of Rs.1,00,000/- in default of payment of fine the appellant is further to undergo R.I. for two years.

3. Brief facts of the case are that according to the Register of Lambardar the appellant had extracted 2 Kgs of opium within five days commencing from 24.3.1986 to 28.3.1986. On 4.4.1986 when the initial weightment in accordance with Rule 14 was made it was fond to be 2 Kgs. When on 24.4.1986 it was weighted again at the Government Centre it was found to be only 550 gms. In this manner the appelent was charged for embezzlement of 1.405 Kgs of pium and 8 in sequently charge under Section of the Act was framed against him for embezzlement of the said quantity of opium and the trial resulted into him conviction, as aforesaid.

4. The prosecution, in support of its case, has examined P.W. 1 Jorawar, P.W. 2 Ashok Kumar Gupta, P.W. 3 Brij Lal and P.W. D.D. Kuril. The first three witnesses are concerned with weighment, classification of the opium, its subsequent weighment and custody. The last witness, i.e. P.W. 4, is the officer Narcotics and has filed the complaint in court for prosecution of the appellant.

5. Learned counsel for the appellant has raised following submission:-

Firstly, the prosecution of the appellant has been made without complying with the provisions of rule 13(5). Secondly, it is not clear from the evidence whether the article, after initial weighment, was left in the custody of the cultivator and after verification on and classification, as required under Rule 15 of Chapter III of the N.D.P.S. Rules, 1985.

Who took it into custody, and what was its weight as the time of its deposit. A perusal of riles 14 and 15 in conjunction with Rule 13 clearly indicate that after the opium is weighed, examined and classified, it cannot be left by the Department with the cultivator. The last submission is that the evidence is cryptic and does not indicate clearly that in the period in question the menace of Nil Gal and other natural climatices had not

affected the production of opium in the are. It is also clear from the evidence of the witnesses that there was no standard measurement fixed for production of opium per aire. In order to appreciate the above said arguments it is necessary to examine the provisions and the evidence closely.

6. The prosecution under Section 19 of the above said Act pertains to embezzlement of opium by cultivators. Foe easy reference Section 19 is quoted below :

> " 19. Punishment for embezzlement of opium by cultivator – Any cultivator licensed to cultivate the opium poppy on account the Central Government who embezsles or other wide illegally disposes of the opium produced or any part there of shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees."

7. The procedure for cultivation, extraction and weighment, examination and classification of any opium cultivated and so extracted is provided by Chapter III of the Rules. According to Rule 5 of this chapter cultivation can be permitted by Central Government on the tracts notified by it from time to time and in accordance with the conditions of a licence issued by the District opium officer under Rule 8. Rule 6 fixes fee for licence. Rule 7 prescribes specific form for issuing such a licence. Such licence can be issued according to Rule 7 on Form No. 1 Rule 8 prescribes the manner in which the licence is to be issued by the concerned authority, i.e. District opium officer or the Central Government itself. Rule 9 lays down that licence is to specify the area of cultivation. Rule 10 provides designation of Lambardar. It is the duty, According to this Rule, of the District opium officer to designate one of the cultivators of opium poppy as Lambardar in each villager where opium poppy was allowed to be cultivated. His functions are to be governed and specified by the Narcotics Commissioners. Rule 11 prescribes power for with holding or cancellation of lience. Rule 12 lays down the procedure for measurement of land under cultivation of any cultivator in accordance with conditions of licenc. The land is to be measured by a proper officer in the presence of the cultivator concerned and the Lambardar of the village. It is to be attested by the cultivator and Lambardar. The entries are to be made in the records to be maintained by Lambardar in accordance with the specifications provided to him by the Narcotics Commissioner in this behalf. The record has to bear their signature or thump impression. The record is to bear testimony to the correctness of the measurement. These measurements are subject to further checks by an officer specified by Narcotics Commissioner in this behalf. The record is to bear testimony to the correctness of the measurement. These measurements are subject to further checks By an officer specified by Narocotis Commissioner in this behalf. Rule 13 lays down procedure for the preliminary weighment. According to sub-rule (1) of Rule 13 the cultivator shall, during the course of harvesting, produce every day before the Lambardar

each day's collection of opium from his crop for weighment. Sub-rule (2) lays down the duty of Lambardar for making arrangement to weigh such opium and for making necessary entries in the records to be maintained by him as specified by the Narcoties Commissioner. Sub-rule (3) days down the regulation for certification by signature or thump impression the entries to be made in the register so maintained by the Lambardar about the preliminary weighment of day to day extraction of opium to produced before him by the cultivator. Sub rule (4) speaks of check to be made by the proper officer of this prelimnary weightment of opium collected by the cultivators with reference to the entries with the Lambardar's record and he was to indicate him finding therein which shall be attested by him and the Lambardar under their signature with date on which such checking is conducted. Te dates are to be mentioned by the Lambardar under their signature with date on which such checking is conducted. The dates are to be mentioned by the Lambardar also regarding him entries. Sub rule (5) lays down the principle to deal with variations in the two weighments. According to it if there is any bariaion found in the preliminary weighment recorded by Lambardar during the check conducted by the proper officer then it has to be enquired into by the proper officer in order to as certain the liability of the cultivator for punishment under Section 19 of the Act. This deviaion, Thus puts a rider on the prosecution of the cultivator under Section 19. According to this rule a prosecution under Section 19 can be under taken only after such an enquiry is conducted and completed by the proper officer. Rule 14 prescribes that made for the delivery of opium produced by the cultivator. Rule 15 prescribe mode to handle opium after it is delivered by the cultivator at the specified place. Rest of the rules are not of much consequence, except Rule 22 and 23, which provides for confiscation of adulterated opium and adjudication of such adulterated opium. Rest of the rules are procedurally in nature. There is a provision under Rule 25 regarding adjustment of cultivators account and recovery of due from the cultivators. For ready reference Rule 25 is quoted as under:

> " 25. Adjustment of cultivators account and recovery of dues from the cultivators. The accounts of the cultivator for a particular crop year shall be adjusted by the District Opium Officer at the time of issuing of licence for the subsequent crop year and any balance that may remain due from the cultivators shall be recovered and any amount due to them be paid."

Rule 26 speaks of weights and scales. According to it the weithers and scales for use at the weight centres and the Government Opium Factory shall be caused to be examined at the appropriate time by the Deputy Narcotics Commissioner or the General Manager, as the case may be.

A careful scrutiny of Rule 13, 14 and 15 days down two different stages of weighment, which includes examination and classification of cultivated opium as well. The first stage is provided by Rule 13, which talks of preliminary weighment. This weighment is to be done by Lambardar, who is a person appointed from amongst the cultivators in a particulars village. It is the duty of the

Lambardar to make arrangement to weigh day today extracted opium a from which cultivation. He had to maintain a record for this purpose in the from of a register, which must contain entries of the preliminary weighment and also bear date of weighment, his signature and the signature or thumb mark of the cultivator. The cultivator and the Lambardar both have to attest these entries made in such record and they have also to sign or put thumb mark on the same with dates as well.

This attestation is by way of certification of the quantity of opium weighed on a particular date. Sub-rule (4) lays down procedure to be adhered to after the preliminary weighment is over, by Lambardar. This subsequent weighment is by way of a check of the weighment made by the Lambardar. This is to be conducted by a proper Officer designated for this purpose by the Narcotics Commissioner. He is required to compare and make entries in the register of the Lambardar regarding day to day weightment made by him in the record. Such findings are to be attested by him and the Lambardar both. They are not only required to Sign but also put the date underneath it. Sub-rule-(5) is pertaining to variations between the quantity of opium produced by the cultivator indicated in the Lambardar's record and as weighed and found by the proper officer during his check. It further provides that this variation shall be enquired into by the proper officer in order to ascertain the liability of the cultivator for punishment under Section 19 of the Act. This is a very important provision occurring in sub rule (5) which provides that any prosecution of a cultivator shall be under taken only after due enquiry and verification of the variations in weighment by proper officer. As a matter of fact it constitutes a fetter in the prosecution of any cultivator under Section 19. Its noncompliance from its language itself appears to be fatel for the prosecution. This is a beneficial provision made in the Act in the form of sub rule (5) to save the interest of the cultivator. It has to be interpreted strictly and no slackness in its interpretation, in my opinion, is permissible. Sub rule (5), it appears to me, clearly is mandatory in nature. After these tow stages Rule 14 provides for the delivery of opium produced. For ready reference , Rule 14 quoted below :

> "14. Delivery of opium produced. All opium, The produce of land cultivated with opium poppy, shall be delivered by the cultivators to the District opium Officer of any other officer duly authorised in this behalf, By the Narcotics Commissioner at a place as may be specified by such officer."

8. Thus, this rule clearly indicates the stage when the opium so produced by a cultivator shall have to be delivered to the District Opium Officer or any officer so authorised in this behalf by the Narcotics Commissioner. The place also is to b e notified where it is to be delivered by the cultivator. In the same breath Rule 15 also is significant. It is quoted below for reference :

> "15. Opium to be weighed, examined and classified All opium delivered by the cultivators to the District Opium Officer or any other officer authorised as a for said, shall, in the presence of the concerned cultivator or nay person authorised by him and the Lambardar of the village, be

> weighed, examined and classified according to its quality and consistence and forwarded by the District opium officer to the Government opium Factory in such manner as may be specified by the Narcotics Commissioner."“

9. From a perusal of this rule it appears that this is clearly the stage before despatch of the opium to the Government factory and after it is deposited by the cultivator. According to rule 14 the District opium officer has to notify the place where the opium is to be delivered by the cultivators. After delivery of the opium by the cultivator it is to be examined, weighed and classified according to its quality and consistence and the Dist4rict opium officer is required to forward such opium to the Government factory in the manner as specified by the Narcotics Commission. In this manner this is the last stage. These rules provide clearly what is to happen after the check weighment and return of his finding in the register of Lamberdar by the proper officer is made or conducted. This check is in the nature of a second weighment. The sequence of Rules 12,13,14 and 15 indicate clearly that after the check is over the opium ought not be left with the cultivator. It has to be taken to a designated place and it is to be received by the District Opium Officer or a designated officer in this behalf. After its re weight, examination and classification, according to its quality and consistence by the District opium officer or any other officer authorised by rule 14 it has to be despatched to the Government factory. The safeguard is to be read in Rule 15, inasmuch as the last weighment, examination and classification is to be done in the presence of the concerned cultivator or any person so authorised by him for this purpose and also the Lambardar of the village. This is yet another check contemplated by the Act and the Rules made under the above said Act. These very checks imposed by law clearly indicate that after the second weighment of the articles opium or copy cannot be retained by the cultivator. It has to be passed on or deposited with the department. This is rendered unequivocal by the provisions contained in Rule 15, as already elaborately discussed earlier.

10. The evidence produced by the prosecution in this case runs short of its obligation. None of the officials produced on behalf of the department have categorically stated that after the second weighment the cultivated opium was left with the cultivator for its production at any specified place on a specified date. In the absence of such as evidence it is open to contention and rightly contended by the learned counsel for the appellant that the prosecution of the appellant under section 19 is mischievous. The evidence of P.W. 1 shows that the produce of 24^{th},25^{th},26^{th} , 27^{th} and 28^{th} March in its total weight was 2 Kgs P.W. 1's statement, Who was Lambardar, Shows that on 4.4.1986 Brij Lal, Deputy Inspector, belonging to opium Department , visited the village. He had weighed opium of Raghubeer himself and found the same to be 2 Kgs., As noted in the measurement book maintained by the Lambardar. The entry was made with regard to this fact by P.W. 1 in his register. His evidence further shows that the weighment noted against Raghubeer in the register was based on the estimate given by Raghubeer himself, although he claimed initially that he had weighed it but he has clearly admitted in cross examination that he had no

measuring scale and weights. He has further admitted that he used to made entries in his register on the statement of the cultivators. The weights are put into the register on the basis of visual estimations as well. In these circumstance, So far as the evidence of P.W. 1 is concerned, he has further admitted that the appellant has also no measurement or weights. He has clearly admitted further that in the year in question crops were badly affected on account of dubious weather. It has further come in his testimony that crops of Raghubeer was damaged beyond redemption be Neel Gai (blue boons). In further cross examination he has come out with the statement that after the formation of seeds cultivators used to extract opium and the measurements are entered into the weighment register on their statements. This statement categorically proves and establishes that no entries in the register were made by Lambardar on the basis of any actual weighment. No reliance can be place on the estimations of the Lambardar as the law requires him to do proper weighing on a scale before making entries in his register. A Kumar Gupta (P.W. 2) Deputy Inspector in the Department, is the person who had made check weighment, as required by sub rule (4) of Rule 13, meaning there by that he was the proper officer or authorised officer as contemplated by this rule. He has proved the measurement of the land allotted to Raghubeer, the appellant , which according to him was 15 aire. He had further proved that a licence for the above measurement was issued to the appellant. He has produced the field book and entries made in column no. 8 of this book. According to him in column no. 21 of this book weigh of opium deposited by the appellant is show as 550 gms. He has stated that the appellant had deposited this opium on 24.4.1986, but this witness has not state that these entries and these measurement were made after compliance of Rule 15 in this register and this weighment was made in the presence of the cultivator and the Lambardar, As required by Rule 15. He had stated that weighment was done by him by the classification was to be done by the District opium officer. He has further r state that in accordance with his order classified opium is sent for further weighment on the weighment scale. He had stated that he made this measurement as Sl. No. 'A'. He had further state that the appellant's opium was suspected to be adulterated. It was suspected after appellant's opium was found to be 550 gms. No payment was made to appellant due to this reason. He had further proved that Brij Lal P.W. 3. Deputy Inspector of the Department had found the opium belonging to the appellant in record no 7 as 2 Kg. He had made his verification entries regarding the same in register of Lamberdar. He had proved his handwriting. It is Et. Ka-3. He had clearly admitted that there is no standard fixed per aire for the cultivation of opium. He has also admitted that blue boon are too fond of opium plants. He has further admitted to him that in tehsil Bisoli Visists of blue boons was very frequent and rampant during the year in question. Although he had denied that on this account he has measured land belonging to Raghubeer after issuance of his licence in the presence of Lamberdar and an entry regarding this was made at page 26 of the book in column no. 7. This entry is dated 16.1.1986. He has further admitted that entries made from 24th to 28th March are not made in one clumn. Stamp-pad used for obtaining signatures is one day the

same. He has admitted that opium deposited by the appellant was suspected to be adulterated, But in his knowledge no enquiry was conducted by the department in this connection. He had no record in his custory to prove that nay notice was given to him. He claimed that opium was deposited in his presence. He further stated that he had not seen the opium, but only weighed it. He further admitted that he can not state, on the basis of record in his possession, that any enquiry was made from the appellant in connection with adulterated opium. His statement further goes on to state that no notice was given to the appellant by the department for this variation in the weighment of his opium. He had admitted that rule lays down that an enquiry should be made with regard to the variation in the weighment before prosecuting any cultivator.

11. P.W. 3 is Brij Lal, He is a retired Inspector of the department. He had made the check after it was first weighed by Lambardar. This weighment was made on 4.4.1986, P.W. 2 had made the weighment on 24.4.1986. His statement shows that the opium after weighment made by the Lambardar was left with the cultivator and on 4.4.1986 he had summoned the same from the cultivator at the residence of Lambardar and weighed there. He also stated that he had made entries regarding weight and verifications in the register and had signed it. The entries regarding Rahubeer, according to him are contained on page no. 7. He claim that eh had weighed himself on 4.4.1986 the opium brought by the cultivators. According to him the total produce of the appellant during the period for which he had the licence ought to have been 6 kgs. He further admitted that change of weather and destruction of crop by animals affects the produce. He further stated that this Department had never tried to hind out why the cultivation fell in the relevant year. He claimed that the entire record pertaining to this case was present in his custody at the tie of his statement. After verification from the record he further stated that he did not find any entry regarding poor produce of opium during the relevant period. He further stated that he hand no knowledge of any notice having been issued to Raghubeer for less production of opium. He had further stated that the record also does not suggest any such notice having been issued to him. He has further stated that he had no knowledge about the total produce obtained by the appellant from 15 Aire of land. He claimed that the weighment was made by him in the presence of Lambardar and the cultivator. He had stated that he had also classified it as No. 1 in quality. When specifically put to test regarding his entry in the record he had to admit that there is only entry that opium is 2 kg. In weight and no entry about classification. He had identified his signatures. This entry admittedly had no date under his signatures, as required by Rule 15. He has further admitted that he maintains a personal daily diary. This diary was provided by the Departments. In this diary he used to make entries with regard to the places he had visited on a particular date. Amongst the record that he had brought in court this diary is not there, although he has submitted that diary at the time of retirement in the Department. He claim that he had weighed the opium on the scale provided to him by Lambardar. It will be relevant to refer to the statement of Lambardar again in this context P.W. 1 Lambardar has very categorically admitted that he had not possessed any scale or weights.

His statement further is that all entires were made by him either on visual estimation or on the estimation disclosed or represented by cultivators. He has further stated that opium is an article which is lost by evaporation, although he had stated that the rate of evaporation is slow. However, it is not certain how much weight is lost. This loss in weight depends on the process of extraction and the conditions in which it had been kept by the cultivator part from the period for which it had been kept by him. He had to admit after the above admission that he had weight and found the opium exactly in accordance with the weight noted by Lambardar in his register. P.W. 1 Lambardar, according to rules, must have weighed day to day produce on the dates commencing from 24th March, 1986 to 28th March, 1986, as required by Rule 13 although he had not specifically stated that he has weighed himself on these dates. It is not unusual that in these 8-12 days opium extracted and weighed will certainly suffer drying and in such a situation it could not be exactly 2 kgs, as a found during check weighing by proper officer on 4.4.1986. It further goes to suggest that these officials had not weighed at all the opiumnd had verified entries made by Lambardar passively. There is no evidence when the cultivator deposited the opium after it was checked and whether he was given any date for this purpose. It was also not weighed at the place of deposit in the presence of cultivator and lambardar.

12. The last witness P.V. 4 D.D. Kuril, is the person who had submitted charge-sheet in court against the appellant. This witness had stated that on 24.4.1986 Raghubeer had produced his opium for weighment at the specified place and it was found to be 550 gms. Therefore, the variation of 1.450 g. was noticed. He has admitted that he has not recorded any statement of any witness but had submitted charge-sheet on the basis of the entries found in the record of the Department. He has very clearly admitted that before submission of the charge-sheet in court he had not issued any notice with regard to this variation in accordance with sub-rule (5) f Rule 13 to the appellant. He has further admitted that the cannot give any estimation regarding regular production of opium per air. The produce depends upon labour of the cultivator and freedom from natural calamities. He further admitted that menace of blue boon in the area was brought to his notice by the cultivators. It was also brought to his notice that these blue boons are very found of opium crop. He had further admitted that in the register, maintained by Lambardar, cultivator himself used to get the entry made with regard to weight of their opium. No scale for weighment was provided to Lambardar by the Department is clear admission of this witness. He, thus, corroborated statement of P.W.1 Lambardar on this point. He has further admitted clearly that there is no such instruction to Lambardar that he should wiegh opium himself. Although he had made an evasive reply to the question that Lambardar used to make entries in the register of the cultivators without weighing it but from the evidence of P.Ws. 1 and 4. It become very clear.

13. From a thorough examination of the evidence detailed above, it becomes absolutely clear that entries regarding weights made in the register, maintained by Lambardar, are not authentic. They are made on visual examination or on the representation of the cultivators. So far as

the appellant is concerned, P.W. 1 is categorical in this statement that neither he had any scale to weigh the opium brought by the cultivators not the appellant had any scale in his possession. Therefore, without any hitch I come to the conclusion that the entries regarding the appellations the register maintained by Lambardar were all estimative and cannot be relied upon. They were made on the basis of imagination. Except Lambardar, who is an interested witness belonging to the Department, not a single witness from amongst the cultivators were produced by the prosecution to substantiate the allegation that entries in the register of Lambardar were made after weighing. So far as P.W. 3 Brij Lal is concerned, his evidence also cannot be taken in corroboration of the statement of P.W. 1. It is admitted to P.W. 4 that no scales provided to Lambardar. This witness has stated that he had weighed the opium brought by the cultivator on 4.4.1986 on the scale belonging to P.W. 1. This statement of his stand completely eliminated and falsified by the averments of P.W. 1 and p.w. 4. Evidence of any witness, who had interest in their cases cannot be considered as sufficient to prove the charge against the appellant especially in the circumstances discussed above. Apart from this all these witnesses have admitted unequivocally that no compliance of sub-rule (5) of rule 13before launching the prosecution against the appellant was made by the Department. This is yet another reason why this appeal must succeed. As I have already held that the provisions of sub-rule (5) of rule 13 are mandatory in nature, the benefit on its violation has to go to the appellant. As already held, while interpreting Rules 13, 14 and 15 by me, that after the second weighment, i.e. the check weighment by a proper officer authorised by the Narcotics Commissioner in this connection, it does not deem proper that opium will be left in the custody of the cultivator without giving him date and also specifying place for its deposit. As provided by Rules 14 and 15, they will have to be brought either by the cultivator himself an the specified destination on a specified date for further activities, such as delivery and despatch after weigh, examination and verification to the opium factory. No witness, especially P.W. 3, has not stated as word about it. This is also fatal for the prosecution. The rules for carry forward further indicates that prosecution is not a must in every case, especially where prosecution has initially came with a case that the deposited opium was adulterated. In these circumstances it is not possible to delineate truth from the statement of prosecution witnesses. No enquiry apparently was undertaken against the appellant before filing charge-sheet in court against him as required by law, as discussed earlier.

14. In the result, this appeal is allowed. The conviction of the appellant under Section 19 of the Narcotic Drugs & Psychotropic Substances Act and consequent sentence of 10 years as also fine of Rs. 1 lakh are hereby set aside. The appellant was granted bail by this Court at the time of admission of this appeal, but his fine was not stayed and he failed to pay the fine. He is still languishing in jail. He shall be released forthwith, if not otherwise wanted in any other case. It is a pity that the appellant has to suffer incarceration for nearly three years on account of a reckless prosecution. Narcotics officials are

warned to be careful not to prosecute any person without compliance of rules.

15. Let a copy of this judgment bet set to the Secretary (Home), Government of India, for necessary action in the direction of preventing such prosecutions of innocent persons.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2000

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

Civil misc. Writ Petition No. 51429 of 2000

Hemant Kumar Rai ...Petitioner
Versus
Joint Director of Education 4th Division Azamgarh and others ...Respondents

Counsel for the petitioner:
Shri D.B. Mishra
Shri A.K. Yadav

Counsel for the Respondents:
S.C.

U.P. Recruitment of dependants of Government Servants-Dying in Harness Rules, 1974- Compassionate appointment Claim to change of post in same or higher grade permissibility.

Held-Para 4

The object for granting appointment on compassionate ground is to enable the family of deceased employee to tide over the sudden crisis, which has occurred due to the death of sole bread earner of the family. Such appointments are made purely on humanitarian consideration with an object to provide the family some sources of livelihood. It cannot be treated as creating a right, which could be enforced at will. The petitioner in his representation dated 30.6.2000 (Annexure-2) clearly stated that he was accepted the appointment on the post of junior clerk. Learned counsel for the petitioner failed to show any rule that entitles a dependant who has been appointed can claim a change of post either in the same or higher grade. In absence of any rule once the petitioner jointed on class-III post of junior clerk, he could not claim the post of Assistant Teacher. The decision in Sanjeev Kumar Dubey (Supra) is of no help to the petitioner; petitioner is not entitled to any relief.

By the Court

1. Petitioner's mother Smt. Uma Rani was an Assistant Teacher (L.T. Grade) in Government Girls Uchchatar Madhyamik Vidyalaya, Ajmatgath, Azamgath she died in harness on 28.6.1996 she left behind her husband Sri Ravindra Nath Rai and the petitioner her only son petitioner's father wrote a letter on 23.7.1997 to the joint director of Education, fourth Region Azamgarh (in brief JDE) that his wife who was a teacher in the vidyalaya died on 28.6.1996 and 21.7.1997 an application was moved for appointing the petitioner under dying in harness rules. But the petitioner on the date of application had not completed his education and was not eligible therefore he was moving the application for appointment of petitioner after completion of the course and till then a post in L.T. Grade may be kept reserved for him. On the application of the petitioner claiming appointment under dying in harness rules the JDE appointed him on 13.1.2000 on a class-111 post of junior clerk in the same institution. He accepted the appointment reserving his right to claim appointment

on the post of Assistant Teacher (Art) on 30.6.2000 he made a representation to JDE that he had accepted the appointment in class-111 without loosing the right to claim appointment in L.T. Grade and since a division bench of the high court has held that a candidate could claim appointment to the post of Assistant teacher under dying in harness rules, therefore the petitioner may be appointed Assistant Teacher (Art) under the dying in harness rules.

2. Sri D.B. Misra the learned counsel for the petitioner has vehemently urged that in view of decision in Sanjeev Kumar Dubey v. District Inspector of schools Etawah and others 2000 (1) UPLBEC 634 /2000(1) ESC 6351 petitioner possessed the qualification to be appointed Assistant teacher (Art) and his appointment on the post of junior clerk could not take away his right to claim the post of Assistant teacher on the other hand Sri K.K. Chand the learned Standing Counsel appearing for respondents nos. 1 and 2 has urged that once the petitioner accepted the appointment on the post of Assistant Teacher and the decision in Sanjeev Kumar (super) was not applicable to the facts of this case. He further urged that father of petitioner is alive therefore the petitioner would be dependant of his father and not of his mother. He submitted that was his source of income he was not entitled for compassionate appointment.

3. The facts of the case demonstrates that the petitioner and his father were under complete misapprehension about the purpose and objective of the appointment under the Dying in harness rules In Umesh Kumar Nagpal v. State of Haryana nad others (1994) 4 SCC 138 the apex court while considering similar rule held that employment under such rule was not a vested right. The Object was to enable the family to get other financial crisis which it faces at the time or faith of the sole bread earner. U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules 1974, framed by the state government and amended from time to time and those framed by Education Department are no different. The petitioner's father while approaching the department on behalf of his son sought reservation of one post in L.T. Grade as he wad not qualified and eligible on the death of his mother. The compassionate appointment is permitted at the time of death. It does not entitle anyone to claim that since he was not eligible or qualified on the date of death, the post may be reserved for him when he becomes eligible. The rules do not contemplate any reservation. If such request is accepted it would defeat the objective of the rule which would convert itself from compassionate employment to tide over financial crisis in the family to reservation of post for employee's dependant as and when he desires. The claim of petitioner's father, therefore, for keeping a post in L.T. Grade reserved for his son was misconceived. The arguments of the learned counsel for the petitioner that he accepted the appointment to class III post without prejudice to his right to claim appointment on the post of Assistant Teacher is equally devoid of any merit.

4. The object for granting appointment on compassionate ground is to enable the family of deceased employee to tide over the sudden crisis, which has occurred due to the death of

sole bread earner of the family. Such appointments are made purely on humanitarian consideration with an object to provide the family some sources of livelihood. The appointment is given by making a departure from the general provisions for making appointment to a post. It is in the nature of exception to the general provision. It cannot be treated as creating a rights which could be enforced at will. The petitioner in his representation dated 30.6.2000 (Annexure-2) clearly stated that he has accepted the appointment on the post of junior clerk. Learned counsel for the petitioner failed to show any rule that entitles a dependant who has been appointed can claim a change of post either in the same or higher grade. In absence of any rule once the petitioner joined on class III post of junior clerk, he could not claim the post of Assistant Teacher. The decision in Sanjeev Kumar Dubey (supra) is of no help to the petitioner. Petitioner is not entitled to any relief.

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

This petition fails and is accordingly dismissed.

Petition Dismissed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD 27 NOVEMBER,2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

First Appeal From Order No. 80 of 1978

Oriental Fire & General Insurance Company Limited, Mahatma Gandhi Road, Kanpur ...Opp. Party/ Appellant
Versus
Smt. Nirmala Devi ...Respondents

Counsel for the Appellant:
Shri A.B. Saran

Counsel for the Respondents:
Shri R.V. Gupta
Shri Pradeep Chandra
Shri M.C.Srivastava

Motor Vehicles Act 1988 S-170- Unless permission is obtained under section 170 of the Motor Vehicles Act, 1988 the insurance company cannot file appeal against the award of Tribunal on merits of the claim. (Held in para 3).

Held- The argument that the claim is not covered by the policy, is purely based on merits and as such the decision of the supreme court applies with full force .

By the Court

1. We have heard Sri A.B. Saran learned Advocate for the appellant we are of the view that in view of the decision of the Supreme Court in **Shankarayya and another vs. United India Insurance Co. Ltd. And another AIR 1998 SC 2968**, wherein it has been held that uncles permission is obtained under Section 170 of the Motor Vehicles Act, 1988, The insurance company cannot file appeal

against the award of Tribunal on merits of the claim. In the instant appeal the claim is based purely on merits and, as such we are of the view that the aforesaid judgement of the Supreme Court specifically applies in the instant case. The appeal is held to be non-maintainable and is liable to be dismissed.

2. In the matter of same Insurance Company (The Oriental Insurance Company Limited) a Division Bench of Calcutta High Court of which one of us (Hon'ble S.K. Sen, C.J.) was party , in the case of **Oriental Insurance Company Ltd. Vs Gurudial Singh AIR 2000 Calcutta 226**, look the same view following the aforesaid decision of the Supreme Court in the case of Shankarayya (supra). We do not find any reason to take different view in the instant case.

3. Mr. Saran learned Advocate for the appellant has , however, argued that the claim is not covered by the policy. We are of the view that this argument is purely based on merits and such the decision of the Supreme Court noted above applies with full force.

4. In view of the above, the instant appeal is held to be non-maintainable and is according dismissed.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 4, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE A.K.YOG, J.

Civil Misc. Writ Petition No. 49411 of 1999

Rakesh Kumar Singh ...Petitioner.
Versus
State of U.P., through Director of Medical Health, Directorate, Swasthya Bhawan, U.P. Lucknow & others ...Opp. Parties.

Counsel for the Petitioner:
Shri Malaya K. Shukla

Counsel for the Respondents:
S.C.
Shri Sabhajeet Yadav
Shri P.K. Besaria

Constitution of India, Article 226 – Certiorari and Mandamus- When to be issued.

Held – Para 6

Healthy babies are invaluable and precious national resource, and to have a 'Healthy Nation' will remain a dream if expectant mothers are not provided all possible and proper 'pre-natal' care. From the facts stated in the petition, which have been unrebutted, coupled with the circumstances that the respondents have no defence to offer inspite of repeated opportunities being given, we are of the considered opinion that huge public money having been invested in constructing 'New Hospital Complex' with modern facilities should not be allowed to go in vain. The money spent by the Government on behalf of the public must not be wasted and the complex (New Hospital) must be utilized forthwith, particularly when there is no explanation whatsoever for not carrying the project to its logical end.

By the Court

The prayer contained in the present petition are to the effect that this Court may be pleased to issue a writ, order or direction in the nature of certiorari and quash the impugned orders dated 13.10.1999 and 2.11.1999 annexures-1 and 2 to the petition) and a writ of mandamus direction the respondents not to interfere with the proper functioning of the Post Partum Centre in the new District Hospital (Ram Prasad Bismil District Hospital), Shahjahanpur apart from other usual relief's.

2. Annexur-1 to the petition is the letter from the letter from the Director General Rashtriya Karyakram Anushrawan Evem Mulyankan, Family Welfare Directorate, U.P. Lucknow addressed to the Chief Medical Superintendent, Shahjahanpur requiring him not to shift the old centre to the new building and maintain status quo in compliance to earlier order dated 7.7.1999. Annexure-2 to the petition is an order of Chief Medical Superintendent, District Women's Hospital, Shahjahanpur, referring to the order dated 13.10.1999 of the State Government, requiring the staff of the Centre to continue to work at their old place and deposit the articles issued to them from District Women's Hospital.

3. The petitioner Rakesh Kumar Singh has approached this Court by filing this writ petition under Article 226 of the Constitution of India alleging inter alia, amongst others, that being resident of District Shahjahanpur he has interest in the subject matter of this petition; a Post Partem Centre (Zila Prasawaottar Kendra) in its existing building called 'Old District Hospital, was to be shifted with Ram Prasad Bismil District Hospital to a new complex having all modern facilities, situate over about 100 Hectares of lan raised at a cost of Rs. Crores; after said building is constructed and equipped, the orders impugned as contained in Annexures-1 & 2 were passed to keep the matter in 'stalemate' and as a consequence thereof the entire project has been directed to be kept in abeyance so as to maintain 'status quo'; the impugned orders have been passed with ulterior motive at the behest of certain persons prompted and motivated by extraneous consideration having no concern with the general interest of the public and purely on the ground of their own personal vested interests; in case the Post Partem Centre is transferred to the new hospital, public at large will have the advantage of availing modern facilities like Ultra Sound etc. besides 'expectant mothers having the advantage of emergency services.

The petitioner has attempted to high light the importance of health of future generation of the country and of healthy 'nation' for general welfare in our society.

4. This petition was filed on 2.12.1999. A Division Bench granted three weeks time to the respondents for filing counter affidavit. The case was listed on 23.12.1999 but no counter affidavit was filed (see office report of the date on the order sheet). On7.4.2000 a Division Bench of this Court again granted time and required the respondents to submit an explanation in the form of report for non action in the matter. The case was, thereafter, listed on two occasions but no counter affidavit has been filed till date. It may be recalled that

on 7.4.2000 the learned Standing Counsel (Sri Sabhajeet Yadav, Advocate) was required to intimate the order of the Court to the Secretary, Department of Health, Government of U.P. for taking appropriate action. None of the respondents (including Secretary of the Department concerned) have cared to file counter affidavit or submit their report as stated by the learned Standing Counsel. The learned Standing Counsel further orally informs this Court that he has no instruction in the matter despite repeated intimation and communication to the respondents.

5. Heard Sri Malay K. Shukla, the learned counsel for the petitioner, who in the peculiar facts and circumstances prayed to allow this writ petition, as well as Sri Sabhajeet Yadav, learned Standing Counsel and perused the record.

6. Healthy babies are invaluable and precious national resource, and to have a 'Healthy Nation' will remain a dream if expectant mothers are not provided all possible and proper 'pre-natal' care. From the facts stated in the petition, which have been unrebutted, coupled with the circumstances that the respondents have no defence to offer inspite of repeated opportunities being given, we are of the considered opinion that huge public money having been invested in constructing 'New Hospital Complex' with modern facilities should not be allowed to go in vain. The money spent by the Government on behalf of the public must not be wasted and the complex (New Hospital) must be utilised forthwith; particularly when there is no explanation whatsoever for not carrying the project to its logical end.

7. Accordingly, the orders dated 13.10.1999 and 2.11.1999 as contained is Annexures-1 and 2 to the writ petition being arbitrary and without any reasonable justification are quashed. The respondents are directed to ensure shifting of the Post Partem Centre forthwith. The writ petition stands allowed.

8. No order as to cost.

9. The office is directed to hand over a copy of this order within on week to Sri Shabhajeet Yadav, learned Standing Counsel, for its intimation to the authority concerned.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 30.11.2000

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

Civil Misc. Writ Petition No. 31843 of 1998

Committee of Management ...Petitioners.
Versus
District Inspector of Schools, Allahabad and others ...Respondents.

Counsel for the Petitioner:
Shri A.K. Tewari

Counsel for the Respondents:
S.C.
Shri S.D. Kautalyhia
Shri Vimlesh Srivastava
Shri A.B. Singh

Intermediate Education Act 1921, Section 16-G (7)- Suspension of Principal of Intermediate College-Management send for approval-DIOS disapproved with saying contrary to Rules, No reasons recorded as to which of the provisions have been violated-order

quashed with direction to pass fresh order in accordance with law.

Held – Para 3

Statutory provision of section 16-G (7) of the Act expressly provides that order under this sub-section has to be passed in writing by the DIOS. It is implicit that while passing an order in writing he has to apply his mind and give reasons for approving or disapproving the suspension order. He is under a legal duty and obligation to pass a reasoned order that can be upheld in law. It is not a formality. Mere writing that suspension order was contrary to the provision of the Act was not sufficient. The impugned order cannot be upheld.

By the Court

1. Sri P.N. Singh the respondent no. 2 was officiating principal of Janta Inter College, Mau Aima, Allahabad. On the basis of an enquiry report dated 11.9.1998, he was suspended on 12.9.1998 by petitioners. The committee of management of 18.9.1998 forwarded papers to the District Inspector of Schools (in brief DIOS) for grant of approval to the suspension order as provided under Section 16-G(7) of the U.P. Intermediate Education Act, 1921 (in brief Act). By order dated 26.9.1998 the DIOD disapproved the suspension order. The petitioners have challenged the order dated 26.9.1998 by means of this writ petition.

2. Sri R.K. Ojha the learned counsel for the petitioner has urged that the DIOS did not give any reason for disapproving the suspension order nor any provision of Act was mentioned in the impugned order on the basis of which the suspension order was disapproved. He placed reliance on a Full Bench decision of this court in Chandra Bhushan Mishra V. District Inspector of Schools, Deoria and others 1995 (1) UPLBEC 460. He further pointed out that on 7.10.1998 this court has stayed the order dated 26.91998 passed by DIOS. And the petitioner was permitted to complete the enquiry against respondent no.2. On the other hand Sri A.B. Singh the learned counsel for respondent no.2 has urged that after expiry of sixty days, the suspension order would automatically come to an end. He placed reliance on decisions of this court in Committee of Management. Vasudev Mishra Higher Secondary School, Kanpur Nagar and others v. Deputy Director of Education, Kanpur Region, Kanpur and other, 1992 (2) UPLBRC 1325 and Committee of Management, Jan Sahyogi Intermediate College, Modhi, Etawah v. District Inspector of Schools, Etawah and another 1986 UPLBEC 144. He also relied on the decision of the apex court in Rajendra Prasad v. Kayastha Pathshala and another AIR 1987 SC 1644. The learned counsel has further urged that enquiry has been completed and the management has passed a resolution for terminating the service of the respondent no.2. The resolution has been sent by the petitioners through the DIOS to the Commission/Board as provided by U.P. Secondary Education Services Commission and Selection Boards Act 1982 for grant of approval. And the matter is pending before the Commission/Board. He urged that the suspension order would be deemed to have come to an end.

3. Under section 16-G(7) of Act the DIOS is under a statutory duty to approve or disapprove the suspension order in writing. This power has been conferred on him so that the management may not

suspend the Head of the institution or a teacher arbitrarily, in highhanded manner. The only reason given by the DIOS for disapproving the suspension order is that from the examination of records he came to the conclusion that the management has suspended the respondent no. 2 in violation of the provisions of Act. Form the impugned order it is clear that the DIOS did not apply its mind to the facts of the case nor any provision of Act was considered. Statutory provision of section 16 – G (7) of the Act expressly provides that order under this sub-section has to be passed in writing by the DIOS. It is implicit that while passing an order in writing he has to apply his mind and give reasons for approving or disapproving the suspension order. He is under a legal duty and obligation to pass a reasoned order that can be upheld in law. It is not a formality. Mere writing that suspension order was contrary to the provision of the Act was not sufficient. The impugned order cannot be upheld.

4. I have held that order passed by the DIOS is illegal, therefore, it is not necessary for me to consider the other arguments raised by the learned counsel for the parties.

5. In the result, this writ petition succeeds and is allowed. The order dated 26.9.198 passed by respondent no.1, Annexure-6 to the writ petition, is quashed. The District Inspector of Schools, Allahabad shall pass a fresh order in accordance with law within a period of two months from today. The petitioners and respondent no.2 are directed to serve a certified copy of this order on respondent no. 1 within a period of one week from today.

Office shall issue certified copy of this order to learned counsel for the parties on payment of usual charges within three days.

Parties shall bear their own costs.

Petition Allowed.

REVISIONAL/APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.12.2000

BEFORE
THE HON'BLE V.K. CHATURVEDI, J.

Criminal Revision No. 2297 of 2000

Ashraf Ali ...Revisionist
Versus
State of U.P. & another ...Opp. Parties

Counsel for the Revisionist:
Shri Arvind Misra

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure Section 441 (1) – no notice is required before cancelling bail and bonds of accrued. (Held in para 8 & 10). The words used in sub section (1) of section 441, Cr.P.C. lave no room for doubt that before a person is released on bail, said person also must execute a bond. The undertaking given by the accused as may be seen from Form No. 45 of schedule II, was to attend the court on every day of hearing and to appear before the court, whenever called upon, and if he fails to appear before the court, then court has no option but to cancel his bail, forfeit his bond and issue notices to the sureties, and if the accused in pursuance of the undertaking given in the bond, fails to appear before the court, no notice is required before cancelling his bail and bonds.

After hearing learned counsel for the parties and keeping in view the legal

position on the point as discussed above, in the opinion of this Court, held-the orders impugned do not suffer from any illegality, incorrectness and impropriety.

By the Court

1. These two criminal revisions have been preferred by same revisionist Ashraf Ali against two different orders, one dated 18.10.2000 and another dated 3.11.2000 both passed by Mr. V.K. Gupta, II Add. District and Sessions Judge, Muzaffarnagar in the same sessions trial no. 906 of 1996. In Criminal Revision No. 2297 of 2000, by the impugned order dated 18.10.2000 bail of the revisionist was cancelled his bail bonds were forfeited and notices were issued to the sureties as to why the amount of bail bonds should not be recovered from them. Whereas in the connected Revision No. 2448 of 2000, by the impugned order dated 3.11.2000, the S.H.O. of police station concerned has been directed to execute non-bailable warrant issued against the revisionist.

2. Before proceeding further, it appears necessary to mention here that the revisionist is facing trial under section 147, 427, 504, 506 IPC read with section 3(1), S.C.S.T. Act in S.T. No. 906 of 1996 before he Court of IInd Addl. District & Sessions Judge, Muzaffarnagar.

3. I have heard Mr. Arvind Misra, learned counsel for the revisionist and learned A.G.A.

4. Mr. Misra, learned counsel for the revisionist argued that the revisionist and his counsel could not appear before the trial court at the time when the case was called out on 18.10.2000, with the result by the impugned order, bail of the revisionist was cancelled, his bail bonds were forfeited and notices were issued to the sureties. Mr. Misra further submitted that after the above order, on that very day i.e. 18.10.2000 an application seeking exemption from personal attendance of the revisionist was moved by the revisionists counsel, but that application was also rejected on the ground that it was moved after passing of the impugned order and as such, according to Mr. Misra, cancellation of bail of the revisionist without giving him any notice is against the provisions of law. In support of his contention, Mr. Misra has relied on various judgements passed by different Benches of this Court reported in 1989 A.C.C.-446 (Ram Laut Vs. State of U.P.), 1989 A.C.R. 375 (Baju and another Vs. State of U.P.), 1988 A.C.C.-6 (Hindi) (Guru Bachan Singh Vs. State of U.P.), 1986 Allahabad Criminal Report (Har Govind and another Vs. State of U.P.) 1997 C.B.C.-155 (Wahid Uddin Vs. State of U.P.).

5. Thus, the point which emerges for consideration in this revision is whether without giving notice to the accused, can his bail be cancelled and his bail bonds be forfeited?

6. At this juncture, section 441 (1), Cr.P.C. is relevant which is in the following terms:

> "Before any person is release don bail or release don his own bond for such sum of money as the police officer or court as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall

continue so to attend until otherwise directed by the police officer or court, as the case may be."

7. The above quoted provision contemplates execution of a bond by the accused. Form No. 45 of Schedule II, Cr.P.C. prescribes bond and bail bond for attendance before Officer In charge of Police Station or Court, which is as under:

"I (name) ……. of ……. (police), having been arrested or detained without warrant by the officer in charge of…….Police station (or having been brought before the court of…….charged with the offence of…….and required to give security for my attendance before such officer or court on condition that I shall attend such officer or court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default therein. I bind myself to forfeit to Government the sum of rupees.

Dated, this ……..day of ……..19…….

(Signature)"

8. The words used in sub-section (1) of section 441, Cr.P.C. leave no room for doubt that before a person is released on bail, said person also must execute a bond. The undertaking given by the accused as may be seen from Form No. 45 of schedule II, was to attend the court on every day of hearing and to appear before the court whenever called upon, and if he fails to appear before the court, then court has no option but to cancel his bail, forfeit his bond and issue notices to the sureties, and if the accuse din pursuance of the undertaking given by him in the bond, fails to appear before the court, no notice is required before cancelling his bail and bonds.

9. As per record, the order impugned has been challenged by the revisionist, who is an accused and no appeal has been preferred by the sureties. The decisions cited by the learned counsel for the revisionist, are distinguishable from the facts of the present case because in all the cases cited, appeal was preferred by the sureties under section 449, Cr.P.C.

10. After hearing learned counsel for the parties and keeping in view the legal position on the point as discussed above in the opinion of this court, held the orders impugned do not suffer from any illegality, incorrectness and impropriety.

11. Both the revisions are therefore liable to be dismissed.

12. However, considering the fact that the revisionist is facing trial under sections 147, 427, 504, 506 IPC read with section 3(1), S.C.S.T. Act before the court of IInd Addl. District & Sessions Judge, Muzaffarnagar and he was granted bail but on 18.10.2000 he could not appear and after the impugned order, as is clear from the order sheet itself, an application was moved for his exemption from personal attendance by his counsel as well as the undertaking given by his counsel that the revisionist shall appear before the trial court on the next date fixed and shall co-operate with the trial, it is provided that in case the revisionist appears before the trial court on the next date fixed, then both the orders impugned dated 18.10.2000 and 3.11.2000 shall be kept in abeyance and he shall continue to remain on bail.

With the above observation, both the revisions stand dismissed.

Revision Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD30.11.2000

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

Civil Misc. Writ Petition No. 29097 of 1998

Mohammad Fuzail Ansari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri K.M. Sinha
Shri P.K. Ganguly
Shri P.A. Ansari

Counsel for the Respondents:
S.C.

Article 226 of the Constitution of India-granting recognition for teaching would not amount to section or creation of post. There is no scope of deemed sanction. (Held in para 7).

There is no material on record that the management had applied to the Director for creation of the post. The petitioner is a teacher and he has no locus-standi to seek a direction from this court for creation of the post of Lecturer Urdu by the Director. If the management makes an application for creation o the post of the Director may consider it. It is open to the petitioner to claim salary from the management for the period he has worked from the funds other than government.

By the Court

1. The only question in this petition is whether the petitioner who has been appointed by the management on 7.7.1997 on the post of Lecturer Urdu, in absence of any creation or sanction of post of Lecturer Urdu is entitled to continue as Lecturer and payment of salary as he is teaching Urdu in intermediate classes since his appointment?

2. The controversy stands squarely covered by a full bench decision of this court in Gopal Dubey v. District Inspector of Schools 1999 (1) UPLBEC 1. It was held that recognition of a subject did not amount to presumed creation of post. The bench held that in absence of sanction or creation of post of state government was not liable to pay the salary nor the management could claim reimbursement of it. But Sri P.K. Ganguli the learned counsel for the petitioner vehemently argued that once the District Inspector of Schools, Azamgarh (in brief DIOS) granted permission to start intermediate class in Urdu it shall be deemed that the post was created and the petitioner who was appointed by the management was entitled to salary. He relied on the judgement of apex court in Chandigarh Administration and others v. Rajni Vali (Mrs.) and others (2000) 2 SCC 42.

3. To decide whether the ratio laid down by the apex court is helpful to the petitioner it is necessary to narrate facts in brief. Muslim Inter College, Mau (in brief institution) was granted recognition in 1956 under the U.P. Intermediate Education Act, 1921 (in brief Act, 1921). The institution was taken in grant-in-aid list, in April 1971, under the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 (in brief Salaries Act). The DIOS by its order

dated 13.7.1976 on the request of the institution, granted permission to run Urdu classes. By order dated 24.2.1977 it was made effective from 1977 examination. Till 1993 there was no difficulty as Sri Abdul Ali the principal of the institution taught Urdu to intermediate classes. He retired on 30.6.1993. On 26.10.1994 the State Government recognised it as minority institution. This order was set aside in Civil Misc. Writ Petition No. 37414 of 1994 decided on 22.8.1997. Special Appeal is pending against this order. The bench directed status quo to be maintained. During the pendency of Special appeal the management appointed petitioner on 7.7.1997 as Urdu Lecturer. His appointment was approved by the DIOS. The Deputy Director of Education appears to have initiated inquiry in the matter of approval granted to petitioner's appointment and by his order dated 17.12.1997 payment of salary to petitioner was stopped. This order dated 17.12.1997 was challenged by petitioner in Civil Misc. Writ Petition NO. 12477 of 1998. This court disposed of the writ petition on 9.4.1998 and directed the Joint Director of Education, Azamgarh to decide the representation of the petitioner. By his order dated 14.7.1998 the representation has been rejected by Joint Director of Education on the ground that eleven posts of Lecturer in different subjects has been sanctioned in the institution but no post of Lecturer Urdu was created or sanctioned. Therefore, the management could not appoint the petitioner on the post of Lecturer Urdu. Approval of DIOS was obtained by concealment of material facts. It is this order dated 14.7.1998 which has been challenged by the petitioner in the present writ petition. Petitioner has filed documents to show that Urdu was recognised by authority since long but he has failed to produce any document to show that sanction for creation of post was granted.

4. The argument of the learned counsel for the petitioner is that the decision of the apex court in Chandigarh Administration (supra) squarely applies to the petitioner's case. Since permission to run Urdu classes in intermediate was granted by the competent authority and he is the only teacher appointed in the institution who is not being paid salary and his other counterparts in the institution are being paid salary from the grant-in-aid received from the state government, therefore, on the ratio of this decision non-payment of salary to him is discriminatory.

5. It is necessary to examine the decision of apex court in this case permission to open class XI and XII was granted on Chandigarh Administration (supra) the condition that no grant-in-aid would be provided for additional staff or teaching the new subjects Humanities and Commerce. New teachers were appointed for teaching Humanities and Commerce by the institution but they were not being paid salaries from the grant-in-aid. They filed writ petition before the High court of Punjab and Haryana and claimed equal pay for equal work. They claimed that same salary and allowances be paid to them which were paid to other teachers to the institution who were teaching class X and were paid salary in the sanctioned pay scale from the grant-in-aid. It was also claimed that non-payment of salary amounted to discrimination. The High Court accepted their claim and directed that same salary be paid to the new

teaches which was being paid to other teachers of the institution and held the non-payment of same salary was discriminatory. The apex court observed, that classes in Humanities and Commerce was started with the permission of the competent authorities for class XI and XII. Other teachers in the institution were being paid salaries by the government as it was an aided institution. In the same institution two class of teachers were working one who were paid salary from grant-in-aid and the other for whom no grant-in-aid was available for payment of salary. The apex court held, that there was no justification for denying parity of pay scale to additional teachers who were appointed for teaching Humanities and Commerce for whom grant-in-aid was not available as it would be discriminatory. It was the responsibility of state administration to find out the ways and means of securing funds for the purpose. The apex court did not examine the effect of appointment against a non-sanctioned post. The only dispute was whether the management was justified in paying different pay scales to teachers doing the same duty. And the court held that payment of two different scales to teachers of same class was discriminatory.

6. But in the instant petition it is not disputed that the post of Lecturer Urdu was not created or sanctioned in the institution. The question arises as to whether salary could be paid to a teacher who was not working on a sanctioned post. This question has been considered by a Full Bench o this court in Gopal Dubey (supra) and it has been held that section 9 of the Salaries Act expressly mandates that no new post of teacher or employees shall be created by the institution except with the previous approval o the Director in writing. No doubt the Director under the Act 1921 grant recognition for opening a subject in the college. But it cannot be presumed that permission to run classes under Act 1921 amounts to deemed consent of the Director under the Salaries Act. Since there was no written permission of the Director for creating the post of Lecturer Urdu under section 9 of the Salaries Act, petitioner cannot be paid any salary. The Full Bench considered section 7-A of Act 1921 which permits the Board to permit an institution to give education in a subject. But it held after examining this section and section 9 of the Salaries Act that in absence of sanction no salary could be paid to a teacher teaching a recognised subject. The learned counsel for the petitioner has urged that the decision of the apex court is binding on me and if I do nor agree with it then the matter should be referred to larger bench. The decision of the apex court in Chandigarh Administration (supra) for the reasons stated earlier is not applicable to the facts of this case. On the other hand the specific question before the Full Bench was whether permission to teach a subject amounted to creation of a post. It was not accepted by the Full Bench. The reason is other than those for which sanction has been given, on the existing staff. For instance Sri Abdul Ali who was principal taught Urdu till 1993. Granting recognition for teaching would not amount to sanction or creation of post that could be done as provided in law. There is no scope of deemed sanction. The Full Bench is binding on me. I do not find any reason to disagree with it.

7. Learned counsel for the petitioner has lastly urged that the Director of Education be directed to decide the matter

of creation of post of Lecturer Urdu. There is not material on record that the management had applied to the Director for creation of the post. The petitioner is a teacher and he has no locus-standi to seek a direction from this court for creation of the post of Lecturer Urdu by the Director. If the management makes an application for creation of the post the Director may consider it. It is open to the petitioner to claim salary from the management for the period he has worked from the funds other than government.

8. Subject to the observations made above this writ petition dismissed.

9. Parties shall bear their own costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 28.11.2000

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

Civil Misc. Writ Petition No. 419 of 1998

M/s. Buland Motor and Land Finance Pvt. Ltd. Motibagh, Bulandshahar ...Petitioner
Versus
The Assistant Commissioner Income Tax, Bulandshahar and others...Opp. Parties

Counsel for the Petitioner :
Shri Vipin Kumar
Shri Ram Niwas Singh
Shri V.B. Upadhyay

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

Income Tax Act, Ss. 234A and 234 B Explanation I Clause (a) Applicability.

Held – paras 19 & 20)

In our opinion the above decisions squarely apply to the facts of the present case as admittedly the income assessed for the assessment year 1989-90 was a loss. Hence there was no liability of the assessee to pay advance tax on the basis of his estimate of his current income for assessment year 1990-91. Moreover, there was no order of the Assessing Officer under section 210 (3). Hence no interest was payable under section 234 B.

Case law discussed :
231 ITR 504
217 ITR 72
207 ITR 1087
200 ITR 149

By the Court

1. This writ petition has been filed praying for quashing of the order dated 7.9.98 (Annexure –7 to the petition) and the demand notice dated 30.3.95 (Annexure-4 to the petition) in respect of interest under section 234-A and 234-B of the Income Tax Act, and for a mandamus restraining the respondents from realising interest under those Sections. It has further been prayed that the petitioners Appeal No. Nil of 1995 be disposed of within a reasonable time.

2. Heard Sri V.B. Upadhyaya and Sri R.N. Singh learned counsels for the petitioners, as well as learned counsel for the Department.

3. The petitioner is a Company registered under the Indian Companies Act. It is a non-Banking Finance Company controlled by Reserve Bank of India. Its business is akin to that of a Commercial Bank and it accepts deposits, and interests the funds in hire purchase business. For the Assessment Year 1989-

90 it filed a return showing loss of Rs. 62,510/- including Set off of earlier lesses of Rs.49,113/-. The Assessment for that year was completed on 18.2.92 under section 143(3) on a net loss of Rs.7,133/-. A true copy of the Assessment order has been annexed as Annexure-1 to the petition. For the Assessment Year 1990-91 it showed a total loss of Rs.46,940/- and the assessment was completed on 25.2.93. The Assessing Officer determined the income of the assessee on income of Rs.6,74,930/- after making addition of Rs.7,08,616/- and allowed absorbed loss of the previous Assessment Year at Rs.49,113/- creating a demand of Rs.5,11,713/- consisting of income of Rs.4,37,355/- plus Interest of a sum of Rs.43,740/- under section 234 A and Rs.30,618/- under section 234-B. A true copy of the Assessment Order dated 25.2.93 is annexed as Annexure-2 to the petition.

4. The Assessing Officer filed an appeal against the assessment order dated 25.2.93 before the CIT (Appeals) which was partly allowed vide order dated 15.3.95 granting relief of Rs.29,216/- and directing the Assessing Officer to verify the facts of additions of Rs.29, 178/- on account of accrued interest on FD Rs. of Bank. True copy of the order of the CIT (Appeals) dated 15.3.95 is annexed as Annexure-2 to the petition. In compliance of the order dated 15.3.95 the Assessing Officer by the order dated 30.3.95 granted relief of Rs.58,533/- and assessed taxable income on Rs.6,16,400/-. True copy of the order dated 30.3.95 is annexed as Anneure-3 to the petition. The Assessing Officer then issued demand notice under section 156 alongwith interest under section 220(2). The details of the same are given in paragraph 9 of the petition. A true copy of the demand notice 30.3.95 is annexed as Annexure4 to the petition. The Assessing Company filed an appeal against the order of the CIT (Appeal) dated 15.3.95 before the Commissioner Income Tax Tribunal vide Annexure-5 to the petition and this appeal is still pending before the Tribunal at New Delhi.

5. The Assessee Company also moved an application under section 154 before the Assessing Officer on 22.12.97 for rectification of the mistake, particularly in respect of the interest on advance tax under section 234 A and 234 B and also regarding interest of advance tax or changing the amount which was shown in the earlier order without giving opportunity to the petitioner. True copy of the said application is annexed as Anneure-6 to the petition. This application was rejected on 7.9.98 vide Anneure-7 to the petition.

6. It is alleged in paragraph 19 of the petition that the Assessee Company had filed return showing loss, and hence in view of Clause (a) of explanation I to section 234 B the provisions of section 234 B were inapplicable and the interest charged was arbitrary and illegal.

7. In paragraph 20 of the petition it is alleged that since loss return was filed for assessment year 1990-91 there was no liability of the assessee to pay self-assessment tax or advance tax. The Assessing Officer had also not been of the opinion during the Assessment year 1990-91 that the Assessing Company was liable to pay advance tax, and no order in writing or notice of demand under section 156 was issued to the assessee under section 210 (3) of (4) during the previous year relevant to Assessment Year 1990-

91. Hence it is alleged that the Asessee Company was not in default in payment of advance tax and was not liable to pay interest under section 234 B.

8. In paragraph 23 of the petition it is alleged that interest under section 234 and 234 B of the Act cannot be levied on the petitioner assessee in view of the fact that the assessee had filed return showing assessment year 1990-91, and the return submitted for assessment year 1989-90 showing loss was accepted by the Assessing Officer.

9. In paragraph 24 of the petition it is alleged that the Assessing Officer wrongly rejected the petitioner's application dated 22.12.97.

10. In paragraph 26 of the petition it is alleged that the Assessing Officer while passing the order dated 30.3.95 had not passed any specific order regarding levy of interest under section 234 A and 234 B and thus interest cannot be levied through notice of demand under section 156. The Assessing Officer in his order dated 30.3.95 only ordered in the last paragraph "*Revised accordingly. Issue fresh challan after taking into account the payment made so far. Also charge interest as per rules.*"

11. In paragraph 27 of the petition it is alleged that the notice of demand is like a decree of a civil court which must follow the order. Since the assessment order does not mention the specific amount to be charged the demand notice cannot contain such amount as it will be going beyond the assessment order. It is contended that the expression "charge interest as per rules" cannot be read to mean that the Assessing Officer has passed an order regarding charging of interest under section 234 and 234 B. A rue copy of the demand notice dated 25.2.93 under section 156 is Annexure-8 to the petition. The Assessing Officer sent notice under section 221(1) dated 9.12.94 on which interest payable under section 234 A was shown to be Rs.43,740/- and interest under section 234 B was shown to be Rs.30,618/-. A true copy of notice dated 9.12.94 is annexed as Annexure-9 to the petition.

12. In paragraph 30 of the petition it is alleged that in the demand notice dated 30.3.95 the amount of interest is shown to be Rs.2,79,580/-. The Assessing Officer has rectified the interest under section 234 b in purported exercise of power under section 154, but the Assessing Officer did not provide any opportunity to the petitioner before rectification of the said mistake, which was a mandatory requirement under section 154(3) and hence it is illegal.

13. In paragraph 38 of the petition it is alleged that the order is respect of interest under section 234 A and 234 B is not applicable and hence it can only be challenged in writ jurisdiction in this Court.

14. A counter affidavit has been filed.

15. In paragraph 4 of the same it is admitted that the assessment for the year 1989-90 was completed at a net loss of Rs.7,133/-.

16. In paragraph 5 of the same it is alleged that the return for the assessment year 1990-91 was belated. In paragraph 10 of the same it is stated that rectification

under section 154 was made on 7.9.98 as there was a mistake. While revising the assessment. In paragraph 13 it is stated that the assessment year 1990-91 the assessee filed loss return but his assessment was made on total income of Rs.6,74,930/-, the details of which have been given in paragraph 13. In paragraph 14 of the same it is stated that since the return was filed on 7.5.91 belatedly the action in charging the interest was correct. In paragraph 22 of the same it is stated that the Assessing Officer rightly charged interest under section 234 A and 234 B.

17. A rejoinder affidavit has also been filed and we have perused the same.

18. Learned counsel for the petitioner has relied on the decision of the Supreme Court in CIT vs. N.D. George Polous 231 ITR 504 in which it has been held that an assessee is not under obligation to file an estimate of advance tax for assessment year 1967-68 and 1968-69 as it had been previously assessed at nil assessment for Assessment year 1965-66. He has also relied on the decision of the Patna High Court in Ranchal Club Ltd Vs. CIT 217 ITR 72. In that decision it was held that explanation 4 to section 234 A makes it clear that interest is leviable on the tax on the total income as declared in the return and not on the total income as determined. In *Director of Income Tax* v. *Shri Sita Ram Public Charitable Trust*, 207 ITR 1087 the Calcutta High Court held that where the returned income and assessed income of the latest previous year is nil there is no obligation on the assessee to file statement of advance tax and no liability to pay interest. The same view has been taken by the Calcutta High Court in *CIT* v. *Indian Molassess Co. Ltd.*, 200 ITR 149.

19. In our opinion the above decisions squarely apply to the facts of the present case as admittedly the income assessed for the assessment year 1989-90 was a loss. Hence these was no liability of the assessee to pay advance tax on the basis of his estimate of his current income for assessment year 1990-91.

20. Moreover, there was no order of the Assessing Officer under section 210(3). Hence no interest was payable under section 234 B.

21. Shri Prakash Krishna then submitted that since the assessee filed returns belatedly he is liable to pay interest under section 234 A. In our opinion since the return was that of loss hence there was no liability to pay interest as held by the Patna High Court in Ranchi Club case (supra).

22. In view of the above the writ petition is allowed.

23. The impugned order dated 7.9.98 and Demand Notice dated 30.3.95 in respect of interest under section 234 A and 234 B are quashed.

No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 7.12.2000

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

Civil Misc. Writ Petition No. 50751 of 2000

Siya Devi and another ...Petitioners
Versus
State of U.P. through the Secretary, Department of Co-Operative, Govt. of U.P., Lucknow and others
...Respondents

Counsel for the Petitioners:
Shri Ram Autar Verma

Counsel for the Respondents:
S.C.
Shri H.M. Srivastava
Shri V.S. Rajput

U.P. Co-Operative Societies Act, 1965, R. 464-Bar under Effect

Held (Para 3)

In the instant case a meeting admittedly took place on 25th September, 2000. The District Magistrate has again called a meeting on 7 December, 2000. It appears that at the said meeting vote of confidence could not be passed against the petitioner. Admittedly, six months period has not expired. In that view of the matter calling of the said meeting by the District Magistrate is without jurisdiction and contrary to Rule 464 of the said Act.

By the Court

1. Heard learned counsel for the parties.

2. In the instant writ petition, the petitioner is aggrieved by further calling of the meeting of the members of Board of Directors by the District Magistrate. According to the petitioner further calling of the meeting within three months is contrary to Rule 464 of the U.P. Co-operative Societies Act, 1965 (hereinafter referred to as the Act) which provides as follows :

> "464. If the motion for no confidence fails for want of quorum or lack of requisite majority at the meeting, no subsequent meeting for considering the motion of no-confidence shall be held within six months of the date of the previous meeting."

3. It appears on proper interpretation of Rule 464 of the Act that if the motion for no confidence fails either for want of quorum or lack of requisite majority, there is no scope for calling any subsequent meeting for considering motion of no confidence again within six months from the date of the previous meeting. In view of the specific bar provided in the aforesaid Rule 464 of the Act, District Magistrate has no power to call another meeting within a period of six months if the meeting fails either for want of quorum or lack of requisite. In the instant case a meeting admittedly took place on 25thSeptember, 2000. The District Magistrate has again called a meeting on 7thDecember, 2000. It appears that at the said meeting vote of confidence could not be passed against the petitioner. Admittedly, six months period has not expired. In that view of the matter calling of the said meeting by the District Magistrate is without jurisdiction and contrary to Rule 464 of the said Act.

4. Accordingly, we allow the writ petition and set aside the order-dated

7/13.11.2000 passed by the District Magistrate.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD : 7.12.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 36163 of 2000

Ismail Khan, President (Adhyaksh), Nagar Panchayat, Rarah, District Mathura ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Shri G.K. Singh
Shri A.P. Sahi

Counsel for the Respondents :
Shri Prem Chandra
B.D. Madhyan
A. Narain
S.C.

Section 48 (A) of the U.P. Municipalities Act, 1916- The State Government has to comply with three conditions before passing an order under Section 48 of the Act, viz. (1) consider the explanation offered by the President (2) Conduct enquiry and (3) record reasons in writing with regard to removal of the President from his Office (Held in para. 6 & 8).

If the State Government relied upon any report submitted by the Deputy District Magistrate, it should have supplied its copy to the person concerned and on its failure to do so, the order was liable to be set aside.

Respondent no. 1 in its order has referred to the charges levelled against the petitioner as well as the explanation offered by him for coming to its own conclusion but it did not record any reasons for arriving at such conclusion, Section 48 (2-A) itself provides that reason is to be recorded in writing for coming to a conclusion. The respondent should have considered each of the charges and the material evidence produced on such charges to come to the conclusion that those charges have been proved. The respondent had to appraise the evidence and record its reasons for taking the decision. The order, in the absence of recording of reasons is clearly in contravention of the provisions of Section 48 (2-A) of the Act.

By the Court

1. This writ petition is directed against the order dated 5th August, 2000 passed by the State Government (respondent no. 1) whereby the petitioner has been removed from the office of the President, Nagar Panchayat Farah, District Mathura in exercise of powers under Section 48 (2-A) of the U.P. Municipalities Act, 1916 (hereinafter referred to as the Act).

2. Briefly stated the facts are that the petitioner was elected as the President (Adhyaksh) of Nagar Panchayat Farah in District Mathura. On a complaint received against the petitioner the State Government issued a show cause notice to him under Section 48 (4-A) of the Act asking him to submit his explanation regarding the charges levelled against him. In the said notice seven charges were shown to have been committed by the petitioner. The first charge was that the police arrested the petitioner on 16th May, 1998 in crime case no. 96/98 under Sections 121, 121-A, 122, 201 and 212

I.P.C. which amounted to involvement of the petitioner in a criminal offence. Charge nos. 2 to 7 were in relation to the contracts given by the petitioner to other persons against the Government Orders as well as against the orders of the District Magistrate. The petitioner was to give Thekas by enhancing 30% of the amount of the preceding year but the petitioner did not follow such instructions of the Government. It is not necessary to refer the details of the charges here. The petitioner submitted his explanation to those charges to the State Government He denied the charge that he had awarded any contract against the instructions or orders of the Government. He further stated that the mere fact that a criminal case has been registered against him, he couldn't be held guilty unless the court finally decides the matter. Respondent no. 1 after narrating the charges levelled against the petitioner and the explanation given by him, passed the impugned order dated 5th August, 2000 removing him from the post of the President (Adhyaksh), Nagar Panchayat Farah, District Mathura.

3. We have heard Shri R.N. Singh, learned counsel for the petitioner, and the learned Standing Counsel for respondent nos. 1 and 2.

4. The learned counsel for the petitioner has assailed the impugned order on three grounds. Firstly, it is urged that the impugned order is based on the report submitted by the District Magistrate, Mathura to the State Government, but its copy was not supplied to the petitioner. Secondly the petitioner was not afforded proper opportunity while making enquiry. Lastly it is urged that respondent no. 1 did not assign any reason in the impugned order for coming to the conclusion that the charges against the petitioner have been proved. In this respect the provisions of Section 48 of the Act have to be examined. Sub-section (2) of Section 48 enumerates various grounds on which a President can be removed from his office. Sub-section (2-A) provides a procedure, which is to be followed before passing an order. Sub-section (2-A) reads as under :

> "(2-A) After considering any explanation that may be offered by the President and making such enquiry as it may consider necessary, the State Government may, for reasons to be recorded in writing, remove the President from his office:
>
> Provided that in a case where the State Government has issued notice in respect of any ground mentioned in Clause (a) or sub-clause (ii), (iii), (iv), (vi) (vii) or (viii) of Clause (b) of sub-section (2), it may instead of removing him give him a warning."

5. The State Government has to comply with three conditions before passing an order under Section 48 of the Act, viz. (1) consider the explanation offered by the President (2) conduct enquiry and (3) record reasons in writing with regard to removal of the President from his office. The petitioner was given a show cause notice and he submitted his explanation to the charges. After explanation is submitted, the Government has to make enquiry. The enquiry is to be conducted after giving opportunity to the President who was sought to be removed. Sub-section (2-A) does not provide the manner in which the enquiry is to be

conducted. The enquiry has to be made on the principles of natural justice.

6. In the instant case the State Government appears to have asked for a report from the District Magistrate and the District Magistrate submitted its report to the State Government. The State Government has relied upon the said report for coming to the conclusion that the petitioner was guilty of the charges levelled against him. Admittedly the petitioner was not supplied with any copy of such report. It was incumbent upon the State Government to provide the copy of the report to the petitioner, if it wanted to rely upon the same for coming to the conclusion that the petitioner is guilty of the charges. This question was considered by the Division Bench of this Court in Civil Misc. Writ Petition No. 18216 of 2000 (Smt. Anwari Begam Versus The State of U.P. & Others) wherein it was held that if the State Government relied upon any report submitted by the Deputy District Magistrate, it should have supplied its copy to the person concerned and on its failure to do so, the order was liable to be set aside. Similar view was expressed in Rama Shankar Barnwal Vs State of U.P. & Others, 2000 (1) U.P.L.B.E.C. 567. Admittedly in the present case as the petitioner was not given any copy of the report of the District Magistrate, the enquiry was thus, in violation of the principles of natural justice.

7. The learned counsel for the respondents contended that the petitioner had awarded contracts and it was for him to submit explanation that he awarded the contract in accordance with law. It is not necessary to examine here as to what extent the onus is on the petitioner to establish his explanation. It is clear that if any authority relies upon certain document or report it has to supply the same to the person concerned. The petitioner had stated that the document was not supplied to him, which he asked for. There is nothing to show that the request of the petitioner was considered. Respondent no. 1 had to consider the request for supply of the document, which was sought to be relied against the petitioner.

8. There is another infirmity in the impugned order. Respondent no. 1 in its order has referred to the charges levelled against the petitioner as well as the explanation offered by him for coming to its own conclusion but it did not record any reasons for arriving at such conclusion. Section 48 (2-A) itself provides that reason is to be recorded in writing for coming to a conclusion. The respondent should have considered each of the charges and the material evidence produced on such charges to come to the conclusion that those charges have been proved. The respondent had to appraise the evidence and record its reasons for taking the decision. The order, in the absence of recording of reasons is clearly in contravention of the provisions of Section 48 (2-A) of the Act. In Ishrat Ali Khan, President, Municipal Board, Rampur Vs State of U.P. & Others, 1986 U.P.L.B.E.C. 1114, this Court held that recording of reasons contemplates that the explanation has to be considered and to state the reasons as to why the explanation offered by the petitioner was not convincing and acceptable. It was observed :

> ".…….Recording of reasons implies that the explanation furnished by the

petitioner should have been considered objectively and if the same was not found satisfactory reasons should have been stated. Instead we find that the State Government has merely stated the charge, the explanation and then it has recorded its conclusion without recording reasons. The State Government was acting in a quasi-judicial manner, it was required to consider the charge and the petitioner's explanation and to state reasons as to why the petitioner's explanation and to state reasons as to why the petitioner's explanation was not convincing or acceptable. Mere statement that the petitioner's explanation was not satisfactory and that the charge is proved, does not fulfil the requirement of recording reasons. Any order of a quasi-judicial authority which does not contain reasons is bad in law. See Mahabir Prasad V. State of U.P., A.I.R. 1970 S.C. 1302 and Indra Prakash Kapur V. State of U.P., 1967 A.L.J. 808."

9. Similarly view was expressed by a Division Bench of this Court in Nasimuddin Vs State of U.P. & Others, 2000 (3) E.S.C. 1611 (All.).

10. In view of the above the writ petition is allowed. The impugned order dated 5th August, 2000 is hereby quashed. Respondent no. 1 is directed to decide the matter afresh in accordance with law keeping in view the observation made above preferably within two months from the date of production of a certified copy of this order before respondent no. 1. In the facts and circumstances of the case, the parties shall bear their own costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD : NOVEMBER 24, 2000

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

Criminal Appeal No. 2632 of 1999

Kamlesh Rai ...Appellate (In Jail)
Versus
The State of U.P. ...Opposite Party/ Respondent

Counsel for the Appellant:
Shri R.C. Yadav,
Shri Shashi Prakash Sharma,
Shri Rajesh Rai

Counsel for the Opposite Party :
A.G.A.

Section 50 of the N.D.P.S. Act it lays down an obligation upon the person who is conducting search for the purpose of recovery of any contraband article to inform him in an unambiguous term about this right. This is to be done before the impending search is undertaken. It clearly means that the police personnel have to make the accused understand the requirement of this section in clear and unambiguous language. It must not contain any if's and but's. (Held in para. 8).

The person who is conducting search for the purpose of recovery of any contraband article to inform him in an unambiguous term about this right. This is to be done before the impending search is undertaken. It clearly means that the police personnel have to make the accused understand the requirement of this section in clear and unambiguous language. It must not contain any if's and but's.

By the Court

1. This appeal arises out of a judgment and order dated 20.8.1999, passed by Shri S.K. Gautam, I Additional Sessions Judge, Ghazipur, in Criminal Case No. 55 of 1991, convicting the appellant under Sections 8/21 of the N.D.P.S. Act and sentencing him to undergo 10 years' R.I. and to pay a fine of Rs. 1 lac. In default of payment of fine, the appellant was directed to undergo further 2 years' R.I.

2. The brief facts of the case, according to F.I.R., are that the S.S.I. Shesh Nath Mishra while on petrol duty on 7.1.1991 reached the barrier, there he was met by S.I. Vachaspati Mishra and other police personnel. At that very time he received an information from an informer that a person would approach on foot the road from the side of village Baresar possessing heroin and would proceed towards Qasba Jamaniya Railway Station Bazar. He could be arrested if the police party takes immediate steps. The statement of the informer was recorded on a sheet of paper and the police party headed by S.S.I. Shesh Nath Mishra proceeded towards the road on which that person was to come. Two persons Guddu son of Najju Miyan resident of Patkholiyan, P.S. Jamaniya, and Shree Ram Sharma son of Ganesh Sharma, resident of Baresar, P.S. Jamaniya, District Ghazipur, were also taken by the police party as public witnesses before embarking upon the arrest of the appellant. The reached near a Gumti (roadside wooden shop) at 5.00 P.M. and hid themselves behind the same. After waiting for about half an hour, they saw a person approaching on foot. As soon as he reached in front of the Gumti, the informer pointed towards him. He was challenged by the police party. The appellant allegedly started to run back towards north. After a chase for about 15-20 steps, he was taken into custody near the culvert at about 5.30 P.M. On enquiry, he disclosed his name to be Kamlesh Rai. He also gave out his parentage and the residence. On being told by the police party that they had information of Heroin in his possession and his search is to be taken in this connection. He was further told that he could give his search to any Magistrate or any Gazetted Officer. The appellant allegedly told the police party to take his search itself. The search was conducted and from his shirt's left side chest pocket 5 gms. Of Heroin was recovered. The pocket was cut off along with the packet in which Heroin was contained. After taking out 1 gm. Each from the recovered Heroin it was sealed in two separate packets of plastic sheets. Rest of the Heroin was sealed separately in another packet. The specimen was prepared. He was brought to the police station along with the recovered narcotic article and was lodged in the lock-up. The recovery memo was also prepared at the spot. His signatures were obtained on the recovery memo also. After investigation by P.W. 6 S.I. J.P. Saroj a charge-sheet was submitted against the appellant.

3. The prosecution in support of its case has examined S.S.I. Shesh Nath Mishra as P.W. 1, Mohd. Gaffar as P.W. 2, Constable Ramashrey Singh as P.W. 3, Constable Nand Kishore as P.W. 4, Head Constable Sheshmani Misra as P.W. 5 and S.I. J.P. Saroj as P.W. 6. Out of these persons, P.Ws. 1, 2 and 3 are the witnesses of fact. P.W. 4 is the Constable who had carried the sample phial for chemical examination. P.W. 5 is the Head

Moharir who had completed all the formalities pertaining to registration of the case. P.W. 6 is the Investigating Officer. He was posted at the same police station as a subordinate official to S.S.I. Shesh Nath Mishra, who was Incharge S.H.O. of the concerned police station on the date of incident.

4. From a perusal of the statement of P.W. 1 S.S.I. Shesh Nath Mishra it can safely be gathered that the police personnel had not conducted any search of their person before effecting arrest and search of the appellant. It is also available from his statement that the paper Ext. Ka-1 was prepared recording the statement of the informer regarding possession of Heroin by the appellant. This would have been proper if the police party was positively on petrol duty, but an examination of the statement of P.W. 3 Ramashrey Singh shows that the informer conveyed the information to the police party when it was present at the police out-post. It is common knowledge that every police out-post has a General Diary (in short called as `G.D.') of its own. It is beyond comprehension as to why no information received from the informer was entered into G.D. of the police out-post and why a separate sheet at the police out-post, according to the statement of P.W. 3, was prepared by P.W. 1. The statement of theses two witnesses run contrary to each other. According to P.W. 3 the police party was present at the police out-post, whereas according to P.W. 1 they were on the way and were on petrol duty when the information was received. It is not easy to reconcile these two contradictory statements made by P.Ws. 1 and 3 and as such the accused is entitled to the benefit of this conflict.

5. It is admitted to P.W. 6 S.I. J.P. Saroj, who was the I.O., that the place where the arrest and recovery were effected was a public thoroughfare cannot be easily brushed aside. In the circumstances why only two persons, Guddu and P.W. 2 Mohd. Gaffar, were picked up as a publics witness by the police is difficult to digest. The sealed packet prepared after recovery did not bear the signatures of the appellant. His signatures, admittedly, were obtained only on the recovery memo. This is also an important circumstance going against the prosecution. P.W. 1 has admitted clearly that he cannot say whether the entry regarding the memo, Ext. Ka-1, was made in the G.D. or not. Then he stated that in G.D., regarding registration of the case, there is a reference about the statement of the informer. In my opinion, this is not the exact word as stated by the informer, but is only a reference to the informer only. He has also admitted that he had sent the information regarding arrest, search and recovery to the S.P. He had admitted that there is no mention any where regarding the time when this information was received by him. He had further admitted that he had not made any report to any senior officer that the investigation of this case may be entrusted to some other Inspector or other official. During remand no signatures of any Magistrate were obtained on the case property or sample phial, although he stated that the Magistrate had examined the recovered property but had not made any mention of the fact in his order. He further stated that the case property was produced at the time of remand. He further stated that on 11.1.1991 the sample was also mixed with the remainder part of the case property. He is probably referring to the second part of the two samples that were prepared

containing 1 gm. Each. Why had it been done is beyond comprehension. The accused has a right to send the second sample prepared by the arresting officer for analysis. According to him the sample of Heroin to be sent to the chemical examiner was brought to the court by the C.O. This fact is not borne out from the statement of P.W. 4, who had carried the article to the chemical examiner. According to him that property was taken to the Magistrate by him. He had denied having his hand in the investigation of the case. He has admitted that he has not made any mention of the fact that the police personnel and the public witnesses had given their searches to each other. This fact is also not mentioned in his 161 Cr.P.C. statement made to the I.O.

6. P.W. 2 Mohd. Gaffar alias Guddu, the solitary public witness examined in the case, had turned hostile and denied any recovery of Heroin from the possession of the appellant. He was cross-examined by the prosecution and in his examination he had denied his statement under Section 161, Cr.P.C. He admitted, no-doubt, that while signing the recovery memo the appellant was also present at the police station. This fact looses all its bearing in the face of the admission of his presence made by the appellant, but the appellant has set up a case that he was forced to sign by the Inspector at the police station, his further case is that he is running a Vedio cinema show. He had licence for the same. The police personnel desired to see the cinema free of cost. He was not permitting them to do so. Therefore, to teach him a lesson he was dropped in the case falsely. No-doubt, the defence has not been suggested to the two police witnesses, P.W. 1 Shesh Nath Mishra and P.W. 3 Ramashrey Singh, yet it cannot be brushed aside lightly.

7. As earlier discussed, the statement of P.W. 3 that they had given their mutual search is belied by the fact that these facts were not mentioned either in the F.I.R. or recovery memo or their statements under Section 161, Cr.P.C. Moreover, P.W. 1 Shesh Nath Mishra had not stated either in examination-in-chief or in cross-examination that any copy of the fard recovery was given to the appellant but this witness had tried to fill in this lacuna. The evidence does not suggest that any copy of the recovery memo was given to the appellant. He had denied that they had not signed the sealed bundles whereas P.W. 1 has stated that the signatures of the witnesses and the appellant were obtained on sealed bundles. He has admitted that the office of the C.O. is in front of the police station and the C.O. lives in Qasba Jamaniya itself. Still it is not proved as to why no information of the arrest and the recovery was made to him by P.W. 1. He had stated that he cannot say whether the signatures of the C.O. were obtained on these packets or not because after the arrest and seizure he had returned back to his police out-post. He had further admitted that in the month of January the Sun used to set by 5.30 P.M. The arrest in this case was effected at 5.30 P.M. and papers were said to have been prepared at the spot. Preparation of the papers and other formalities including the seizure and sealing of the recovered Heroin in three different packets must have taken some time. In the darkness it is wholly importable. None of these witnesses have asserted presence of any light in their statements at the spot.

8. Now coming to the compliance of Section 50 of the N.D.P.S. Act, which is a very important safeguard provided by the framers of this Act to an accused. What I find is that in the F.I.R. it had been stated that the appellant was told that he could give his search to a Magistrate or a Gazetted Officer, upon which the appellant had told them to take his search themselves. Whereas in the statements in court both these witnesses (P.Ws. 1 and 3) had stated that P.W. 1 had told the appellant that will he like to give his search before a Magistrate of a Gazetted Officer then he told them that they could take his search. The requirement of law is that if the offender arrested for a charge of possessing any narcotic or psychotropic substance "he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate." It lays down an obligation upon the person who is conducting search for the purpose of recovery of any contraband article to inform him in an unambiguous term about this right. This is to be done before the impending search is undertaken. It clearly means that the police personnel have to make the accused understand the requirement of this section in clear and unambiguous language. It must not contain any if's and but's. This is the requirement of law. The law requires that the accused should be clearly asked in a language which is not open to any other interpretation than the one that whether he would give his search before a Magistrate or a Gazetted Officer, which is his right. If he declines to do so only then the police party is entitled to effect the search and make the arrest. Here the language used in the substantive evidence given in court indicates somewhat a dubious conduct on the part of the police official. This has been done, in my opinion, in all probability, in order to save their own skin. The facts and circumstances of the case revealed that the search and the arrest was made first and in order to cover up their mis-deed it has been introduced as a device to safeguard their illegal action. Why no signature of the appellant were obtained on the container and why no copy of the recovery memo was given to him? It fortifies the above conclusion.

9. The fact that after the order for sending the sample to chemical examiner was passed the property was brought to the police station is also not understandable. Why was this property, after the Magistrate had passed the order, was not taken straight to the chemical examiner and why was it deposited back in the Malkhana and taken out on the next day is surprising. It smells of some foul play. There is conflict regarding who presented it before the Magistrate.

10. In the result, in view of the discussions made above, in my opinion, this appeal deserves to succeed. It is accordingly allowed and the judgment and order dated 20.8.1999, referred to above passed by the trial court is set aside. The appellant is acquitted of the offence under Sections 8/21 of the N.D.P.S. Act for which he was convicted and sentenced by the trial court. He is in jail. He shall be set at liberty forthwith, if not wanted otherwise in any other case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD DECEMBER 19, 2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 7424 of 2000

Irfan Khan ... Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri S.M.N. Abbas Abedi

Counsel for the Respondents:
A.G.A.

U.P. Control of Goondas Act, 1970- the order has been passed without issuing any notice and without giving any opportunity of hearing. If the proceedings were initiated under U.P. Control of Goondas Act (Herein after referred to as the Act), it was obligatory to issue notice to the petitioner under Sub-Section (1) of Section 3 of the Act informing him of the general nature of the material allegations against him and giving him a reasonable opportunity of tendering an explanation regarding them. (Held in para 4).

If the order impugned violates the fundamental right or if the same has been passed in violation of principles of natural justice, and also in complete violation of the procedure prescribed under the Act. The A.D.M. seems to have been in complete misapprehension about his authority and was dealing with the case as if it related to a matter pertaining to prevention detention where the order can be passed on the subjective satisfaction of the detaining authority, In our opinion this is a most appropriate case where this Court must interfere and exercise its power under Article 226 of the Constitution.

By the Court

1. This petition under Article 226 of the Constitution has been filed challenging the order dated 18.11.2000 of Additional District Magistrate (Finance & Revenue), Baghpat. The impugned order is a very short one and it recites that the Station House Officers of different police stations had identified mischievous/ Criminal elements. Who are likely to create disturbance during the forthcoming municipal elections. It further recites that he was satisfied from the report of the S.P. which in turn was based upon the report of the Station House Officers that the petitioner is likely to create disturbance in the forthcoming municipal election and it was not in public interest that he should remain within the limits of the district. Thus holding the petitioner to be a "goonda" he was externed from the limits of district Baghpat for a period of one month. Though the order does not mention anywhere that the proceedings were drawn under U.P. Control of Goondas Act,1970 but on the top of the order it is mentioned as "case no.255 under section ¾ Goonda Act State Versus Irfan."

2. We have heard learned counsel for the petitioner, learned A.G.A. for the State and have perused the record.

3. It is specifically averred in para 5 of the writ petition that the order has been passed without issuing any notice and without giving any opportunity of hearing. If the proceedings were initiated under U.P. Control of Goondas Act (hereinafter referred to as the Act), it was

obligatory to issue notice to the petitioner under sub-section (1) of section 3 of the Act informing him of the general nature of the material allegations against him and giving him a reasonable opportunity of tendering an explanation regarding them. The averments in the writ petition and also the contents of the order clearly show that no notice was issued to the petitioner and he was not afforded any opportunity of tendering an explanation. 'Goonda' has been defined in sub-section (b) of section 2 of the Act. There is no finding that the petitioner comes within the expression 'Goonda' as provided under the Act. No proceeding under the Act can be initiated against a person simply on the basis of a report by the S.H.O. that he is likely to create disturbance in the election. The power under the Act can be exercised on the basis of objective consideration of evidence and material and no on the basis of a report made by S.H.O. which itself is based upon his subjective satisfaction. Therefore, the impugned order is not only illegal but also wholly without jurisdiction and cannot be sustained at all.

4. Learned A.G.A. has submitted that against an externment order passed under sub-section (3) of section 3 of the Act, an appeal lies to the Commissioner under section 6 and, therefore, this writ petition is liable to be dismissed on the ground of alternative remedy. The principle requiring exhaustion of statutory remedies before the writ will be granted is a rule of convenience, discretion and policy and not a rule of law. There are also exceptions to such a principle. If the authority against whom the writ is sought is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation, a writ can be issued in an appropriate case. Similarly, if the order impugned violates the fundamental right or if the same has been passed in violation of principles of natural justice, this Court will not hesitate to entertain a writ petition. In the present case, the impugned order has been passed in complete violation of principles of natural justice and also in complete violation of the procedure prescribed under the Act. The A.D.M. seems to have been in complete misapprehension about his authority and was dealing with the case as if it related to a matter pertaining to preventive detention where the order can be passed on the subjective satisfaction of the detaining authority. In our opinion this is a most appropriate case where this Court must interfere and exercise its power under Article 226 of the Constitution.

5. In the result, the writ petition succeeds and is hereby allowed. The impugned order dated 18.11.2000 of Additional District Magistrate (Finance & Revenue), Baghpat, externing the petitioner from the limits of the district is quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.12.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Writ Petition No. 7449 of 2000

Sri Lalta Prasad Dubey ...Petitioner
Versus
The Director General of Police U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri Ranjit Saxena

Counsel for the Respondents:
A.G.A.

Article 226 of the Constitution of India- G.O. bearing No.376-Chha-dated 19.2.1996 laying down the conditions under which security shall be provided at the State expense. Para-7 of the G.O. lays down that security shall be provided for a limited period to a person who is doing pairvi of a case in which his relation has been murdered. The same para also provides for giving security to prosecution witnesses. The petitioner is an eye witness of the incident and he happens to be real uncle of one of the deceased- The inaction of the authority in not providing security to the petitioner in the facts and circumstances of the case, is not justified. (Held in para 6)

A writ of mandamus is issued commanding the respondents nos. 1,2,4,5 and 6 to provide two guards to the petitioner for his security till the prosecution evidence in S.T. no. 340 of 1998 pending in the court of learned IIIrd Addl. Sessions Judge, Jaunpur, is concluded.

By the Court

1. This writ petition under Article 226 of the Constitution has been filed praying that a writ of mandamus be issued directing the Superintendent of Police, Jaunpur to comply with the order dated 10.5.2000 passed by the learned IIIrd Addl. Sessions Judge, Jaunpur in S.T. No.340 of 1998.

2. We have heard learned counsel for the petitioner, learned A.G.A. for the State and have perused the record.

3. It is averred in the writ petition that an incident took place in which three persons including the nephew of the petitioner were murdered. After investigation, charge sheet was submitted against the accused and in due course, the case was committed to the Court of Sessions for trial. The trial has been registered as S.T. no.340 of 1998 and is pending in the court of learned IIIrd Addl. Sessions Judge, Jaunpur. The petitioner is an eye witness of the aforesaid case. It is also averred in the writ petition that the accused are hardened criminals and they are extending threats to the petitioner not to appear as a witness in court. It is further averred that threats have been extended to some other eye witnesses as well. The record shows that the petitioner moved an application before the learned IIIrd Addl. Sessions Judge, Jaunpur on 10.5.2000 stating that he was receiving threats to his life and therefore security may be provided to him. The learned IIIrd Addl. Sessions Judge passed order on the same day directing the Superintendent of Police, Jaunpur to provide security to the petitioner as he had received threats and he needed protection both at home and while coming to court for purpose of giving evidence. The D.G.C. (Criminal), Jaunpur had also written to Superintendent of Police informing him about the order passed by the court. The grievance of the petitioner is that inspite of clear direction by the learned IIIrd Addl. Sessions Judge, no security has been provided to the petitioner so far.

4. The State Government has issued a G.O. bearing no.376 Chha dated 19.2.96 laying down the conditions under which security shall be provided at the State expense. Para 7 of the G.O. lays down that security shall be provided for a limited period to a person who is doing pairvi of a case in which his relation has been murdered. The same para also provides for giving security to

prosecution witnesses. The petitioner is an eye witness of the incident and he happens to be real uncle of one of the deceased. On facts, the case is entirely covered by para 7 of the G.O. It is averred in para 8 of the writ petition that Superintendent of Police, Jaunpur has not complied with the order passed by the learned III[rd] Addl. Sessions Judge on account of some oblique motive. Certain allegations have also been made against the Superintendent of Police but we do not want to go into that question. In view of the fact that the case of petitioner is covered by para 7 of the G.O. and also that there is direction given by the learned III[rd] Addl. Sessions Judge, the Superintendent of Police, Jaunpur ought to have provided security to the petitioner. The inaction of the authority in not providing security to the petitioner in the facts and circumstances of the case, is not justified.

5. The record shows that the petitioner has filed a transfer application in this Court being Criminal Misc. (Transfer) Application no.310 of 2000 seeking transfer of the case from Jaunpur to some other place on the same ground namely that there is apprehension to the life of the petitioner. Sri Ranjit Saxena learned counsel for the petitioner has given an undertaking that in view of the order which we propose to pass in the present writ petition, the petitioner will get the transfer application dismissed so that the trial may proceed.

6. The writ petition is accordingly, allowed. A writ mandamus is issued commanding the respondents nos. 1,2,4,5 and 6 to provide two armed guards to the petitioner for his security till the prosecution evidence in S.T. no.340 of 1998 pending in the court of learned III[rd] Addl. Sessions Judge, Jaunpur is concluded.

7. Office is directed to place a copy of this order on the record of Criminal Misc. (Transfer) Application no.310 of 2000.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: DECEMBER 20, 2000

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE A.K. YOG, J.

Civil Misc. Writ Petition No. 13620 of 1993

D.K. Joshi ...Petitioner
Versus
The State of U.P. & Others...Respondents

Counsel for the Petitioner:
Shri U.N. Sharma
Shri Suneet Kumar

Counsel for the Respondents:
Shri Sabhajeet Yadav,
S.C.

Drugs and Cosmetic Rules, 1945 – those persons can be appointed as Licencing Authority and Controlling Authority who are having requisite qualifications in terms of Rules 49-A and 50-A of the Rules (Held in para. 6)

Such Chief Medical Officers who have now been conferred the authority to act as Licencing and Controlling Authorities under the Rules, who do not possess the requirements laid down by the Legislature, cannot be allowed to function as such. If this is allowed to continue it is bound to endanger the health of the people besides breach of the avowed object for which the Legislature had proceeded to enact the

Drugs and Cosmetics Act and the Rules framed under that Act. This Constitutional Court, in that backdrop could not become a silent spectator and thereby indirectly become a party to allow continuance of the breach of the sacred Constitutional mandate enshrined under Article 21 of the Constitution of India and the avowed object of the Act and the Rules.

By the Court

1. The prayer of the petitioner is to command the Respondents (I) to restrain the Chief Medical Officers of this State to act as Licencing and Controlling Authority who are not qualified under the Drugs & Cosmetic Rules, 1945 framed under the Drugs & Cosmetics Act, 1940 (hereinafter referred to as the Rules and the Act respectively for the sake of brevity); (ii) to cancel the licences issued to such persons who are not qualified under the Rules after 12th April, 1989; and (iii) to award costs to him.

2. The petitioner claims to be a social worker and having interest in the welfare of the public at large specially for those of the District Agra who are being subjected to consumption of drugs distributed by such persons who are not authorised to distribute the same under the law; he has no rivalry – direct or indirect – against the Respondents nor is connected in any manner with them; the Act contemplates to regulate the import, manufacture, distribution and sale of Drugs & Cosmetics and for maintenance of their high standard and its main object is to prevent import etc. of the sub-standard drugs and intends to eradicate such drugs; in the year 1945 the Rules were framed under the Act; our State Legislature passed an Amendment Act No. 47 of 1975 amending the provisions of (I) the Indian Penal Code, (ii) the Code of Criminal Procedure, (iii) the Prevention of Adulteration of Food and (iv) the Drugs and Cosmetics Act for providing deterrent punishment for offences relating thereto; the State Government while exercising its power under sub-rule (I) of Rule 59 of the 1945 Rules vide Notification No. 1022/XVI-X-XII(67)-76 dated March 24, 1977 was pleased to appoint all the Chief Medical Officers of the State in respect of whole of the District in which they were posted including Nagar Maha Palikas, Nagar Palikas, Notified Areas and Town Areas as Licencing Authority as per Part VI of the Rules, as also the Controlling Authority under Rule 50 of the Rules; Vide Rule 49-A the qualifications for the Licencing Authority were laid down to the effect that no person shall be qualified to be a Licencing Authority under the Act unless he is a graduate in Pharmacy or Pharmaceutical Chemistry or in Medicine with specialisation in clinical Pharmacology or Microbiology from a University established in Indian by law and has experience in the manufacture or testing of drugs or enforcement of the provisions of the Act for a minimum period of five years provided that the requirements as to the academic qualification shall not apply to those Inspectors and Government Analysis, who were holding those positions on the 12th day of April, 1989; vide Rule 50-A the qualification of a Controlling Authority was prescribed laying down that no person shall be qualified to be a Controlling Authority under the Act unless he is a graduate in Pharmacy or Pharmaceutical Chemistry or in Medicine with specialisation in Clinical Pharmacology or Microbiology from a

University established in India by law and has experience in the manufacture or testing of drugs or enforcement of the provisions of the Act for a minimum period of five years provided that the requirements as to the academic qualification shall not apply to those Inspectors and the Government Analysts who were holding those positions on the 12th day of April, 1989; Rules 49-A and 50-A aforementioned came into force with effect from 12th April, 1989; the aforesaid Rules have been accepted by our State as no amendment to the contrary has been made till date; Part VI of the Rules lays down provisions for the sale of drugs other than Homeopathic medicines, conditions for grant or renewal of the licences to sale, stock, exhibit or offer for sale, or distribute drugs other than those included in Schedule X which shall be made in Form 19 or Form 19-A, as the case may be, or in the case of drugs included in Schedule X, shall be made in Form 19-C to the Licencing Authority and shall be accompanied by a fee of Rupees Forty; Rule 59(1) states that the State Government shall appoint Licencing Authority for the purposes of Part VI for such areas as may be specified; Rule 65 lays down the conditions of licence; Rule 65(2) states that the supply, otherwise than by way of wholesale dealing of any drugs supplied on the prescription of a Registered Medical Practitioner shall be effected only by or under the personal supervision of a qualified person; thus, it is relevant that the supply of drugs by retail sale of the prescription of the Registered Medical Practitioner may be done under the personal supervision of the qualified person; Rule 65(15)(c)(ii) lays down that the "qualified person" means a person who (a) holds a Diploma or Degree in Pharmacy or Pharmaceutical Chemistry of an Institute approved by the Licencing Authority, or (b) is a registered Pharmacist, as defined in the Pharmacy Act, 1948; it is thus evident from the scheme of the Drugs and Cosmetics Act and the Rules made thereunder that the stock and sale of the drugs shall be strictly under the supervision of a qualified person and further the licences for the retail sale and wholesale should be granted by Licencing Authority for whom the Rule specifically provides the qualifications with a view that a person having knowledge in Drugs and Cosmetics should be a person who is qualified under the Rules acting as a Licencing Authority; in our State there are such Licencing Authorities, who do not possess the minimum qualification as required under Rules 49-A and 50-A the names and place of postings of such persons are disclosed in Paragraph 20 of this writ petition; in State of Agra there were 167 registered Pharmacists in the year 1984 and approximately 200 registered Pharmacists are presently in the city and approximately 1600 licences have been granted to the retailers and it is not understandable how such a few qualified persons take the licence to the extent of 10 times of the qualified persons; similar is the position in the remaining 62 Districts of the State; the gravity of the situation became all the more alarming when the demographic to the population of the State is taken into account, as per the latest census almost 50% of the population of this State are living below the poverty line and are illiterate, the illiteracy being 30% which were highlighted by publication in various News Papers viz. Amar Ujala dated 17.11.1992 and 19.12.1992, Jansatta dated 15.1.1993, Dainik Jagran dated 19..1993 and Aaj dated 20.3.1993, copies

of which are Annexures 1 to 5; in Writ Petition No. 00 of 1990, Vijai Kumar Versus Inspector of Drugs, Range Chatiya Azam Khan, Agra, filed in the year 1990, this Court vide its order dated 9.2.1990 held that the Rules are applicable to the Chief Medical Officers of this State, but directed the petitioner Vijai Kumar to file an Appeal under Rule 66 before the State Government with a direction to decide it within a reasonable times, pursuant to which the State Government, vide its order dated 17.2.1990, as contained in Annexure-7, held that the Chief Medical Officer, Agra does not possess the minimum qualification under Rule 49-A and is, thus, not competent to act as Licencing Authority, which is also applicable to other Chief Medical Officers of the State; under Article 47 it is the duty of the State Government to improve the health and healthy life of the public which means that the State Government cannot subject the public health of such a large number of persons and maintenance of health which having being guaranteed under Article 21 of the Constitution of India and in the facts and circumstances it would be expedient in the interest of justice that the commands prayed for be issued.

3. The record discloses that before admission also this case was adjourned time and again awaiting filing of Counter Affidavit and ultimately taking into account the non-filing of any Counter Affidavit the Bench (comprising one of us, Binod Kumar Roy, J.) proceeded to admit this writ petition on 16.11.1998 giving liberty to the Standing Counsel to file Counter Affidavit, if any, by 5th January, 1999. No Counter Affidavit has been filed till to date.

4. Sri U.N. Sharma, learned counsel appearing in support of the prayers made in this public interest writ petition, contended as follows :

In view of the amendments made in the Rules, with effect from 12th April, 1989 only those persons can be appointed as Licencing Authority and Controlling Authority who are having requisite qualifications in terms of rules 49-A and 50-A of the Rules and even though the Government took a decision in relation to Agra that the Chief Medical Officer, Agra was lacking such qualifications, yet it has adopted a callous attitude in not appointing such Licencing and Controlling Authorities as required under the Rules rather had illegally proceeded to appoint the Chief Medical Officers of various Districts enumerated in paragraph 20 of the writ petition to function as Licencing and Controlling Authorities apparently contrary to the Rules and, thus, it is a high time that the Government be appropriately directed to conform the standards prescribed, and abide by the Rules.

In support of this submissions he also referred to a common Judgment of the Supreme Court dated September, 19, 1988 in Civil Appeal No. 757 of 1984, Dr. M.C. Bindal Versus R.C. Singh and others, Writ Petition No. 750 of 1986, Dr. R.C. Bindal v. The U.P. Public Service Commission, Allahabad & another, Civil Appeal No. 3926 of 1986, Sadan Kumar Majumdar v. The State of U.P. & others and Civil Appeal No. 798 of 1984, State of Uttar Pradesh v. Ram Chander Singh & others and, yet another Judgment of the Supreme Court dated August 25, 1999 in Civil Appeal No. 3369 of 1997, Bhagwan

Singh & another v. State of Punjab & others.

5. Sri Sabhajeet Yadav, learned Standing Counsel appearing on behalf of the Respondents, on the other hand, contended as follows :

This writ petition be thrown out on the ground that such Chief Medical Officers whose appointed as Licencing and Controlling Authorities is under challenge do not possess requisite qualifications laid down by the rules have not been impleaded as Party-Respondents. While making this submission Sri Yadav placed reliance on these decisions of the Supreme Court – (i) Prabodh Verma v. Dal Chand and others, A.I.R. 1985 S.C. 167, (ii) J. Joshe Dhanaplaul v. S. Thomas, 1996 (3) S.C.C. 587 and (ii) Ishwar Singh v. Kuldip Singh 1995 Supplement (1) S.C.C. 179. He has informed that he has no instructions on behalf of the Respondents except Respondent No. 4 the Chief Medical Officer, Agra, and that he is taking this objection in regard to maintainability of this writ petition on his behalf only.

6. The main prayer of the petitioner is to command the Respondents to restrain such Chief Medical Officers of this State who have been authorised to act as Licencing and Controlling Authority under the Act on the ground that they do not possess requisite qualifications laid down under the Rules so that the avowed constitutional mandate enshrined under Article 21 of the Constitution of India under which this State is bound to safeguard the health of the people of this State and the objects of Act be achieved and not to quash the appointments of those unqualified Chief Medical Officers. The facts state by the writ-petitioner have not been countered by the Respondents by filing any Counter Affidavit. The Legislative intent, in the absence of any contrary amendment by our State, has to be followed in terms and spirit by all concerned. The two decisions of the Supreme Court relied upon by Sir Sharma do support his submissions. Therefore, such Chief Medical Officers who have now been conferred the authority to act as Licencing and Controlling Authorities under the Rules, who do not possess the requirements laid down by the Legislature, cannot be allowed to function as such. If this is allowed to continue it is bound to endanger the health of the people besides breach of the avowed object for which the Legislature had proceeded to enact the Drugs and Cosmetics Act and the Rules framed under that Act. This Constitutional Court, in that backdrop could not become a silent spectator and thereby indirectly become a party to allow continuance of the breach of the sacred Constitutional mandate enshrined under Article 21 of the Constitution of India and the avowed object of the Act and the Rules. We do not see any merit in the preliminary objection raised by Sri Yadav or legal impediment so as to restrain ourselves in not restraining the Respondents from not abiding the Rules aforementioned. The three decisions relied upon by Sri Yadav do not apply to the facts and circumstances of the instant writ petition.

7. We presume that the Government must be having complete dates to find out objectively as to which of those Chief Medical Officers are duly qualified under the Rules or not and, accordingly, over ruling the preliminary objection as being of without any substance, command the

Respondents to restrain such Chief Medical Officers of this State, who do not possess the qualifications aforementioned to act as Licencing and Controlling Authority under the Rules, besides to cancel the licences issued after 12th April, 1989 to those persons who are not qualified under the Rules. Let a writ of mandamus issued accordingly.

8. As award for costs to the petitioner was not pressed by Sri U.N. Sharma, we do not grant it.

9. The office is directed to hand over a copy of this order to Sri Sabhajeet Yadav, learned Standing Counsel, by 23rd December, 2000 for its intimation to and follow up action at once by the State by the appropriate authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:THE ALLAHABAD 5.12.2000

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

Civil Misc. Writ Petition No. 51969 of 2000

Sri Shri Pal ...Petitioner.
Versus
State of U.P. & others ...Respondents.

Counsel for the Petitioner:
Shri Yogesh Kumar Saxena,

Counsel for the Respondents:
S.C.

Article 226 of the Constitution of India- merely because permission has been granted to teach some subjects in the institution, it would not amount to creation of post, therefore unless the post is created under section 9 of the Salaries Act, 1971, no salary could be paid to the assistant teacher. (Held in para 4).

The post of assistant teacher had not been created in the institution under section 7 of the Salaries Act. In absence of any creation of post, the petitioner could not be paid any salary from the grant in aid received by the institution. Even though permission to open a new section was granted in 1988 but that by itself was not sufficient. It was incumbent on the management to have applied to the Director for creation of post. In the absence of any creation of post, it could not be deemed that a post of assistant teacher has been created in the institution. Merely because permission has been granted to teach some subjects in the institution, it would not amount to creation of post, therefore, unless the post is created under section 9 of the Salaries Act, 1971, no salary could be paid to the assistant teacher:

By the Court

1. Sri Raghuvar Singh Samta Vidyalay, Auraiya is a recognised and aided institution under the U.P. Recognised Basic School (Junior High School Recruitment and Conditions of Service of Teachers) Rules, 1978 (in brief Rules 1978). The institution is managed by a private committee of management and is not maintained by the Board. Therefore, the provisions of U.P. Junior High School (Payment of Salaries of Teachers and other Employees) Act, 1978 (in brief Salaries Act) is applicable. The service condition of teachers working in the institution are governed by Rules 1978.

2. The institution was granted permission on 30.7.1988 to open a new section. But no posts were created or sanctioned by the Director, as provided by

Section 7 of the Salaries Act. A post of assistant teacher was vacant in the institution. The management advertised the vacancy and the petitioner was selected. And appointment letter was issued to him on 28.6.1992. He joined on 1.7.1992. Approval to his appointment was granted on 20.12.1997 by the District Basic Education Officer, Etawah (in brief BSA). Salary was not paid to him even after approval by the BSA. He filed civil misc. writ petition no. 19781 of 1999. This petition was disposed of on 13.5.1999 that post on which the petitioner was working had been created and sanctioned or not as the petitioner was claiming salary from the date of his appointment as assistant teacher. And whether in absence of creation of post, salary could be paid. A communication was sent from the office of the Director that if the post has been created and the petitioner has been validly appointed, then the petitioner may be entitled for salary. The BSA was directed to take a decision at his end and to send details of posts which had been created in the institution. The BSA on 10.3.2000 informed the Director that there was nine sections in the institution and 12 teachers including the Head Master were being paid salary from the grant-in-aid received from the government. Thirteenth teacher in the institution the petitioner was not being paid salary as post of assistant teacher had not been created, though as per the standard fixed, there should be 13.5 teachers in the institution. The B.S.A. sought a clear direction from the Director sending the details that approval had been granted to the appointment of the petitioner on 20.12.1997, as to whether salary should be paid to the petitioner. By letter on 6.6.2000 issued from the office of the Director by Deputy Director of Education (Finance), the BSA had been directed to comply with the order dated 13.5.1999 passed by this Court and pay salary to the petitioner. But no salary has been paid to the petitioner, therefore, he has filed this writ petition for a direction to the respondents to pay salary to him w.e.f. 28.6.1992.

3. Learned counsel for the petitioner Sri Yogesh Kumar Saxena has vehemently urged that as per the section standard fixed 13.5 teachers were required in the institution and permission to open new section was granted by the respondents in 1988. Therefore, it would be deemed that post of assistant teacher had been created in the institution and the petitioner is entitled for salary from the date of his appointment. He relied on a decision of this Court in Arjun Singh Vs. State of U.P. through Secretary 1997 (3) AWC 1475. Learned counsel for the petitioner lastly urged that office of the Director has issued a direction to the BSA after perusing the records and in compliance of the order dated 13.5.1999 passed in civil misc. writ petition no. 19781 of 1999 for payment of salary to the petitioner, therefore, his salary should be paid. On the other hand, Smt. Champa Singh, learned Standing counsel has urged that Arjun Singh (supra) was of no help to the petitioner in view of full bench decision of this Court in Gopal Dubey vs. District Inspector of Schools 1999 (1) UPLBEC 1. The learned standing counsel vehemently urged that since the institution was received grant-in-aid therefore, in absence of creation of post under Section 7 of the Salaries aid therefore, in absence of creation of post under Section 7 of the Salaries Act, no salary could be paid to the petitioner from the government fund. Learned standing

counsel further urged that approval to the appointment of the petitioner was granted by the BSA with a condition that if any fact was found to have been concealed, while granting approval, the approval would automatically come to an end. She urged that since management had concealed the fact that the post was not sanctioned, the petitioner is not entitled for any salary. The learned standing counsel has lastly urged that the impugned order issued by the Deputy Director of Education (Finance) from the office of the Director, did not amount to a direction for payment of salary to the petitioner. She pointed out that a perusal of order dated 6.6.2000 clearly demonstrates that the order for payment of salary to the petitioner was made under misapprehension of the order passed on 13.5.1999 by this Court in civil misc. writ petition no. 19781 of 1999. It is urged that order dated 13.5.1999 has been filed as Annexure 4 to the writ petition and only direction issued was for deciding the representation by the concerned authority and no direction was issued for payment of salary to the petitioner. Therefore, in absence of any direction from this Court for payment of salary, the BSA rightly did not pay salary to the petitioner as the post on which he was working was neither created nor sanctioned by the director.

4. The question that arises for consideration is whether the petitioner is entitled for payment of salary on the post of assistant teacher when on the admitted facts of this case, it is clear that the post of assistant teacher was not created under Section 7 of the Salaries Act by the Director, Section 7 of the Salaries Act mandates that no college shall create a new post of a teacher or employee except with the previous approval of the Director of Education or such other officer empowered in that behalf by the Director. The post of assistant teacher had not been created in the institution under Section 7 of the Salaries Act. In absence of any creation of post, the petitioner could not be paid any salary from the grant in aid received by the institution. Even though permission to open a new section was granted in 1988 but that by itself was not sufficient. It was incumbent on the management to have applied to the Director for creation of post. In the absence of any creation of post, it could not be deemed that a post of assistant teacher has been created in the institution. A similar controversy arose on the appointment of assistant teacher under the U.P. Intermediate Education Act and Regulations framed there under and Section 9 of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teacher and other Employees) Act, 1971. This controversy has been resolved by a full bench of this Court in Gopal Dubey (supra) and it has been held by the full bench of this Court that in absence of creation of post, merely because permission has been granted to teach some Article 226 subjects in the institution, it would not amount to creation of post, therefore, unless the post is created under section 9 of the Salaries Act, 1971, no salary could be paid to the assistant teacher. The decision in Gopal Dubey (supra) can be gainfully applied to the facts of this case.

5. It was next urged that in view of recent decision of the apex court in Chandigarh Administration and others vs. Rajni Vali (Mrs.) and other (2000) 2 SCC 42, non payment of salary to the petitioner is discriminatory as other teachers working in the institution are being paid

salary from the grant in aid received from the government. This question has been considered by the court in civil misc. writ petition no. 29097 of 1998 Mohd. Fuzail Ansari vs. State of U.P. and others decided on 30.11.2000, therefore, for the same reasons, I do not find any merit in the submission of the learned counsel for the petitioner.

6. The other argument of the learned counsel for the petitioner that approval to his appointment has been granted by the BSA, therefore, he is entitled for salary is also devoid of any merit. It appears that BSA had granted approval to the appointment of the petitioner on 20.12.1997 under a mistake as the post was not created and the management appears to have concealed this fact from the BSA. Even the subsequent letter of BSA by which he informed the Director that approval was granted in 1997 on a post, which was not created itself demonstrate that a mistake was committed by the BSA, while granting approval on 20.12.1997, therefore, such approval automatically came to an end as per the clear terms of the other of approval. And no right could accrue on the post to the petitioner on the basis of approval dated 20.12.97.

7. The last argument of the learned counsel for the petitioner is that since the direction has been issued by the office of the Director to the BSA for payment of his salary, therefore, he is entitled for salary is also devoid of merit. The order clearly states that in view of the directions of this Court in civil misc. writ petition no. 19781 of 1999 decided on 13.5.99, salary be paid to the petitioner. I have gone through the order passed by this Court which has been filed as Annexure 4 to the writ petition. There is no direction for payment of salary to the petitioner and only direction issued by this Court was for deciding the representation of the petitioner by the concerned authority. The order dated 16.6.2000 that has been issued by the office of the Director had been issued under a mistake that this Court directed the respondents for payment of salary to the petitioner. If salary of the petitioner has not been paid by the BSA, he has not committed any illegality as the post of assistant teacher was not created, therefore, no salary could be paid to him.

8. However, it is always open to the management to apply to the Director for the creation of the post of assistant teacher.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.200

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

Civil Misc. Writ Petition No. 52242 of 2000

Brahma Dutta Sharma ...Petitioner
Versus
The State of U.P. & others ..Respondents.

Counsel for the Petitioner:
Shri R.C. Katara

Counsel for the Respondents:
S.C.
Smt. Chitralekha Stsangi

Constitution of India Article 226 the full Bench decision is not applicable to the facts of the case as learned counsel for the petitioner has not been able to show

any provision under which the Director of Education is subordinate to the State Education Minster.

Held-

The learned counsel for the petitioner has placed reliance on a Full Bench decision of this court in Tara Prasad Misra v. State of U.P. and others (1990) 2 UPLBEC 905 where in it has been held that the subordinate authority should comply the orders of the superior authority. This full Bench Decision is not applicable to the fact of this case as learned counsel for the petitioner has not been able to sow any provision under which the Director of Education is subordinate to the State Education Minster.

By the Court

1. The petitioner was teaching as Lecture in Chemistry in Government Inter College, Agra. By order dated23.8.2000 he was transferred to Government Inter College, Mainpuri on administrative grounds. The wife of the petitioner made a representative to the Revenue Minister who wrote a letter on 19.9.2000 to the State Education Minister if he would issue order for cancellation of petitioner's transfer. On 21.9.2000 the State Education Minister directed the Director, Madhyamik Shiksha to submit a report and cancel the transfer of the petitioner. This writ petition has been filed by the petitioner for a direction to respondents to implement the order passed by the State Education Minister. The other relief claimed is that the respondents have deducted a sum of Rs.1634/- from the salary of the petitioner for loss of one steel almirah without any inquiry.

2. Shri R.C. Katara the learned counsel for the petitioner has vehemently argued that once the State Education Minister wrote a letter to the Director of Education to cancel the transfer order of the petitioner, the director was under statutory duty to cancel the transfer order dated 23.8.2000 passed against the petitioner. The other argument of the learned counsel for the petitioner is that the respondents without inquiry and serving him an order of recovery could not have deducted Rs.1634/- from his salary.

3. On the other hand Smt. Chitralekha Satsangi the learned standing counsel has urged that the petitioner did not make any representation to the director or to the State Education Minister. The wife of petitioner did make a representation to the Revenue Minister who wrote a letter to the State Education Minister, to cancel the transfer order. She urged that in law wife of an employee could not make any representation for staying the transfer of her husband. It is the employee himself who has to make to the concerned authority for cancelling the transfer.

4. The learned counsel for the petitioner has vehemently urged that the minister is in-charge of the Department and it is the duty of the Director of Education to obey every order passed by the Minister and since the Director is under statutory duty to obey the orders passed by the Minister and since the Director is under statutory duty to obey the order of the Minister, therefore, a writ of mandamus can be issued to him to implement the order. The learned counsel for the petitioner has placed reliance on a Full bench decision of this court in Tara Prasad Misra v. state of U.P. and others (1990) 2 UPLBEC 905 wherein it has been held that the subordinate authority

should comply the order of the superior authority. This Full Bench decision is not applicable to the facts of this case as learned counsel for the petitioner has not been able to show any provision under which the Director of Education is subordinate to the State Education Minister. Therefore, this argument of the learned counsel is devoid of any merit.

5. So far as the other contention of the learned counsel for the petitioner is concerned that Rs.1634/- has been deducted from his salary without any inquiry or supplying a copy of the order, the petitioner may approach the Principal, Government Inter College, Agra and make a representation for providing a copy of the order by which his salary of Rs.1634/- has been deducted. On such a representation copy of the order shall be made available to the petitioner within a period of two weeks from the date a certified copy of this order is produced before the principal.

6. For the reasons aforesaid and subject to the observations made.

This writ petition fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD DECEMBER 19, 2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE U.S. TRIPATHI, J.

Criminal Misc. Habeas Corpus Petition No. 15791 of 2000.
Guddu alias Shamsher ...Petitioner.
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Sri V.P. Srivastava

Counsel for the Respondents:
Sri S.N. Misra
A.G.A.

Constitution of India Article 22(5) -The question whether the petitioner was informed that he had a right to make representation to the detaining authority namely the District Magistrate is a pure question of fact. (Held in para 18).

Order of detention can be passed on the subjective satisfaction of the detaining authority. If the District Magistrate was of the opinion that it was necessary to detain the petitioner alone in order to prevent him from acting in any manner prejudicial to the maintenance of public order, then such a satisfaction cannot be vitiated only on the ground that no such order has been passed as regards the other co-accused of the case.

By the Court

1. This habeas corpus petition has been filed by Guddu @Shamsher for quashing the detention order passed against him and setting him at liberty forthwith.

2. The District Magistrate, Ghaziabad passed an order on 6.1.2000 under Section 3(2) of the National Security Act (hereinafter referred to as the Act) for detaining the petitioner Guddu @ Shamsher with a view to prevent him from acting in any manner prejudicial to the maintenance of public order.

3. The detention order and also the grounds of detention were served upon the petitioner on the same day, i.e. on 6.1.2000 in jail as he was in judicial

custody in respect of an offence being case Crime No. 235 of 1999 under Sections 363, 366, 376 IPC and Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of P.S. Ganmukteshwar. The ground of detention relates to an incident which took place at about 12 in the night of 2/3.8.1999. The petitioner along with his companions, armed with pistols and guns, came to the house of Smt. Sheela Devi, widow of Murari Lal, resident of Manak Chowk. P.S. Ganmukteshwar and forcibly carried way her 13 year old daughter Sunita in a tractor. The petitioner and his companions constantly threatened her with firearms and repeatedly raped her. Thereafter, he brought her in a tractor and threw her in front of the Panchayat in Manak Chowk at about 10 p.m. on 3.8.1999.

4. The order of detention passed by the District Magistrate was approved by the State Government within the period prescribed under sub-section (4) of Section 3 of the Act. The petitioner made representation to the State Government and the Central Government, which were given by him to the Superintendent of Jail on 28.1.2000. After receiving comments from the Station Officer of the police station concerned and Superintendent of Police, the District Magistrate sent the representation to the State Government on 4.2.2000 along with his own comments. The representation was received by the State Government on 5.2.2000 which was Saturday. It was examined by the Joint Secretary (Home) and also by the Home Secretary on 7.2.2000 and was ultimately rejected by the Chief Minister on 8.2.2000. The representation made to the Central Government was received there on 7.2.2000 and was put up before the Dy. Secretary (Home) and the concerned Joint Secretary on 8.2.2000. Finally, it was rejected by the Home Secretary on 9.2.2000. The case of the petitioner was also referred to the advisory board in accordance with Section 10 of the Act. The advisory board gave an opinion that there was sufficient cause to detain the petitioner and a report to that effect was forwarded to the State Government. The State Government, after examining the matter afresh and also the report of the advisory board, passed an order under Section 12 (1) of the Act confirming the order for keeping the petitioner under detention for a period of 12 months.

5. The principal submission of learned counsel for the petitioner. Sri V.P. Srivastava, is that the petitioner has been detained on the basis of a solitary incident which relates to “law and order” and not to “public order” and, therefore, the order of detention is illegal. Learned counsel has urged that the solitary act alleged against the petitioner is not subversive of public order and, therefore, the detention on the ostensible ground of preventing him from acting in a manner prejudicial to public order was not justified. In support of his submission he has placed reliance on Dr. Ram Manohar Lohia Vs. State of Bihar, AIR 1966 SC 740, Subhash Bhandari Vs. District Magistrate, 1988 ACC 48 (SC), Gulab Mehra Vs. State, 1987 ACC 520 (SC), Mrs. T. Deoki Vs. Government of Tamil Nadu, 1990 JIC 832 and Smt. Victoria Fernandes Vs. Lal Mauli, 1992 ACC 143 (SC). In Subhash Bhandari (supra) it was held as follows :

> “A solitary act of omission or commission can be taken into consideration for being subjectively satisfied, by the detaining authority

> to pass an order of detention if the reach, effect and potentiality of the act is such that it disturbs public tranquility by creating terror and panic in the society or a considerable number of the people in a specified locality where the act is alleged to have been committed. Thus. It is the degree and extent of the reach of the act upon the society which is vital for considering the question whether a man has committed only a breach of law and order or has acted in a manner likely to cause disturbance to public order."

6. There can be no quarrel with the proposition of law urged by Sri Srivatava. It has to be examined here what is the degree and extent of the act upon the society and it is the answer to this question which will determine whether the offending act is a mere breach of law and order or it causes disturbance of public order. In the grounds of detention it is mentioned that on account of abhorring and terrorising act of forcibly taking away a girl from her home and of gang rape committed by the petitioner and his companions an atmosphere of fear and terror was created in the area and every one started feeling insecure. It is further mentioned that after the incident the people in the entire area stopped sending their girls to schools, markets or place of work. The girls also stopped moving alone and stopped going to schools or markets and fields. Hundreds of people of the area of all castes and creeds expressed their anger and anguish over the incident by blocking the main Meerut-Ganmukteshwar road, and also resorted to a `dharna'. Due to this reason the normal activity of people at large was obstructed and public order was disturbed. When a solitary act may amount to disturbance of public order, was explained by Hidayatullah, C.J. in Arun Ghosh Vs. State of West Bengal, AIR 1970 SC 1228, and relevant part of paragraph 3 of the judgement is being reproduced below :

> "……An Act by itself is not determinant of its now gravity. In its quality it may not differ from another but in its potentiality it may be very different. ……Take another case of a man who molest women in lonely places. As a result of his activities girls going to college and schools are in constant danger and fear. Women going for their ordinary business are afraid of being way-laid and assaulted. The activity of this man in its essential quality is not different from the act of the other man but in its potentiality and in its effect upon the public tranquility there is a vast difference. The act of the man who molests the girls in lonely places causes a disturbance in the even tempo of living which is the first requirement of public order. He disturbs the society and the community. His act makes all the women apprehensive of their honour and he can be said to e causing disturbance of public order and not merely committing individual actions which may be taken note of by the criminal prosecution agencies. It means therefore that the question whether a man has only committed a breach of law and order or has acted in a manner likely to cause a disturbance of the public order is a question of degree and the extent of the reach of the act upon the society……."

7. The test whether an act relates to law and order or it amounts to disturbance of public order, was formulated in the aforesaid case as under:

> "……Does it lead to disturbance of the current of life of the community so as to amount a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed? This question has to be faced in every case on facts. There is no formula by which one case can be distinguished from another……."

8. The grounds of detention in the present case show that the petitioner along with his companions came on a tractor and forcibly carried away a young girl of 13 years of age while she was sleeping in her house and repeatedly raped her and threatened her with firearms and, thereafter, on the next day at about 10 in the night brought her back and threw her near the panchayat. While going back the people were again threatened with firearms. The forcible abduction of a girl from her house by several persons accompanied with threats with fire-arms is bound to affect everyone residing in that area. The people would be deeply concerned with the safety, protection and honour of the girls and womenfolk of the area, and they can legitimately think that sending a girl alone to school, market or any other place would be highly unsafe and would tend to keep them properly secure in their own houses. It is not possible to believe that such an incident would have affected the victim Suneeta or her mother Smt. Sheela Devi alone, and would not have affected the people at large who are residing in that area. The affect and reach of the act is not to be judged in the cool atmosphere of an air-conditioned court room, but has to be judged from the spontaneous reaction of the people and community at large of that area. Again what was the reaction is to be seen at the time of incident and shortly thereafter and not after a long lapse of time as things cool down with the passage of time. The grounds show that hundreds of people of that area, irrespective of caste or community, resorted to blocking of the road and `*dharna*' to express their anger and resentment against the abduction and gang rape of the girl. This itself shows that the offending act disturbed the even tempo of life of the community and clearly falls within the domain of "public order". It may be pointed out that in Arun Ghosh (supra) the act of molestation of girls in a lonely places was held as an act relating to disturbance of public order. The case in hand stands on a much stronger footing as the petitioner along with his companions armed with pistols and guns not only forcibly carried away the girl from her house but also repeatedly raped her. Thus, there cannot be even a slightest doubt that the ground on which the order of detention is founded clearly relates to disturbance of public order and not to breach of law and order. The authorities cited by the learned counsel for the petitioner have not laid down any contrary principle. On facts of these cases the grounds were held to be that of breach of public order and, therefore, they can be of no assistance to the petitioner.

9. Sri Srivastava has next urged that at the time when the detention order was served upon the petitioner, he was already in custody in respect of a criminal case and his bail application had also been rejected by the learned sessions judge

and, consequently, it was not all possible for the petitioner to commit any such act which may save amounted to disturbance of public order. According to the learned counsel, this showed that the order of detention had been passed in a mechanical way and without any application of mind. It has been further urged that the subjective satisfaction of the detaining authority was completely vitiated as the same was not arrived at on consideration of relevant materials.

10. The question as to whether a detention order can be passed against a person who is already in custody in respect of a criminal offence has been considered in a series of decisions by the Apex Court. In Sanjiv Kumar Agarwal Vs. Union of India, AIR 1990 SC 1202, after reviewing all earlier cases including those cited by learned counsel for the petitioner, it was held as follows :

> "It could not be said that no order of detention can validly be passed against a person in custody under any circumstances. Therefore, the fact and circumstances of each case have to be taken into consideration in the context of considering the order of detention passed in the case of a detenu who is already in jail. In the instant case the detaining authority was not only aware that the detenu was in jail but also noted the circumstances on the basis of which he was satisfied that the detenu was likely to come out on bail and continue to engage himself in the smuggling of goods. Therefore the detention was not ordered on the mere ground that he is likely to be released on bail but on the ground that the detaining authority was satisfied that the detenu was likely to indulge in the same activities if release on bail. Therefore the detention order could not be quashed merely on the ground that the detenu was in jail."

11. In Smt. Azra Fatma Vs. Union of India, 1990 Crl. L.J. 1731, the view expressed in Sanjiv Kumar Agarwal (supra) was reiterated and it was held that it cannot be said that no order of detention can validly be passed against a person in custody under any circumstances. The facts and circumstances of each case have to be taken into consideration in the context of considering the order of detention in the case of a detenu who is already in jail. In this case, though the bail application filed by the detenu had already been rejected, the order of detention was upheld. In Kamarunnissa Vs. Union of India, AIR 1991 SC 1640, Ahmadi, J. (as his lordship then was) after reviewing the earlier authorities held as follows :

> "In the case of a person in custody a detention order can validly be passed (1)if the authority passing the order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him (a) that there is a real possibility of his being released on bail, and (b) that on being so released he would in all probability indulge in prejudicial activity and (3) if it is felt essential to detain him to prevent him from so doing."

12. In Abdul Sathar Ibrahim Manik Vs. Union of India, AIR 1991 SC 2261, it was held as follows :

> "If the detenu has moved for bail then the application and the order thereon refusing bail even if not placed before the detaining authority it does not amount to suppression of relevant material. The question of non-application of mind and satisfaction being impaired does not arise as long as the detaining authority was aware of the fact that the detenu was in actual custody."

13. The same question was again considered in Bijendra Kumar Rai Vs. Union of India, AIR 1993 SC 962 and it was held that if sufficient material was placed before the detaining authority and he is satisfied that there was compelling necessity for detaining the detenu in order to prevent him from indulging in offending activities, the Court is not entitled to interfere with the detention order merely on the ground that detenu was already in custody in respect of a criminal offence. Similar view has been recently taken in Ahamed Nassar Vs. State of Tamil Nadu, 1999 (4) Crimes 358 (SC) (paragraph 41), wherein it was held as follows :

> "In spite of rejection of the bail application by a court, it is open to me detaining authority to come to his own satisfaction based on the contents of the bail application keeping in mind the circumstance that there is likelihood of detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail……."

14. In this connection it is necessary to examine the grounds of detention. It is enumerated therein that the petitioner is in judicial custody and his bail application had been rejected by the learned magistrate on 16.8.1999 and the bail application filed in the court of sessions on 1.10.1999 had been rejected by IInd Addl. Sessions Judge on 27.10.1999. The list of documents supplied along with the detention order contain at serial no. 44 "copy of the bail application of the petitioner" notice of which had been given to the Government Advocate in Allahabad High Court. Under the Allahabad High Court Rules, before actually filing a bail application in Court, copies of the bail application and notice thereof have to be given to the Government Advocate. This had actually been done by the petitioner. This is conclusive proof of the fact that the petitioner was making serious efforts to get bail.

15. There can be no doubt that the detaining authority was fully aware of the fact that the petitioner was in custody in jail at the time when he passed the detention order. It is not a case where the detaining authority was either unaware of the fact that the petitioner was already in jail in connection with a criminal case or the relevant materials regarding the rejection of his bail application had not been placed before him. Therefore, the detention of the petitioner cannot be assailed on the ground that he was already in custody at the time when the order was passed.

16. Sri V.P. Srivastava had next urged that the copies of the medical examination report and X-ray report of the victim Suneeta had not been supplied to the petitioner and as a result of such a lapse, he could not make an effective

representation against his detention, rendering his continued detention illegal. The contention raised is both factually and legally incorrect. A copy of grounds of detention has been filed as annexure-2 to the writ petition, and it gives the list of documents copies of which were furnished to the petitioner. The copy of the medical examination report of Suneeta is mentioned at serial no. 39 of the list and this clearly shows that a copy of the said document was supplied to the petitioner. The grounds do not at all show that the detaining authority had taken into consideration X-ray examination report of the victim. It is well-settled that the copies of only such documents on which the order of detention is primarily based has to be supplied to the detenu and the detention order would not be vitiated merely on the ground that the copies of non material documetns were not furnished. Sri Madan Lal Anand Vs. Union of India, AIR 1990 SC 176, M. Mohd. Sulthan Vs. Joint Secretary, AIR 1990 SC 2222, Syed Farooq Mohd. Vs. Union of India, AIR 1990 SC 1597 and Kamarunnissa Vs. Union of India, AIR 1991 SC 1640.

17. Learned counsel has urged that though in the grounds of detention it was mentioned that the petitioner could make a representation to the State Government and to the Central Government but it was not mentioned that the petitioner could also make a representation to the detaining authority, namely, to the District Magistrate and on account of such a lapse the petitioner could not exercise his constitutional right of making a representation against the detention order to the detaining authority, rendering his continued detention invalid. In support of this submission, learned counsel placed reliance on State of Maharashtra Vs. Santosh Shankar Acharya, JT 2000 (8) SC374, wherein it has been held that non-communication to a detenu that he has a right to make representation to detaining authority would constitute an infraction of a valuable right of a detenu under Article 22 (5) of the Constitution. We have given our thoughtful consideration to the submission made by the learned counsel, and we are of the opinion that such a contention cannot be accepted in the present case. The question whether the petitioner was informed that he had a right to make representation to the detaining authority, namely, the District Magistrate is a pure question of fact. In the writ petition no such plea has been raised and, as a result, the respondents had no opportunity to give reply to the said fact. It is not necessary to communicate such a right to the petitioner in the grounds of detention itself. It could be very well be done separately by any permissible mode. Therefore. In absence of any pleading to that effect such an inference cannot be drawn in favour of the detenu by merely looking at the grounds of detention.

18. Lastly, it was urged that there were other persons who are alleged to have participated along with the petitioner in the crime in question, but no order of detention has been passed against them and, consequently, the order passed by the District Magistrate for detaining the petitioner is hit by vice of discrimination. It is well-settled that an order of detention can be passed on the subjective satisfaction of the detaining authority. If the District Magistrate was of the opinion that it was necessary to detain the petitioner alone in order to prevent him from acting in any manner prejudicial to

the maintenance of public order, then such a satisfaction cannot be vitiated only on the ground that no such order has been passed as regards the other co-accused of the case. This view has been taken by a Full Bench of our Court in Chandra Prakash Paswan Vs. State, 1999 (38) ACC 721.

19. No other point was urged.

20. For the reasons mentioned above, we do not find any merit in this habeas corpus petition, which is hereby dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 10.1.2001

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

Civil Misc. Writ Petition No. 9055 of 1994

Bhurey ...Petitioner
Versus
State of U.P. & others ...Respondents.

Counsel for the Petitioner:
Shri Prakash Krishna

Counsel for the Respondents:
Shri S.K. Mehrotra,
S.C.

Land acquisition Act, 1894 Section 28-A- the implementation of the order passed under Section 28-A of the Act is statutory duty of the authority concerned. Indeed, he is obliged to do so. (Held in para 4)

The respondents jointly and severally, shall take appropriate steps for enforcement of the order dated 31 March, 1993, (Annexure-2) to the Petition and ensure that the order is enforced in accordance with law within a period of six months.

By the Court

1. Heard Sri Prakash Krishna, the learned counsel appearing for the petitioner and Sri S.K. Mehrotra, the learned Brief Holder of the state of U.P. representing the respondents.

2. By means of instant petition under Article 226 of the Constitution of India, the petitioner prays, in substance, for direction to the respondents for implementation of the order dated 31st March, 1993 passed by the Special Land Acquisition Officer, Moradabad, the respondent no. 2, in proceedings under Section 28-A of the Land Acquisition Act, 1894, hereinafter called the Act, A copy of the said order is Annexure '2' to the petition.

3. Neither is there anything in the counter-affidavit filed on behalf of the respondents nor has anything been pointed out by the learned counsel representing the respondents which may justify the inaction on the part of the respondent no. 2 in not implementing the order dated 31st March, 1993. It cannot be gainsaid that implementation of the order passed under Section 28-A of the Act is statutory duty of the authority concerned. Indeed, he is obliged to do so.

4. For what has been said above, the petition succeeds, and is allowed. The respondents jointly and severally, shall take appropriate steps for enforcement of the order dated 31st March 1993, (Annexure-2 to the petition) and ensure that the order is enforced in accordance

with law within a period of six months, to be computed from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 13.12.2000

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

Civil Misc. Writ Petition No. 52362 of 2000

Jagdish Singh ...Petitioner
Versus
Basic Shiksha Parishad U.P. Allahabad through its Secretary and other ...Respondents.

Counsel for the Petitioner:
Shri Ashok Gupta,

Counsel for the Respondents:
Sri P.K. Sharma
S.C.

Transfer- Order of – Cancellation after its implementation – Held, Valid.

Held – Para 3

There is no bar or restriction to the modification, revocation or cancellation of an order of transfer even after it has been implemented. Therefore, the District Basic Education Officer did not commit any error in cancelling the transfer order on the ground that it was illegal.

Cases referred
(1995) 2 UPLBEC 1128

By the Court

1. The petitioner was transferred by an order passed on 27.7.2000 by the District Basic Education Officer, Banda. In pursuance of the transfer order the Petitioner joined on 31.7.2000 at the transferred place. By another order passed on 1.9.2000 the District Basic Education Officer, Banda has cancelled the earlier transfer order. The petitioner in this petition has challenged the order passed on 1.9.2000.

2. I have heard Shri Ashok Gupta the learned counsel for petitioner. Shri P.K. Sharma the learned counsel appearing for the respondent's no. 1 and 2 and learned the standing counsel for the respondent no. 3.

3. The argument of learned counsel for the petitioner is that in pursuance of the transfer order since the petitioner has joined, therefore, the transfer order stood exhausted and it could not be cancelled, cannot be accepted. The Full Bench of this court in Director Rajya Krishi Utpadan Mandi Parishad, Lucknow and others v. Natthi Lal (1995)(2 UPLBEC 1128 has held that there is no bar or restriction to the modification, revocation or cancellation of an order of transfer even after it has been implemented. Therefore, the District Basic Education Officer did not commit any error in cancelling the transfer order on the ground that it was illegal.

4. The other argument of the learned counsel for the petitioner is that the Chief Development Officer had no power to direct the District Basic Education Officer to cancel the transfer order is devoid of any merit. The Chief Development Officer is the Chairman of the committee under the government order that recommends transfer of the teachers working basic schools in the district, therefore, he is empowered to direct the District Basic Education Officer to cancel transfer order illegally passed earlier by his predecessor.

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

6. The writ petition fails and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 11.12.2000

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

Civil Misc. Writ Petition No. 52016 of 2000

Rajendra Singh ...Petitioner
Versus
District Inspector of Schools, Fatehpur and others ...Respondents.

Counsel for the Petitioner:
Shri S.K. Mishra

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

Constitution of India, Article 226 – Mandamus – Petitioner, a part time teacher, has no legal right to insist performance of a statutory duty by administrative authority- Hence writ of mandamus, held, cannot be issued.

Held – Para 5

A writ of mandamus cannot be issued as a matter of course. It is a discretionary jurisdiction and can only be issued for enforcement or performance of statutory duty by administrative authority, on an application of a person who can show that he himself has a legal right to insist for such performance. A part-time or honorary teacher does not have any statutory right to claim continuance as a teacher in the institution nor the committee of management is entrusted with performance of statutory duty. Therefore, a writ of mandamus cannot be issued to the management or principle to continue a part-time or honorary teacher nor it can compelled to pay any honorarium due to such teacher.

Cases referred:
2000 (2) LBESR 790
(2000) 1 U.P.L.B.E.C. 2327
CMW51940 of 2000, decided on 4.12.2000
AIR 1977 ALL 539

By the Court

1. Adarsh Janta Inter College, Aung, Fatehpur (in brief institution) is an un-aided and recognised institution imparting education up to class VIII. In 1994 the institution was upgraded to High School and again it was upgraded to Intermediate in 1996. The institution is an un-aided institution and it was never in the grant-in-aid list of the State Government. The petitioner was appointed as Assistant Teacher in the institution on 1.7.1992 and no appointment letter was issued to him. It is alleged that salary of the petitioner is not being paid by the respondents. In the year 1998 in the identity card issued to the petitioner it is stated that the petitioner was appointed on 1.7.1998 as Hindi lecturer. It has been stated in paragraph 12 of the writ petition that the petitioner has been disengaged by respondents with effect from March, 2000. This writ petition has been filed for a direction to respondents no. 2 and 3 to permit the petitioner to function as lecturer in the institution and pay his salary since March, 2000.

2. Sri S.K. Mishra the learned counsel for the petitioner has vehemently urged that the petitioner was appointed in the institution and even though the institution is un-aided the management could not even disengage the petitioner

from service and he is entitled to salary. He has placed reliance on the decisions of this court in Dharmendra Pal Dwivedi v. District Inspector of Schools and another 2000 (2) LBESR 790 and Smt. Shashi Kala Singh v. District Inspector of Schools. Maharajganj and others (2000) 1 UPLBEC 2327. He further urged that respondents no. 2 and 3 be directed to permit the petitioner to function as lecturer in the school and pay him salary since March, 2000.

3. On the other hand, Sri K.K. Chand the learned standing counsel has urged that decision of this court in Civil Misc. Writ Petition No. 51940 of 2000 Smt. Suman Lata Sharma V. Regional Joint Director of Education, Meerut and others decided on 4.12.2000 it has been held that a part time teacher appointed under section 7-AA of the U.P. Intermediate Education Act, 1921 (in brief Act) is not a teacher envisaged under section 16-G of the Act. The service conditions of such teacher are to be governed by the government order dated 15.10.1986. The government order dated 15.10.1986 provided that the scheme of engaging part-time teachers is being made on experimental basis for imparting education in the interest of the students and the payment was to be made from the own funds of the management. The government order further provided that there was no age limit for appointing any person as part time teacher and even a retired person could be appointed as part time teacher.

4. A teacher working in a recognised unaided institution could not be said to be a regular teacher as envisaged by Section 16-G of the Act. He can only be a part time teacher or an honorary teacher. He could be engaged or disengaged by the management, which pays honorarium from its own resources. The controversy involved in the case is covered by the decision of this court in Smt. Suman Lata (supra).

5. The other argument of the learned counsel for the petitioner is that the management and principal of the institution be directed to continue him as teacher and pay him salary is devoid of any merit. A full bench of this court in Aley Ahmad Abidi v. District Inspector of Schools, Allahabad and others AIR 1977 Allahabad 539 has held as below:

> "The Committee of Management of an Intermediate College is not a statutory body. Nevertheless, a Writ Petition filed against it is maintainable if such petition is for enforcement of performance of any legal obligations or duties imposed on such committee by a statute."

A writ of mandamus cannot be issued as a matter of course. It is a discretionary jurisdiction and can only be issued for enforcement or performance of statutory duty by administrative authority, on an application of a person who can show that he himself has a legal right to insist for such performance. A part-time or honorary teacher does not have any statutory right to claim continuance as a teacher in the institution nor the committee of management is entrusted with performance of statutory duty. Therefore, a writ of mandamus cannot be issued to the management or principal to continue a part-time or honorary teacher nor it can be compelled to pay any honorarium due to such teacher.

6. For the reasons aforesaid, this writ petition fails and accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 6.12.2000

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

Civil Misc. Writ Petition No. 51963 of 2000

The Committee of Management R.B. Rao Inter College & others ...Petitioner
Versus
The Joint Director of Education, VIIth Region & Others ...Respondents.

Counsel for the Petitioner:
Shri A.B. Singh

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act, 1921, Regulation 105- Compassionate Appointment – Husband died in harness- District Committee constituted under notification dated 2.2.1995 accepted the claim – D.I.O.S. by order dated 23.8.2000 directed Management/Principal to issue appointment letter – instead of that management filed writ petition – direction issued to issue the appointment letter.

Held – Para 3

The claim that they would offer appointment to her minor son when he becomes major is also advanced to deny appointment to the widow. The family of the deceased appears to be in financial crisis. The widow is running from pillar to post but the petitioners are not complying with the order of DIOS nor they are permitting the widow to join. The order was passed by DIOS on the basis of public policy. It serves public interest in absence of any valid reason the petitioner cannot deny appointment to the widow.

By the Court

1. Dhrup Deo Dubey was working as Chaukidar on a class-IV post in Ram Bilas Rao, Intermediate College, Rampur Buzurg, Salempur, Deoria. He died in harness on 28.3.1999, leaving behind Smt. Subhawati Devi his widow, a minor son and a minor daughter. The widow claimed appointment under the dying in harness rules. On 25.1.2000 the District Inspector of Schools, Deoria (in brief DIOS) called for report from the manager/Principal. The district Committee constituted under notification dated 2.2.1995 considered the petitioner's claim and found the widow entitled for appointment under the dying in harness rules. The DIOS on 2.8.2000 directed the Manager/Principal to appoint Smt. Subhawati Devi. The petitioners made a representation on 15.9.2000 to DIOS that order dated 23.8.2000 be cancelled. The manager alleged that Smt. Subhawati Devi is aged 60 years. He raised dispute about date of birth of the widow. And stated that son of the deceased who is a minor be given appointment after he becomes major. It appears that at the instance of the petitioners that Principal did not issue appointment letter to the widow. The widow informed the DIOS that neither she has been appointed nor permitted to join the institution. The DIOS on 16.10.2000 wrote a letter to the Manager/Principal that they were not complying with the order dated 23.8.2000. And in case the order is not complied legal action would be taken. Instead of complying with the orders of DIOS the petitioner have filed this

petition challenging the order of DIOS dated 23.8.2000.

2. Sri A.B. Singh the learned counsel for the petitioners has urged that Smt. Subhawati Devi is aged sixty years and she could not be appointed under the dying in harness rules. He further urged that the date of birth of the widow is disputed as to whether it is 18.4.1968 of 18.4.1958. The representation dated 15.9.2000 in this regard made by Manager is pending before the DIOS but without deciding it the DIOS could not direct for compliance of his order. He lastly urged that the management is ready to appoint minor son of the deceased after he becomes major, therefore, the appointment of the widow deserves to be set aside. On the other hand Sri S.P. Pandey the learned standing counsel appearing for respondents no.1 and 2 supported the orders of DIOS.

3. Appointments on compassionate grounds under the Dying in Harness Rules is made as an exception to the general rules of recruitment. The object of compassionate appointment is to enable the family of the deceased to tide over the sudden crisis, and grant immediate relief to the family in penury, which is facing undue hardship due to the death of sole earner of the family. Dhrup Deo Dubey died on 28.3.1999 leaving behind his widow, minor son and minor daughter. The family did not have any source of livelihood nor was able to make both ends meet. This is clear, as the widow is illiterate and children are minor. On her claim for appointment under the Dying in Harness Rules the District Committee constituted under Regulation 105 of the Regulations framed under U.P. Intermediate Education Act 1921, recommended for appointing her on a class-IV post. The DIOS on 23.8.2000 directed the appointing authority to appoint respondent no. 3, the widow. The petitioners are opposing her appointment. The objection that the widow is aged 60 years does not appear to be correct. No evidence or material was filed along with the representation. Photostat copies of family register have been filed in this court. The entries are conflicting. In one date of birth is 18.4.1958 whereas in the other it is 18.4.1968. This is a disputed question of fact. It cannot be decided by this court. The petitioners did not appear to have raised it before the DIOS. The circumstances do not support the petitioners. Dhrup Deo Sharma died in 1999. He was not aged sixty years. Therefore, it is reasonable to assume that his wife was not aged sixty years in 2000. The petitioners for the reasons best known to them are opposing her appointment. The claim that they would offer appointment to her minor son when he becomes major is also advanced to deny appointment to the widow. The family of the deceased appears to be in financial crisis. The widow is running from pillar to post but the petitioners are not complying with the order of DIOS nor they are permitting the widow to join. The order was passed by the DIOS on the basis of public policy. It serves public interest. In absence of any valid reason the petitioner cannot deny appointment to the widow.

4. The writ petition is devoid of any merit. It is accordingly dismissed. The petitioners and principal of Ram Bilas Rao Intermediate College, Rampur Buzurg, Salempur, District Deoria are directed to appoint Smt. Subhawati Devi the respondent no. 3 on a class-IV post

and permit her to join as directed by the District Inspector of Schools.

ORIGINAL JURISDICTION
CIVIL SIDE
DATE : ALLAHABAD 13.10.2000

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

Civil Misc. Writ Petition No. 19821 of 1997

Shri Ram Briksha Chaudhari ...Petitioner
Versus
Principal, Maharani Laxmi Bai Medical College, Jhansi & another ...Respondents

Counsel for the Petitioner :
Shri Pradeep Chandra
Shri B.P. Srivastava

Counsel for the Respondents :
S.C.

Constitution of India, Article 226 – Appointment on the post of Lab-Technicians without advertisement, without adopting prescribed procedure – even not possessing requisite training – not entitled for any relief-entire salary pursuant to ex parte interim order-reimbursed, Chief Secretary, to hold enquiry-take suitable action against the guilty officer.

Held – Para. 5

It is made clear that though it is a fit case where Petitioner should be required to reimburse entire salary paid under interim order of this Court, but for the fact that he was paid entire amount by way of salary under interim order dated 12th December, 1997, which was passed in absence of the Counter Affidavit. This Court cannot ignore the fact that Petitioner is not alone responsible for obtaining an illegal appointment and also other responsible person holding the post that of Director General, Medical Education and Training and Principal of Maharani Laxmi Bai Medical College, Jhansi are also involved, it will not be expedient to punish the Petitioner alone particularly when he has rendered services involving physical volition. It is, however, a fit case where a certified copy of this judgement be sent to the Chief Secretary, Government of Uttar Pradesh, Lucknow for taking necessary action, after holding necessary enquiry, and suitable action may be taken as may be advised and deemed proper in the facts of the case.

By the Court

1. Admittedly, petitioner Shri Ram Briksha Chaudhari, was appointed by the Principal, Maharani Laxmi Bai Medical College, Jhansi as is evident from perusal of his appointment letter dated 22nd February, 1995 (Annexure-1 to the Writ Petition). There is no averment that the post was ever advertised. From the record of the petition it is evident that the Petitioner was appointed without adopting prescribed procedure for making appointment.

2. Moreover, there is no averment nor any material on record to show that Petitioner, who did not possess requisite training of Lab-Technician, was appointed under constraints of non-availability of a qualified candidate. It is queer to note that no effort was made to advertise the post and select best available candidate at that time. Petitioner alleges that he was not permitted to complete requisite training in pursuance to the condition contained in the aforesaid appointment letter (Annexure-1 to the Writ Petition) and in its support he has filed two documents (Annexures-4 and 5 to the Petition) wherefrom it appears that Petitioner applied to the Director General for according permission to him for

obtaining requisite Lab Technician Training. The Principal appears to have recommended the same vide letter dated 15th June, 1996 (Annexure-5 to the Writ Petition). What action was taken by the Petitioner when requisite permission was not accorded by the Director General, Medical Education and Training is a matter of guess work in absence of requisite pleadings and cannot be decided as necessary requisite pleadings are wanted in this case. Petitioner has not filed relevant material indicating the minimum qualification required for the post of Lab Technician nor he has filed copy of the requisite rules permitting in-service training and/or otherwise permitting a candidate to be appointed as Lab Technician without possessing requisite training/qualification.

3. A Counter Affidavit has been filed on behalf of Respondent No. 1. In Para. 3 of the Counter Affidavit it is stated that Petitioner did not complete training of Lab Technician even though he had full opportunity to do so until 31st January, 1997. From the averments made in the Counter Affidavit this Court comes to the conclusion that Petitioner was not serious to complete Lab Technician Training.

4. Be that as it may be, the initial appointment of the Petitioner being arbitrary and absolutely illegal, he is not entitled to any relief claimed under Article 226, Constitution of India, which is an extraordinary discretionary remedy. This Court has no hesitation in recording that Petitioner succeeded in obtaining appointment by using extraordinary means on the dictates of Director General, Medical Education and Training and completely by-passing the regular procedure of selection for the post in question.

Writ Petition stands dismissed.

Interim order dated 12th December, 1997 is discharged.

5. It is made clear that though it is a fit case where Petitioner should be required to reimburse entire salary paid under interim order of this Court, but for the fact that he was paid entire amount by way of salary under interim order dated 12th December, 1997, which was passed in absence of the Counter Affidavit. This Court cannot ignore the fact that Petitioner is not alone responsible for obtaining an illegal appointment and also other responsible person holding the post that of Director General, Medical Education and Training and Principal of Maharani Laxmi Bai Medical College, Jhansi are also involved, it will not be expedient to punish the Petitioner alone particularly when he has rendered services involving physical volition. It is, however, a fit case where a certified copy of this judgment be sent to the Chief Secretary, Government of Uttar Pradesh, Lucknow for taking necessary action, after holding necessary enquiry, and suitable action may be taken as may be advised and deemed proper in the facts of the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 30, 2000

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE R.P. MISRA, J.

Civil Misc. Writ Petition No. 8864 of 1998.

Vishanji Tokarsi ...Petitioner.
Versus
The Collector, Kanpur Nagar and others ...Respondents.

Counsel for the Petitioner:
Sri V.B. Tiwari

Counsel for the Respondents:
S.C.
Sri Sudhir Agarwal
Sri R.C. Yadav

U.P. Government Electrical Undertakings (Dues Recovery) Act, 1958, S. 5-A-Applicability.

The plea of bar based on the provisions contained under Section 5-A of the Act can be raised only as defence in a civil suit that may be filed against the consumer for recovery of any dues. The provisions contained under Section 5_A of the Act have no application in proceedings for recovery of the dues as arrears of land revenue. The contention of the petitioner has no force. It deserves to be rejected, and is so rejected.

By the Court

1. Heard Sri V.B. Tiwari, learned counsel appearing for the petitioner, Sri Vinay Malviya, learned Standing Counsel of the State of U.P., representing the respondent Nos. 1 and 2 and Sri Sudhir Agarwal, learned counsel representing the respondent No. 3, at length and in detail.

2. Though the petition is not admitted formally yet it is ready for final hearing in as much as requisite affidavits between the parties have already been exchanged. Learned counsel appearing for the parties jointly pray and agree that the petition may be disposed of finally. The Court, therefore, proceeds to dispose of the petition finally.

3. By means of the impugned citation dated 22nd January, 1998, photocopy whereof is Annexure `1' to the petition, a sum of Rs.31,128/- is being recovered from the petitioner as arrears of land revenue towards the dues of Kanpur Electricity Supply Administration, Kanpur, Nagar, the respondent No. 3, which, is indisputably, a Government undertaking as defined in the Uttar Pradesh Government Electrical Undertakings (Dues Recovery) Act, 1958, hereinafter called the `Act'.

4. The petitioner seeks to challenge the recovery of the amount on following two counts :—

(A) that no notice of demand as contemplated under Section 3 of the Act was issued before issuing the recovery certificate for the purposes of recovering dues as arrears of land revenue ;and

(B) that the recovery is barred by limitation prescribed under Section 5-A of the Act.

5. It is not disputed on behalf of the respondents that issuance of a notice of demand to the petitioner under Section 3 of the Act was necessary and default thereof would render recovery proceedings invalid. However, the respondents contend that requisite notice

of demand was infact sent to the petitioner. Therefore, the question that arises for adjudication is whether the requisite notice of demand under Section 3 of the Act was sent to the petitioner.

6. In paragraph 6/e of the counter-affidavit of Sri Virendra Srivastava, filed on behalf of the respondent No. 3, it is categorically asserted that the notice of demand was sent to the petitioner at his known address, House No. 84/76, G.T. Road, Kanpur. The averment in paragraph 6/e of the counter-affidavit has been replied by the petitioner in paragraph 6(e) of his rejoinder-affidavit. In his reply the petitioner does not clearly and categorically plead that notice of demand was never sent to him. What is stated by the petitioner is that there was no reason to send the bill at 84/76 G.T. Road, Kanpur address of the petitioner when the petitioner had requested to remove the metre from the aforesaid premises and to transfer it to 102-A, Dada Nagar, Kanpur. After advancing the said logic petitioner asserts "Be as it may be petitioner never received CA 4 or any other bill".

7. It is to be noticed that Explanation (1) of Section 3 of the Act provides that sending of notice of demand by registered post shall be deemed to be sufficient service on the person concerned. In the instant case plea of the petitioner is not that no notice of demand was sent. Plea taken in the rejoinder-affidavit is that notice of demand was never received. In the absence of any plea denying the sending of notice of demand to the petitioner, and keeping in view the Explanation (1) of Section 3 of the Act, it cannot be held that requisite notice of demand under Section 3 of the Act was not sent to the petitioner. Thus, the first contention of the petitioner fails.

8. Coming to the second contention of the petitioner about the limitation, the Court is of the opinion that the submission is based totally on misconception of the provisions of Section 5-A of the Act. The plea of bar based on the provisions contained under Section 5-A of the Act can be raised only as defence in a civil suit that may be filed against the consumer for recovery of any dues. The provisions contained under Section 5-A of the Act have no application in proceedings for recovery of the dues as arrears of land revenue. The contention of the petitioner has no force. It deserves to be rejected, and is so rejected.

9. All told in the opinion of the Court, there is no illegality or infirmity in the recovery proceedings in pursuance of the impugned citation, founded on the recovery certificate issued by the respondent No. 3, warranting interference by this Court in exercise of its special and extraordinary jurisdiction under Article 226 of the Constitution of India. The petition is devoid of merits and is dismissed summarily. The interim order/orders shall stand vacated. There is no order as to costs.
