ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD: 28.02.2001

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

Civil Misc. Writ Petition No. 13761 of 1998.

Gopal Prasad Agarwal and others ...Petitioner

Versus

Madhyamik Shiksha Parishad and another ...Respondents

Counsel for Petitioner:
Shri Janardan Sahai

Counsel for Respondent:
S.C.

Constitution of India – Article 14 and 19 (1) (g) – conditions through the impugned G.O. have been imposed for protecting the best interest in the speedy, efficient and effective printing of the text books held reasonable and not violative of Articles 14 and Article 19 (1) (g) of the Constitution. (Held in para 5).

The terms and conditions imposed are reasonable and not violative of Articles 14 and Article 19(1) (g) of the Constitution. We do not find any arbitrariness or unreasonableness in imposition of the terms and conditions. Obviously they have been imposed for protecting the best interest in the speedy, efficient and effective printing of the text books and not to allot those who do not pay income tax, It cannot be said that by imposing the terms and conditions the petitioners' fundamental right of trade or business mentioned under Article 19 (1) (g) have been violaged.

By the Court

1. The prayer of the petitioners is to quash the notification, dated 6.3.1998 and the advertisement dated 10.3.1998 as contained in Annexure Nos. 2 & 3 respectively. The notification (Annexure-2) provides for an inboard procedure for the purposes of publication of text books of Madhyamik Shiksha Parishad including authority to call for a tender on State level. Annexure-3 is the advertisement published in this regard.

2. Sri Satyendra Singh, holding brief of Sri Janardan Sahai, learned counsel appearing on behalf of the petitioners, contended that the relief's prayed for be granted, more so when the Respondents have not filed any counter affidavit as the impugned documents are bad for two reasons: -

(i) The conditions imposed are wholly arbitrary and violative of Articles 14 and 19 (1) (g) of the Constitution of India. It is not possible for any individual publisher or printer to give turn over of more than Rs. 50 lacks only by giving business to the printers. Due to imposition of stringent conditions in the notification many printers and publishers, who have been doing printing and publishing work, had to drop out.

(ii) It gives smell of monopolisation of the trade of publishing nationalised text books.

3. From a perusal of the impugned Government Order the following conditions have been imposed as stated in paragraph 16 of this writ petition: -

"1. For the last three years publishers printer must have paid income tax.

2. For the last financial year the minimum annual turnover of the firm must be over Rs. 50 lacks.

3. Concerned printer must have printing press of his own or of group.

4. The printer/publisher must not have any dispute legal or otherwise with the Board."

4. The solitary question for our adjudication is whether the aforementioned terms which have been imposed are arbitrary and unreasonable thereby break the provisions of Articles 14 and 19 (1) (g) of the Constitution?

5. We are of the view that the terms and conditions imposed are reasonable and not violative of Articles 14 and Article 19(1) (g) of the Constitution. We do not find any arbitrariness or unreasonableness in imposition of the terms and conditions. Obviously they have been imposed for protecting the best interest in the speedy, efficient and effective printing of the text books and not to allot those who do not pay income tax. It cannot be said that by imposing the terms and conditions the petitioners' fundamental right of trade or business mentioned under Article 19 (1) (g) have been violated.

6. For the reasons aforementioned this writ petition is dismissed summarily.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD: 09.02.2001

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

Civil Misc. Writ Petition No. 14700 of 1996.

Mohd. Farman ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for Petitioner:
Shri V.S. Chaudhary

Counsel for Respondent:
S.C.

Indian Stamp Act-Article 57, Schedule 1-B-the petitioner who is a registered contractor, has to pay stamp duty on the refundable amount of security under Article 57, Schedule 1-B as the deposited refundable security amount is not mortgage. Consequently, the demand of Stamp duty over and above the rate prescribed under aforesaid provision of Indian Stamp Act is illegal and cannot be legally justified. (Held in para 15).

A writ of mandamus is issued directing Respondents to refund excess amount charged as stamp duty on security deposit provided Petitioner files requisite application under Indian Stamps Act within two months of receipt of certified copy of this judgement and if such an application is being filed as contemplated above, the excess amount shall be refunded to the Petitioner within three months of filing of the application.

By the Court

1. Petitioner, Mohd. Farman, claimed to be a Registered Contractor and General Order Supplier with the Public

Works Department of Uttar Pradesh and other Corporations contends that the Respondents (authorities of U.P. Public Works Department, Rural Engineering Services) published an advertisement inviting tenders from Registered Contractors in order to execute certain work. The Contractors were required to furnish tenders form quoting rates. On accepting the tenders, Contractors (Petitioner) was required to execute an agreement with the Respondents and also to deposit the contract amount as earnest money apart from certain amount as security with an object to ensure that contract work was executed as per terms and conditions of agreement between the concerned parties. In case of default of any of the conditions of the contract on the part of either party, amount of security, apart from other consequences was to be forfeited; Petitioner alleges that the Stamp Department issued instructions to all the concerned Departments to charge stamp duty apart from stamp duty over other heads, on security deposits under agreements entered into between the Department and said Contractor. In Paragraph 5 of the petition it is alleged that vide letter dated 15th February 1996 Respondent No. 5/Executive Engineer, Rural Engineering Service (R.E.S.), Division Meerut expressed acceptance of the tender and required the Petitioner to deposit a sum of Rs. 15,663/- as security amount (Annexure-1 to the Writ Petition).

2. Petitioner is aggrieved due to the instructions contained in the aforesaid letter dated 15th February 1996 (Annexure-1 to the Writ Petition) directing the Petitioner to pay stamp duty on security deposit by prescribing higher rate of stamp duty and not to treat the said refundable security deposit under Article 57, Schedule 1-B of Indian Stamp Act. According to the Petitioner, Respondents illegally want to charge stamp duty treating said deposit of refundable security under Article 40, Schedule 1-B.

3. Petitioner thus claimed writ of mandamus directing the Respondents not to realise stamp duty from the Petitioner on the deposit of security amount on the basis of order contained in letter dated 15th February 1996 (Annexure-1 to the Writ Petition).

4. No Counter Affidavit has been filed on behalf of the Respondents as per record before the Court.

5. Heard learned counsel for the Petitioner as well as learned Standing Counsel on behalf of the Respondents.

6. According to the Petitioner, the short controversy required to be decided in the present petition is that the Petitioner, who is a Registered Contractor, has to pay stamp duty on the refundable amount of security under Article 57, Schedule 1-B as the deposited refundable security amount is not a mortgage. Consequently, Petitioner alleges that the demand of stamp duty over and above the rate prescribed under aforesaid provision of Indian Stamp Act is illegal and cannot be legally justified.

7. Learned Standing Counsel has submitted ‘written arguments’ stating that the only question; to be adjudicated in the case as – ‘whether the security bond/deposit is chargeable with stamp duty as per Article 57 of Schedule 1-B or under Article 40 of Schedule 1-B?’ In the written argument learned Standing Counsel points out that this very question

has already been referred by a learned single Judge in Writ Petition No. 25706 of 1999 – M/s Sharma Build-tech (Pvt.) Ltd. Versus The State of U.P. and others vide order dated 30th June 1999. It appears that this controversy had arisen in large number of writs filed in the Court and one of such case, being Writ Petition No. 47964 of 1999, has been referred to a larger Bench.

8. Perusal of the referring order indicates that the Court was considering the scope and extent of Government Order dated April 01, 1999 issued by Principal Secretary, Tax and Institutional finances, U.P. Government. The learned single Judge has referred to the decision of Tajveer Singh and others versus State of U.P. and others – 1997 (2) A.W.C. 1029 as well as Supreme Court decision In Board of Revenue versus A.M. Ansari– AIR 1976 SC 1813.

The learned single Judge (S.R.Singh, J) observed :

"The answer to the question is interwoven with the interpretation of the term 'Mortgage Deed' as defined in Sec. 2 (17) of the Act and interaction of Article 40 with article 57 of Schedule 1-B of the act as well as terms and conditions of contract as stipulated in the tender notice. In Taveer Singh (supra) a Division Bench has placed reliance on Supreme Court decision in A.M. Ansari and held " the position is thus settled that the security deed is chargeable with duty under Article 57 of Schedule 1-B. I have my reservations about the correctness of the proposition laid down by the Division Bench in the case aforestated. As a matter of fact, the view so taken by the Division Bench purports to be based on Supreme Court decision in A.M. Ansari (supra) but to me, it appears that the Supreme Court decision in A.M. Ansari is not intended to lay down the proposition that in each and every case the stamp duty on security as per the deed of agreement to be executed for due performance of contract is chargeable with duty under Article 57 of Schedule 1-B only. In the case of A.M. Ansari, the question that begged consideration before the Supreme Court was "as to whether the security deposits made by the respondents savoured of the nature of mortgages so as make the respondents liable to pay the stamp duty under Article 35- C of the Stamps Act." The Supreme Court after noticing the definition of 'Mortgage Deed' as embodied in Sec. 2 (17) of the Act held bearing in mind clause (17) of the said notice in that case thus "There is nothing in the above clause to indicate that any right over or in the security deposit was created in favour of the State Government."

Further the learned single Judge observed:

"On a careful consideration of the decision in A.M. Ansari, if would transpire that in case, any right over or in the security deposits is created in favour of the State Government, in that event the instrument may be termed as 'Mortgage Deed' liveable to stamp duty under Art. 40 of Schedule 1-B and by that reckoning the Government Order dated April 1, 1999 being Annexure-3 to the writ petition, cannot be discounted. In the above perspective, therefore, it would be in the fitness of things if a larger Bench is constituted to delve into the question."

9. Learned single Judge referred the matter to larger Bench in view of

Government Order dated April 01, 1999 (referred to above). This contingency, however, does not arise in the present case since as the Government Order dated April 01, 1999 (annexed as Annexure-3) to the Writ Petition No. 25706 of 1999- M/s Sharma Build-tech (Pvt.) Ltd. Versus The State of U.P. and others) was not in existence when the demand order dated 15th February 1996, (impugned in the present petition) was issued.

10. To justify the imposition of stamp duty under Article 40, Schedule 1-B of the Act and to establish that under its terms – reading the documents as a whole – renders the security deposit – a mortgage as defined under relevant Act, it was incumbent upon the Respondents to file a copy of the agreement in question to satisfy the Court that the deed in question required deposit of security, and though refundable, it is covered by the definition 'Mortgage'. This has not been done. Respondents have miserably failed to bring on record even by way of pleading a simple fact that deed in question requiring deposit of security is in effect a mortgage and, therefore, their stand requiring stamp duty under Article 40, Schedule 1-B is justified.

11. There is nothing on record of this case, as it stands today, to indicate that the any interest is being created in the security amount as such and the deed sought to be executed between the parties is in the nature of mortgage deed. The Respondents have failed to support their claim of charging higher stamp duty under Article 40, Schedule 1-B of the Indian Stamps Act vide impugned order dated 15th February 1996 (Annexure –1 to the Writ Petition).

12. In absence of the above, decision reported in the case of Tajveer Singh and others squarely applies to the facts of the present case.

13. Our view is supported by the judgment and order dated 18th March 1996 passed by Division Bench comprising B.M. Lal and R.K. Mahajan, JJ. In the case of M/s Shri pal Goel Versus Deputy Director (Construction), Rajya Krishi Utpadan Mandi Parishad U.P. & others (copy filed as Annexure-2 to Writ Petition No. 31866 of 1996).

14. As a consequence thereof, Writ Petition deserves to be allowed. It is already noted above that there has been no interim order. One can presume that Petitioner has paid stamp duty under the impugned order while executing his contract agreement. In that situation Petitioner cannot be granted relief as claimed, but the Petitioner is entitled to the relief being appropriately moulded by the Court.

15. Consequently, the Writ Petition stands allowed. A writ of mandamus is issued directing Respondents to refund excess amount charged as stamp duty on security deposit provided Petitioner files requisite application under Indian Stamps Act within two months of receipt of certified copy of this judgment and if such an application is being filed, as contemplated above, the excess amount shall be refunded to the Petitioner within three months of filing of the application.
No costs.

Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD: 28.02.2001

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

Criminal. Misc. Writ Petition No. 336 of 2001.

Mahesh Rathi ...Petitioner
Versus
State of U.P. through Home Secretary, U.P. Shashan Lucknow and others ...Respondents

Counsel for Petitioner:
Shri Atul Mehra

Counsel for Respondent:
A.G.A.

Constitution of India – Article 226 – if there is a delay in passing the detention order and the same has not been satisfactorily explained, it will vitiate the subjective satisfaction of the detaining authority rendering the detention order invalid but the delay alone cannot lead to the inference that the order has been passed for a wrong purpose. (Held in para 10).

There is no inflexible rule that whenever there is a delay in passing a detention order it must necessarily be held that the satisfaction of the detaining authority was vitiated rendering the detention order invalid. It will depend upon the facts and circumstances of each case and if there is satisfactory explanation for passing the order, the same cannot be held to be illegal or invalid.

By the Court

1. This petition under Article 226 of the Constitution has been filed praying that a writ of mandamus be issued commanding the respondents not to arrest and detain the petitioner under the provisions of section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as COFEPOSA) and to restrain the respondents from giving effect to the detention order passed against the petitioner.

2. The authorities of Customs Department conducted search of premises bearing no. C.K. 13/48, Pashu Pateshwar, Varanasi on 4.9.1999 and found twelve bags of silk yarn of Chinese origin stored therein. On opening of the bag, a label was found which contained the writing – "Blosoms, white Steam Filature China National Silk Import & Export Corp. Made in China." The wife of the owner landlord of the premises informed the authorities that the same had been let out to a tenant. Thereafter, the owner of the premises G.N. Mishra was summoned to Customs Office, who informed in writing and also gave an affidavit that the premises had been let out to the petitioner Mahesh Rathi on a rental of Rs. 1000/- per month and he carries on business of Banarsi Sarees and whatever goods were found in the premises belonged to him. The petitioner Mahesh Rathi was also summoned in the office of Customs Department, where in, his statement was recorded on 4.10.1999. He admitted that he was carrying on business of Banarsi Sarees and his godown was situate in premises no. 13/53, Pashu Pateshwar in Varanasi city. He also admitted that Rajesh Singh used to bring Chinese Silk yarn from Bangladesh and Nepal and used to give him for the purpose of sale. Subsequently, the petitioner gave an application that his statement had been recorded by the Customs authorities under

threat and coercion and it was not his voluntary statement.

3. The petitioner was taken into custody and was produced before the Magistrate on 5.10.1999. He was granted bail on 30.10.1999. It is averred in paragraph 18 of the writ petition that after a lapse of more than one year, an order under section 3 (1) of COFEPOSA has been passed against him and he came to know about the said order when some officers of Custom Department and police personnel came to his house to arrest him in the first week of January 2001. It is in these circumstances that the petitioner has filed the present writ petition under Article 226 of the Constitution and the principal prayer is that the detention order passed against the petitioner may be quashed and he should not be arrested or detained in pursuance of the aforesaid order.

4. The copy of the detention order passed against the petitioner has not been filed along with the writ petition. It is also noteworthy that the detention order, which the petitioner alleges to have been passed against him, has not been given effect to and he has not been taken into custody so far. The detention order has neither been executed nor the grounds of detention have been served upon him. The extent and scope of power of interference while exercising jurisdiction under Article 226 of the Constitution at pre-execution stage has been considered threadbare by the Supreme Court in **Additional Secretary to the Government of India Versus Smt. Alka Subhash Gadia, 1991 (1) JT 549** and after dealing with the matter exhaustively, the court ruled as follows:

"….. The courts have the necessary power and they have used it in proper cases as has been pointed out above, although such cases have been few and the grounds on which the courts have interfered with them at the pre-execution stage or necessarily very limited in scope and number, viz. where the courts are prima facie satisfied (i) that the impugned order is not passed under the act under which it is purported to have been passed, (ii) that it sought to be executed against a wrong person, (iii) that it is passed for a wrong purpose, (iv) that it is passed on vague, extraneous and irrelevant grounds, or (v) that the authority which passed it had no authority to do so. The refusal by the courts to use their extraordinary powers of judicial review to interfere with the detention order prior to their execution on any other grounds does not amount to the abandonment of the said power or to their denial to the proposed detenu, but prevents their abuse and the perversion of the law in question."

5. This decision has been subsequently followed in **N.K. Bapna** Versus **Union of India, 1992 (4) JT 49**, **State of Tamil Nadu** Versus **P.K. Shamsuddin, 1992 (4) JT 179** and **Subhash Muljimal Gandhi** Versus **L. Himingllana, 1994 (6) SCC 14.** Thus the power under Article 226 of the Constitution can be exercised at the pre-execution stage on very limited grounds enumerated by the Apex Court and not on all grounds, which are available after the detention order has been served and the person has been taken into custody.

6. It is not the case of the Petitioner that the detention order has not been passed under COFEPOSA or that the authority of the State Government or the

officer of the State Government who passed the order had no authority to do so or that the impugned detention order had not been passed against him and it is sought to be executed against a wrong person. It is also not the case of the petitioner that the impugned order is based on vague, extraneous and irrelevant grounds. Sri Atul Mehra, learned counsel for the petitioner has submitted that the passing of the detention order after a period of one year makes the order punitive rather than preventive in nature and that it is passed for a wrong purpose.

7. The main question which requires consideration is that if there is delay in passing a detention order, can it be held that the order has been passed for a wrong purpose. The dictionary meaning of the word "purpose" is – a result, which it is desired to obtain and is kept in mind in performing an action. Section 3 (1) of COFEPOSA provides that the Central Government or the State Government or any officer of the aforesaid governments specially empowered may, if satisfied, with respect to any person with a view to preventing him from smuggling goods or abetting the smuggling of goods or concealing or keeping smuggled goods or dealing in smuggled goods make an order directing that such person be detained. It has been held in the case of **N.K. Bapna** (supra) that as "smuggling" has been defined in the Act, the said definition has to be taken into consideration for the purpose of the Act and not the dictionary meaning of the word. Section 2 (e) of the Act lays down that "smuggling" has the same meaning as in section 2 (39) of the Customs Act, 1962 and all its grammatical variations and cognate expression shall be construed accordingly. Section 2 (39) defines "smuggling" in the following words;

"Smuggling", in relation to any goods, means any act or omission which will render such goods liable to confiscation under section III or section 113."

8. There are various clauses namely, clauses (a) to (p) in section 111 which make the goods brought from a place outside India liable to confiscation and that would, therefore amount to 'smuggling' within the meaning of section 2 (39) read with section 111 of the Customs Act. If foreign goods are brought from any place outside India to any place inside India without payment of requisite duty, it will amount to smuggling of goods as mentioned in sub-clause (i) and the goods so brought would be smuggled goods within the meaning of sub-clause (iv) of subsection (1) of section 3 of the Act. The State Government was satisfied that foreign goods had been brought to Indian from Nepal or Bangladesh without payment of duty and the same was sold to the petitioner. The case of the petitioner was thus covered by sub-clause (iv) of sub-section (1) of section 3 of the Act. Since the material with the State Government showed that the petitioner was involved in transporting, concealing or dealing in smuggled goods, it could very well pass a detention order under section 3 (1) of the Act. The object with which the order was passed was to prevent the petitioner from indulging in the aforesaid activities. The preamble of COFEPOSA is – "an Act to provide for preventive detention in certain cases for the purposes of conservation and augmentation of foreign exchange and prevention of smuggling activities and for

matters connected therewith." There can be no doubt that the State Government having been satisfied that the petitioner was engaged in transporting, concealing, keeping or dealing in smuggled goods and in order to achieve the object of the Act namely, prevention of smuggling activities, passed the impugned detention order. Thus, it cannot be held that the order has been passed for a wrong purpose.

9. The contention that if a long period has elapsed between the offending activity and passing of a detention order the same would be for a wrong purpose is, in our opinion, wholly fallacious. It has been held in **Sheikh Serajul** Versus **State of West Bengal, 1975 Vol. II SCC 78** and **Ravindra Kumar** Versus **West Bengal, AIR 1975 SC 1408** that where there is delay in passing the detention order it is the subjective satisfaction of the detaining authority which gets vitiated rendering the detention order invalid. The delay cannot lead to the inference that the detention order has been passed for a wrong purpose.

10. It is important to emphasise that there is no inflexible rule that whenever there is a delay in passing a detention order it must necessarily be held that the satisfaction of the detaining authority was vitiated rendering the detention order invalid. It will depend upon the facts and circumstances of each case and if there is satisfactory explanation for passing the order, the same cannot be held to be illegal or invalid. This view has been taken in **Rajendra Kumar Natwar Lal Shah** Versus **State of Gujrat, AIR 1988 SC 1255, Yogendra Morari** Versus **State of U.P., AIR 1988 SC 1935** and **K. Aruna Kumari** Versus **Government of Andhra Pradesh, AIR 1988 SC 227**. A conspectus of the authorities cited above would show that if there is a delay in passing the detention order and the same has not been satisfactory explained, it will vitiate the subjective satisfaction of the detaining authority rendering the detention order invalid but the delay alone cannot lead to the inference that the order has been passed for a wrong purpose. The submission that the impugned detention order has been passed for a wrong purpose being based solely upon the alleged delay in passing thereof, has thus no merit and is liable to be rejected.

11. Having given our careful consideration to the submission made by the learned counsel for the petitioner, we are clearly of the opinion that the petitioner has not been able to make out any ground, which may justify interference with the detention order at the pre-execution stage.

12. The writ petition lacks merit and is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD: 19.02.2001

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

Civil Misc. Writ Petition No. 5588 of 2001.

Sri N.P. Agarwal ...Petitioner
Versus
The Prescribed Authority and another ...Respondents

Counsel for Petitioner:
Shri Rama Goel
Shri Rajesh Tandon

Counsel for Respondent:
S.C.

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972–Rule 15 (1) and (3) framed under section 21 (1) (a)- tenant–landlord dispute be decided with utmost expediency. - Adjournments in the present 'Judicial delivery System' are like fire–By allowing adjournments lightly, unscrupulous litigant is encouraged while court fails in its duty to protect the other side from exploitation, avoidable harassment and frustration. (Held in para 16)

Courts must not succumb to delaying tactics by granting adjournments in lighter vein. By asking for adjournment for the sake of adjournment and the judge granting them very lightly, both became part of very vicious circle. The Bar has to contribute its might. Adjournment, where it becomes unavoidable may be sought, but not for the sake of it, not at the drop of a hat.

By the Court

1. This is a landlord petition praying to this court for issuing a writ of mandamus directing opposite no.1/Prescribed Authority for quick disposal of the Release application (release case no. 129 of 1999) filed under Section 21 (1) (a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, U.P. Act No. XIII of 1972 (for short called 'the Act'). Petitioner who is owner of the House no. 111/428, Ashok Nagar, Kanpur and is landlord vis a vis his tenant Sardar Harbhajan Singh, Respondent no.2, who occupies a portion of the said house described in the release application. The release application has been filed on the ground that he was aged about 65 years and resides along with his wife aged about 62 years on the first floor of the said house. The landlord claimed to be the Consultant Civil Engineer and submitted it was very inconvenient and caused physical hardship in climbing stairs for meeting his client (para 4 of the release application (Annexure-1 to the Writ Petition).

2. Petitioner has annexed photocopy of order sheet of the case Perusal of the order sheet indicates that proceedings are being taken leisurely. It is natural that tenant, who is sought to be vacated will not be keen to have to proceedings go swiftly and it is natural tendency to ensure delay in the disposal of the case. This court is conscious of the fact that the Lower courts are awfully occupied and working under great stress. The factors are many folds but this does not justify grant of adjournments lightly and even of the drop of hat.

3. Rule 7 (7), framed under section 10, 18 and 22 of the Act, read: -

"As far as possible, a revision under Section 18 shall be decided within one month, an appeal or revision under Section 10 shall be decided within two months, and an appeal under Section 22 shall be decided within six months from the date of its presentation."

4. Rule 15 (1) and (3), framed under Section 21 (1) (a) of the Act read: -

(1) Every application referred to in sub-rule (1) shall, as far as possible, be decided within two months from the date of its presentation. Disposal of release application filed by Landlord, it is statutory obligation of the Court.

(2) …….

(3) Every application referred to in sub-rule (1) shall, as far as possible, be decided within two months from the date of its presentation.

5. Hon'ble Dr. A.S. Anand, Chief Justice of India, in his letter dated December 22, 1998 addressed to all the Chief Justices of the High Courts, referred to 'laws delay' – and noted "we should take every possible step for early disposal of old cases so that the agony of the litigants is brought to an end ……. Conveying unequivocally to the parties that such old matters cannot be allowed to remain pending indefinitely and bring disrepute to the courts. No party to the litigation can be permitted have any vested right in slow motion justice …… Let 1999 be an "YEAR OFACTION" towards disposal of old cases." He advised old cases to be decided on day-to-day basis.

6. In another letter dated April 22 of 1999, the Chief Justice of India with reference to "International Year of Older Persons" noted "In India, there is high incidence of litigation concerning property and inheritance, two of the most common issues in which elderly persons are generally involved apart from landlord – tenant disputes. Besides property and inheritance matters, service matters, such as pension and retrial benefits also concern older people ……".

"The problem gets compounded by the inordinate delay in disposing of the matters of older persons in the courts and in many matters the litigants unfortunately dies even before the case is finally settled. You will appreciate that the elderly people deserve to be attended by the legal system of the country somewhat on priority basis. Therefore, there is a need to envolve a system which may ensure timely disposal of their matters pending in the court …….".

7. Adjournments in the present 'Judicial delivery system' are like fire. If we sit with our back towards it, then for sure, in future we shall be sitting on our blisters, – **Bible** says: "Do not let evil conquer you, but overcome evil with good".

Mohammad Ali said: "It is poor statesmanship to slur over inconvenient realities". Court should not over look or ignore realities, if it desires the public to continue to have faith in the system.

8. This court would not like to believe that sensitivity to human hardship in our judicial system has been lost. No court can dispense justice unless it is alive and sensitive to human sufferings and takes note of realities.

9. From the scheme contemplated under the Act and the rules quoted above, it is abundantly clear that legislature did mandate that tenant-landlord dispute be decided with utmost expediency.

10. Expression "as far as possible" and "so far as possible" in aforequoted rules, do imply that court must decide the cases referred therein within the time prescribed by the legislature unless otherwise not possible.

11. Expression "as far as possible" came for interpretation in **AIR 1977 S.C. 251 (Para 26) N.K. Chauhan Versus State of Gujarat; 1997 (3) SLJ 199(SC), Usmania University Versus Muthu Rangam;** to must unless otherwise not

permissible. Expression "so far as possible" in Rule 8 (2) of Act, has been interpreted by this Court in the case of **1980 AWC 186 (Para 9 and 10), Mohd. Naseem Versus A.R.O/R.C. and E.O Agra and others** and held that the statutory requirement is essential and must unless for reasons to be recorded, it is not possible to act or comply with the same.

12. When a court grants adjournment, it is expected that it shall record reasons, in brief, to indicate that adjournment was imminent and not avoidable.

13. By allowing adjournments lightly, unscrupulous litigant is encouraged while court fails in its duty to protect the other side from exploitation, avoidable harassment and frustration.

14. In view of the above, it is desired that all the subordinate courts, dealing with Rent Control matters, be required to bear in mind the aforesaid observations.

15. This Court is not inclined to issue a Writ of mandamus to command court below to decide a case within a specified period inasmuch as court below dealing with the cases of Landlord and Tenant is the best judge of its diary and conscious of other circumstances/situation under which it has to deal with its docket but, while granting adjournment it must justify its order.

16. Courts must not succumb to delaying tactics by granting adjournments in lighter vein. By asking for adjournment for the sake of adjournment and the judge granting them very lightly, both became part of very vicious circle. The Bar has to contribute its might. Adjournment, where it becomes unavoidable may be sought, but not for the sake of it not at the drop of hat. Look at the plight of the poor litigant. What happens to him. Who pays for loss of time so far as he concerned? We must avoid all unnecessary adjournments.

17. One way to check frivolous/manipulated adjournment is to impose real and adequate costs; so that concerned party should take up the case with all seriousness at its command give priority to such cases.

18. Writ petition dismissed in limine subject to the observations made above.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD: 23.02.2001

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

Civil Misc. Writ Petition No. 21049 of 1990.

Dr. (Smt.) Premlata Pandey ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for Petitioner:
Shri Ambrish Kumar Sharma
Shri A.K. Gaur

Counsel for Respondent:
Sri Vinya Malviya
S.C.

Constitution of India – Article 14 and 16- denial of the benefit of personal promotion to the post of Reader and its pay-scale to the petitioner on the ground

of withdrawal of the Scheme is wholly arbitrary and violative of the constitutional guarantee of equal treatment envisaged in Articles 14 and 16 of the Constitution of India in as much as several other incumbents, similarly situated as the petitioner was granted the benefit of personal promotion to the post and pay-scale of Reader and the petitioner was singularly left out – it will surely result in perpetuation of the vice of discrimination forbidden by Article 14 and 16 of the Constitution of India. (Held in para 13).

Denial of the benefit of personal promotion to the post of Reader and its pay-scale to the petitioner on the ground of withdrawal of the Scheme is wholly arbitrary and violative of the constitutional guarantee of equal treatment envisaged in Article 14 and 16 of the Constitution of India in as much as the petitioner had already matured her right to the grant of personal promotion to the post of Reader, and to the pay-scale of the post of Reader, and had also demanded from the respondents for enforcement of the said right much before the issuance of the Government Order dated 6th September, 1990 withdrawing the scheme of personal promotion to the post of Reader and to the pay-scale attached thereto. Moreover, the Government order dated 6th September, 1990 can not be, by any strech of imagination, held to operate retrospectively depriving the petitioner of the right already accured to her.

By the Court

1. Heard Sir A.K. Gaur, the learned counsel appearing for the petitioner and Sri Vinay Malviya, the learned Standing Counsel of the State of U.P., representing the respondents.

2. By means of instant writ petition, under Article 226 of the Constitution of India the petitioner urges this Court to issue a writ, order or direction in the nature of mandamus commanding the respondent to grant to her personal promotion to the post of Reader and its scale of pay.

3. Undisputed acts and events constituting facts of the case, as they emerge from the pleadings on record, are these: The petitioner was appointed as a Lecturer in Pharmacy at Motilal Nehru Medical College, Allahabad, on ad-hoc basis, in the year 1974, and was regularised on 12th February, 1986.

4. In the year 1986, the State of Uttar Pradesh issued a Government Order dated 24th June, 1986 envisaging grant of personal promotion to Lecturers of various Medical Colleges of the State on fulfilment of conditions specified therein. The principal condition for grant of the promotion was completion of 13 years of satisfactory continuous service. The Government Order dated 24th June, 1986 was followed by another Government Order dated 28th October, 1986 whereby the incumbents granted the personal promotion of Reader were also granted the designation of Reader.

5. The petitioner completed the requisite 13 years of satisfactory continuous service, a condition precedent for grant of personal promotion to the post and scale of Reader, on 25th February, 1987. Despite the fact that the petitioner had completed requisite 13 years of satisfactory continuous service she was not granted the benefit of personal promotion to the post of Reader and the scale of the pay of the said post. This led her to make a representation on 24th January, 1989, which was duly

recommended by the Principal of the Medial College. The representation of the petitioner went unheeded compelling her to approach this Court through instant writ petition.

6. On 10th August, 1990, on the request of the learned Standing Counsel representing them, the respondents were granted a month's time for filing counter-affidavit but the respondents failed to respond.

7. Thereafter, the matter came up before the Court on 1st August, 1991. The Court noticed the lapse on the part of the respondents in not filing the counter-affidavit and admitted the writ petition. The Court also passed an interim order dated 1st August, 1991 directing the Secretary, Department of Medical, Lucknow and Director, Medical Education & Training, U.P., Lucknow to accord to the petitioner personal promotion within a period of six weeks from the date of service of a certified copy of the order upon them or to show cause by filing counter-affidavit within that period.

8. There is no dispute that the certified copy of the order dated 1st August, 1991 was duly served on the respondents concerned. It will be relevant to notice here that despite service of the interim order dated 1st August, 1991, the respondents neither carried out the direction of the Court for grant of personal promotion to the petitioner nor did they show cause within the period stipulated in the interim order dated 1st August, 1991.

9. However, the State of U.P. passed an order dated 7th October, 1991, a photocopy whereof is Annexure-C A-2 to the counter-affidavit filed on behalf of the respondents on 27th November, 1998, whereby the requisite personal promotion to the post of Reader and scale of pay of that post was granted to the petitioner. But, the grant of personal promotion and scale of pay was made subject to result of this petition.

10. Obviously the order granting the personal promotion and scale of pay to the petitioner being conditional, the controversy regarding the entitlement of the petitioner for the grant of personal promotion to the post of Reader and scale of pay thereof survives calling upon the Court to adjudicate upon the same.

11. The respondents seek to defend the denial to the petitioner the grant of personal promotion to the post of Reader and pay-scale attached thereto on the ground of withdrawal of scheme of grant of personal promotion vide Government Order dated 6th September, 1990, a photocopy whereof is Annexure-CA-1 to the counter-affidavit of Sri Amarjeet Mishra.

12. Neither in their pleadings contained in the counter-affidavit and supplementary counter-affidavit nor during the course of hearing it has been disputed that the petitioner had completed 13 years of satisfactory continuous service on 25th February, 1987 entitling her to the grant of personal promotion to the post of Reader and the scale of pay of the said post. The respondents have not pleaded that the petitioner does not satisfy other specified conditions. It is also not in dispute that the petitioner had demanded from the respondents the grant of the benefit of personal promotion to the post

of Reader and the scale of pay of that post through her representation dated 24th January, 1989.

13. In the opinion of the Court, denial of the benefit of personal promotion to the post of Reader and its pay-scale to the petitioner on the ground of withdrawal of the Scheme is wholly arbitrary and violative of the constitutional guarantee of equal treatment envisaged in Articles 14 and 16 of the Constitution of India in as much as the petitioner had already matured her right to the grant of personal promotion to the post of Reader, and to the pay-scale of the post of Reader and had also demanded from the respondents for enforcement of the said right much before the issuance of the Government Order dated 6th September, 1990 withdrawing the scheme of personal promotion to the post of Reader and to the pay-scale attached thereto. Moreover, the Governor Order dated 6th September, 1990 can not be, by any stretch of imagination, held to operate retrospectively depriving the petitioner of the right already accrued to her.

14. It is also relevant to notice that several other incumbents, similarly situated as the petitioner was, were granted the benefit of personal promotion to the post and pay-scale of Reader as is evident from the uncontroverted averments made in paragraph 9 of the supplementary affidavit of the petitioner filed on 18th August, 1998, and the petitioner was singularly left out. If such a situation is allowed to be countenanced it will surely result in perpetuation of the vice of discrimination forbidden by Articles 14 & 16 of the Constitution of India.

15. On the facts and circumstances, noticed herein before, it is absolutely clear that the petitioner was and is entitled to the grant of personal promotion to the post of Reader and to the scale of pay of the post of Reader in pursuance of the Government Orders dated 24th June, 1986 and 28th October, 1986, and her claim therefore is hereby upheld. The direction of Court contained in its interim order dated 1st August, 1991 for the grant of personal promotion to the post of Reader and scale of pay attached thereto to the petitioner is made absolute.

16. Subject to what has been said above, the petition stands disposed of finally. There is no order as to costs.

Petition Disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD: 19.02.2001

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

Criminal Misc. Application No. 4677 of 1998.

Imtiyaz Ahmad ...Applicant
Versus
State of U.P.& another...Opposite Parties

Counsel for the Applicant:
Shri B.K. Tripathi

Counsel for the Opposite Parties:
A.G.A.
Shri I.K. Chaturvedi

Indian Penal Code – Section 211 – no prosecution under section 211 I.P.C. can be launched by the complainant after the application made by the applicant under section 156 (3) Cr. P.C. for sending the same to the police for investigation was rejected. (Held in para 7).

The order rejecting the application under Section 156 (3) Cr. P.C. was passed by the learned Additional Chief Justice Magistrate, Azamgarh, on 27.3.1997. The application giving rise to the present proceeding under Section 211 I.P.C. was filed two days after that order i.e. on 29.3.1997. The police which submitted a report against this applicant did not choose to prosecute him or even recommend for his prosecution for making an application on fabricated and false charges. It is vested with such a right. The Court too was competent to initiate such an action suo motu. The complainant himself could also have applied to the Magistrate for initiation of such an action. In the absence of any of these facts the opposite party cannot be allowed to prosecute the applicant on his own under Section 211 I.P.C. It shall otherwise be an abuse of process of the Court.

By the Court

1. Heard learned counsel for the applicant Sri B.K. Tripathi and learned counsel for the opposite party Sri I.K. Chaturvedi.

2. The contention raised before this Court is that no prosecution under Section 211 I.P.C. can be launched by the complainant after the application made by the applicant under Section 156 (3) Cr. P.C. for sending the same to the police for investigation was rejected by the learned Addl. Chief Judicial Magistrate, Azamgarh, on the basis of an enquiry report submitted by the police, as directed by him. The complainant was a named accused in that application.

3. In the present case it appears that the application under Section 156 (3) was rejected first and the prosecution under Section 211 I.P.C. was launched thereafter by the accused who filed a complaint.

4. Learned counsel for the applicant claims that a prosecution under Section 211 I.P.C. on the basis of any inquiry report submitted by the police later on is barred by the provisions of Section 195 (1)(b)(ii) Cr. P.C. The contention apparently has force. There was no regular investigation conducted by the police in that application. The report was submitted by police on the basis of a preliminary enquiry held on the direction of the learned Addl. Chief Judicial Magistrate. On the basis of that tentative enquiry it was found by the police that the application under Section 156 (3) Cr. P.C. filed by the applicant, was based on incorrect facts. The learned Addl. Chief Judicial Magistrate acted upon that report and finally rejected this application. In the circumstances, as contended by the learned counsel for the applicant, the provision of Section 195 (1)(b) Cr. P.C. shall be applicable to the facts of the case and the bar will apply against the applicant's prosecution. This report was submitted by police in an application which was sent to it by the court. There exist, therefore, a proceeding before a court of law and such report clearly is a part and parcel of this proceeding. No private person, therefore, has any right to initiate any proceeding on this basis by filing any complaint. Only court where such a proceeding was pending or was decided can prosecute an accused after adhering to due process of law as enshrined in Section 340 Cr. P.C.

5. Learned counsel for the opposite party has cited a decision of the apex court reported in **1967 Cr. L.J. 528 (M.L. Sethi V. R.P. Kapur and another).** At

the very outset it must be pointed out that the facts of that case were absolutely divergent to the facts of the present case. According to the case cited by the learned counsel for the opposite party, an F.I.R. was lodged against R.P. Kapur charging him with commission of certain cognisable offence and during pendency of investigation R.P. Kapur filed a complaint before a Judicial Magistrate against M.L. Sethi for commission of an offence under Section 211 I.P.C. On his complaint the Magistrate took cognisance. The evidence clearly shows that on the date of cognisance, no judicial order was made by any court in respect of written report lodged against R.P. Kapur, though subsequent to this cognisance R.P. Kapur was arrested and chargesheeted by the police. The apex court had held that the question about legality of cognisance is to be judged in relation to the date on which cognisance was actually taken and as on that date, there was no proceeding pending in any court in which or in relation to which offence under Section 211 I.P.C. was alleged to have been committed and, therefore, the Magistrate was not barred from taking cognisance of the offence on such a complaint by the provisions of Section 195 (1)(b) Cr. P.C.

6. The facts of the present case clearly revealed that a private complaint in the present case under Section 211 I.P.C. against the applicant was filed after the court had terminated the proceeding, i.e. the application for sending the same to the police for investigation under Section 156 (3) Cr. P.C. finally came to rejected. Therefore, this is a case wherein the result of the enquiry was subject matter of a proceeding, which will be covered fully by the term in relation to which offence under Section 211 I.P.C. was alleged to have been committed. The present offence definitely is related to the proceeding decided by the learned Magistrate. The cornerstone in launching the proceeding under Section 211 I.P.C. was the date of submission of the inquiry report by the police. The prosecution of the applicant under Section 211 I.P.C. shall be barred by the provisions of Section 195 (1)(b) Cr. P.C. It can be said with certainty that the submission of the report was in relation to a proceeding pending in the court of Addl. Chief Judicial Magistrate. Whether the application under Section 156(3) Cr. P.C. was to be sent for investigation was the issue to be decided. Before making that decision the learned Magistrate decided to obtain an enquiry report from the police. It shall not be out of place to mention that this is simply an enquiry and not an investigation as contemplated under the Code. Some evidence might or might not have been collected by the police to establish that the report was false, but this report was undoubtedly submitted to court in relation to that application and the application definitely gave rise to a miscellaneous proceeding before the Judicial Magistrate. In these circumstances, the bar of Section 195(1)(b) Cr. P.C. will undoubtedly be effectively attracted against any such prosecution after the dismissal of that application because the report submitted by the police was in relation to that proceeding. In these circumstances, the judgment cited above by the learned counsel for the opposite party holds no water in the facts of the present case.

7. The order rejecting the application under Section 156 (3) Cr. P.C. was passed by the learned Additional Chief Judicial Magistrate, Azamgarh, on 27.3.1997. The application giving rise to

the present proceeding under Section 211 I.P.C. was filed two days after that order, i.e. on 29.3.1997. The police which submitted a report against this applicant did not choose to prosecute him or even recommend for his prosecution for making an application on fabricated and false charges. It is vested with such a right. The court too was competent to initiate such an action suo motu. The complainant himself could also have applied to the Magistrate for initiation of such an action. In the absence of any of these facts the opposite party cannot be allowed to prosecute the applicant on his own under Section 211 I.P.C. It shall otherwise be an abuse of process of the court.

8. In view of above, the present application is allowed and the proceedings pending in the court of Additional Chief Judicial Magistrate I, Azamgarh, in complaint case No. 386 of 1997 (Mohd. Hammad V. Imityaz Ahmad) against present applicant are hereby quashed.

Application Allowed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 14, 2001

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

Civil Revision No. 291 of 1998

Smt. Vijay Lakshmi Jain ...Defendant/ Applicant

Versus

Rameshwar Dayal Gupta ...Plaintiff/ Respondent

Counsel for the Revisionist:
Sri Rajesh Tandon

Counsel for the Respondents/ Opposite Parties:
Sri R.N. Bhalla

Provincial Small Causes Courts' Act- Section 25 – Ordinarily, higher court should refrain from remanding the case to the lower court as it results in further consumption of time. But it has to be sent back to the trail court, where the controversy cannot be decided without remanding the case (Held para 13).

It would not be proper for this court exercising the revisional jurisdiction to summon the documents and then to record evidence. This course would be expedient as it will be open both to the land lord as well as tenant to produce better municipal evidence in the light of what has been indicated above.

By the Court

1. This is tenant's revision application under section 25 of the Provincial Small Causes Courts' Act arising out of S.C.C. suit no. 17 of 1989 instituted by the plaintiff respondent Ramshwar Dayal Gupta seeking the eviction of the defendant-revisionist from a portion of premises no. 88 Sadar Bazar Road, Cantt. Mathura and for recovery of arrears of rent and damages. A brief backdrop to the short point in issue – whether the provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (Act NO. XIII of 1972) (Hereinafter referred to as ' the Act No. XIII of 1972') are applicable to the rented accommodation or not – is that the defendant-revisionist was inducted as tenant in the disputed portion of the house, aforesaid, comprising three rooms and a shed in the southern portion for running a school at the rate of Rs.800 per month w.e.f. 01.05.1985. An agreement dated 10.04.1984 was executed between

the parties. The plaintiff-respondent (hereinafter referred to as 'the landlord') was aggrieved on account of non-payment of rent and consequently he served a notice dated 27,8,1987 of demand and to quit on the applicant-defendant (hereinafter referred to as 'the tenant') who sent a reply thereto and also remitted some amount of rent through a cheque. Since after the termination of the tenancy, the tenant failed to clear all the dues and to vacate the premises, the landlord was compelled to institute S.C.C. suit no. 17 of 1989 claiming a sum of Rs.20,740/- as arrears for rent and pedentelite and future mesne profits @800 per month, besides the basic relief of delivery of possession after eviction of the tenant. The suit was contested by the tenant raising the controversy with regard to the monthly amount of rent which, according to her, was Rs.700 per month only and not Rs.800, as claimed by the landlord. It was also pleaded that the provisions of the Act no. XIII of 1972 apply to the disputed accommodation and since she has committed no default in payment of arrears of rent as she has been depositing the same under Section 30 of the Act no. XIII of 1972, on the refusal of the landlord to received the same, she cannot labelled as a defaulter within the meaning of Section 20(2) (a) of the Act no. XIII of 1972 She had also taken the plea that even if it be treated that she has committed default in payment of rent, she stands relieved of the liability from eviction as she has deposited the entire amount as contemplated under Section 20(4) of the Act no. XIII of 1972. Both the parties led evidence before the trail court.

2. After appraising the evidence on record and taking into consideration the respective submissions of learned counsel for the parties, a finding of fact has been recorded that the provisions of the Act no. XIII of 1972 do not apply to the disputed accommodation and, therefore, on the termination of the tenancy of the tenant by a valid notice under Section 106 of the Transfer of Property Act, she is liable to be evicted. Accordingly, a decree has been passed for eviction of the tenant from the disputed accommodation and for recovery arrears of rent and measne profit as claimed by the landlord. It is in these circumstances that the present revision application has been preferred by the tenant by invoking the provisions of Section 25 of the Provincial small Causes Courts' Act.

3. Heard Sri Rajesh Tandon, learned Senior Advocate appearing on behalf of the defendant-revisionist (tenant) as well as Sri R.N. Bhalla, learned Senior Advocate representing plaintiff-respondent (landlord), at considerable length and perused the material brought on record.

4. The parties would swim or sink with the finding on the crucial question whether or not the provisions of the Act no. XIII of 1972 are applicable to the disputed accommodation. Sri Rajesh Tandon, learned Senior Advocate appearing on behalf of the tenant, vehemently argued that the evidence on record would itself indicate that the landlord has himself admitted that the premises are covered by the provisions of the Act no. XIII of 1972 as having been constructed in the year 1970. He found his submission on the admission made by the landlord in P.A. Case no. 31 of 1992 filed by him against the tenant under Section 21(1) (a) of the Act no. XIII of 1972 for release of the tenanted accommodation

for his personal need. In that application, a copy of which is Annexure A-3 to the revision application, the landlord has, in unambiguous terms, admitted that the tenanted accommodation came into being in the year 1970. Sri Lalta Prasad Garg, who happened to be the Advocate for the landlord also made a statement before the prescribed Authority, a copy whereof in Annexure A-4 to the revision application, that the provisions of the Act no. XIII of 1972 applied to the accommodation in respect of which the petition for release had been filed. The landlord – Rameshwar Dayal Gupta filed his own affidavit in the case, aforesaid, a copy of which in Annexure 5, deposing that the tenanted accommodation was built in the year 1970. The release petition was ultimately decided ex parte in favour of the landlord who was successful in dispossessing the tenant. The tenant took steps to set aside the order dated 07.11.1999 by the tenanted accommodation was released. Consequent upon the setting aside of the order of release, the tenant was put back in possession and occupation of the tenanted premises. The landlord filed Civil Misc. Writ No. 435 of 1993 which was partly allowed by order dated 08.03.1994 with the observation that the landlord shall not interfere with the possession of the tenant and in her taking the connection for water and electricity supply. Sri R.N. Bhalla, learned Senior Advocate for the landlord was not in a position and to assail the admission with regard to the age of the tenanted accommodation made by the landlord in the release petition but took the forceful stand that the admission of the landlord in proceedings for release of the tenanted accommodation is of no relevance and consequence and the trial court unmindful of the admission of the landlord, has to decide, as a fact on the basis of the evidence available on record, as to when the premises came into existence. It was maintained that the plea of estoppel in such a matter is not attracted. To support his contention, Sri Bhalla placed reliance on the decision of this court in Smt. Padmini Bala Rani Vs. District Judge, Dehradun - 1983 A.R.C.-159, in which the effect of the plea regarding non-applicability of the Act NO. XIII of 1972 was thrashed out. In that case, the landlady had applied for release of certain flats. On behalf of the tenants, it was pleaded that the flats were new constructions. It was held that whether the disputed flats are new constructions within the meaning of Section 2(2) of the Act no. XIII of 1972 is a question which goes to the root of the jurisdiction of the rent control authorities and where such is the case, please of estoppel cannot come in the way of landlady from contending that the Rent Control Authorities have no jurisdiction to pass orders in respect of the building which are exempt from the operation of the Act no. XIII of 1972 by virtue of Section 2(2) of the said Act. A reference was also made of the decision of this court in Smt. Samundari Devi and another Vs. Nand Kishore Marwa and other-1987 Alld, L.J.-255 in which again the provisions of Section 2(2) of the Act no. XIII of 1972 came to be interpreted.

5. Before embarking upon the discussion on the issue and sifting of the decisions, aforesaid, it would be proper for clear understanding to quote, in extenso, the provisions of Section 2(2) of the Act no. XIII of 1972, which run as follows:

"(2) except as provided in sub-section (5) of Section 12, sub-section (1-

A) of Section 21, Sub-section (2) of Section 24, Sections 24, Sections 24-A 24-B, 24-C or sub-section (3) of Section 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed:

Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evan Vikas Parishad, and the period of repayment of such loan or advance excess the aforesaid period of ten years then the reference in this sub-section to the period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), whichever is shorter.:

Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference to a period of forty years from the date on which its construction is completed.

Explanation 1- For the purposes of this Section –

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

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants;

(b) 'construction' includes any new construction in place of an existing building which has been wholly or substantially demolished;

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

6. The object of the aforesaid provision, it was held in Samundri Devi's case (supra), is to ensure a period of holiday for the landlord to encourage building activity. There is nothing in the scheme of the Act no. XIII of 1972, particularly, having regard to the objects with which it has been enacted to suggest that assumption of a date of completion of construction, different from the one provided for in explanation 1 to Section 2(2) of the Act no XIII of 1972 would sub-serve the objects of the Act or that fixing in date of completion of the construction of a building in terms of explanation 1 would, in any manner, defeat the object of the Act. Moreover,

the mere fact that the deeming provision in expressed to be an explanation, will not alter its basis character nor limit it to a mere explanation of substantive provision. It was further observed that the explanation 1 to Section 2(2) contains a deeming clause. It creates a legal fiction. The language in which explanation 1(a) is couched is clear. In effect, it says that for purposes of sub-section (2) of Section 2, the construction of a building shall be deemed to have been completed (a) on the date on which its completion is reported to or otherwise recorded by the local Authority; and (b) in case of a building subject to assessment the date on which the first assessment thereof comes in effect, (c) and, where there is no report, record or assessment, the date on which it is actually occupied. This is sequence in which the date of completion of construction is to be deemed for the purposes of Section 2(2). The legislature having regard to the fact that the building was to be kept out of the purview of the provisions of the Act no. XIII of 1972 for a specified period from the date of completion of its construction wished to ensure that the said date should be known with definiteness and, in order to achieve this it engrafted a legal fiction in respect of the said date. In order to achieve this it engrafted a legal fiction in respect of the said date. In other words, irrespective of what the actual date of completion of construction may be, the date, for purposes of Section 2(2), would be the one determined with reference to the deeming provisions contained in the Explanation. Where, irrespective of the reality, the Legislature has unmistakably provided for assumption of the date of completion of the construction of a building in Explanation 1 to Section 2(2) of the Act no. XIII of 1972 it is immaterial whether the landlord admits or avers to a date of completion of construction of the building different from the one contemplated by the fiction. Normally an admission may be binding upon the person making it except where he is able to explain it away that principle will be wholly inapplicable to a case in which the Legislature, acting within its competence, mandates through a legal fiction assumption of a fact different from the reality. Though in the instant case, the landlord in the release proceeding under Section 21(1)(a) of the Act no. XIII of 1972 asserted in unerring terms that the tenanted accommodation came into being in the year 1970 the controversy whether the Act no. XIII of 1972 applies or not is to be determined with reference to parameters laid down in Section 2(2) read with explanation 1. The admission or assertion of either of the parties would hardly be any consequence.

7. There has been some controversy with regard to the burden of proof, whether it is initially on the landlord or the tenant. In Durga Prasad Vs. IIIrd Additional District Judge, Kanpur and another – 1985(1) A.R.C.-398 it was held by this court that the burden to prove the fact that the provisions of the Act no. XIII of 1972 are attracted to the tenanted accommodation or not, lies on the landlord but where both the parties have led evidence to prove or disprove this fact, the revisional court has jurisdiction to record a finding on this jurisdictional fact and consequently the burden of proof looses it importance. There have been some conflicting decisions of this court as divergent views were expressed on the point (See Ram Pal Singh Vs. VI Additional District Judge and others- 1983 (2) A.R.C.-7). It is not necessary to

refer all such cases as the whole controversy came to be quelled by an authoritative pronouncement of the apex court in Ram Swaroop Rai Vs. Smt. Leelawati-1980 A.R.C.-466 in which taking note of the fact that the provisions of the Act no. XIII of 1972 apply to all buildings except where that exemption operates, it was laid down that the landlord, who seeks exemption must prove that exemption. The burden is on him to make out that notwithstanding the rent control legislation, his building is out of its ambit. It is not for the tenant to prove that the building has been constructed beyond a period of ten years, but it is for the landlord/landlady to make out that the construction has been completed within ten years of the suit. In the same decisions, it was further noticed that the stature makes it clear that reliance upon the municipal records, rather than on the lips of witnesses, is indicated to determine the date of completion and the nature of the construction. The oral evidence in the case is inconsequential being second-hand testimony. Even the recital in he rent deed that there was a new construction by the tenant and the landlady, nether of whim has any direct knowledge about the construction because the landlady had purchased that building. It was further observed that of course, an admission by the tenant is admission against him but an admission is not always conclusive especially in the light of the municipal records such as are available and the burden such as has been laid down by the Stature.

8. In the subsequent decision in Suresh Kumar Jain Vs. Shanti Swarup Jain and others- A.R.C. 1997 (1)-640, the apex court has further dwelt over the same point and observed as follows:-

"There is no dispute that the defendant appellant is a monthly tenant covered by the provisions of the said Rent Act. It is apparent that for mitigating the hardship likely to be meted out to a landlord who has made new construction by incurring substantial expenses, the landlord, in case of tenancy in a newly constructed building has been favoured with exemption of the rigours of the Tenancy Act in the matter of evicting a tenant inducted in such newly constructed premises. But such exemption in not unfettered but controlled by the provisions of Section 2(2) of the said Rent Act read with Explanation 1 and proviso to such Explanation 1. The outer limit of the period of exemption in respect of newly constructed building is ten years. Such outer limit of the period of exemption has been introduced for balancing the equities between the landlord and tenant. In order to ensure that such exemption in favour of the landlord is not extended indefinitely, the legislature has provided a mechanism for determining the date with reference to which the building in question will be deemed to have been constructed by indicating four distinct alternative. As such, four dates are likely to be different, Legislature, in its anxiety to ensure that the period of exemption is not unjustly extended beyond the period intended, has indicated that such period of exemption is to be reckoned from the date which is on the earliest point of time amongst four different deemed dates provided for in Explanation 1 to sub section (2) of the U.P. Rent Act. The four different dates for the purpose of exemption as to whether a newly constructed building is ten years old or not are as follows:-

(i) the date on which completion of the building is reported to local authority;

(ii) the date on which the completion of the building is otherwise reported by the local authority having jurisdiction;

(iii) the date on which the assessment or property tax is first made;

(iv) In the absence of any such report, record or assessment, the date on which the building was actually occupied".

9. From a close reading of the decision of the apex court in Ram Saroop Rai (supra) and Suresh Kumar Jain (supra), it follows that it is not for the tenant to prove that the building has been constructed beyond a period of ten years but it is for the landlord to make out that the construction has been completed within ten years of the suit. This is sensible not merely because the Statute expressly states so and the setting necessarily implies so but also because it is the landlord who knows best when the building was completed, and not the tenant. As between the two, the owner of the building must tell the Court when the building was constructed and not the tenant thereof. Speaking generally, it is fair that the onus of establishing the date of construction of the building is squarely laid on the landlord.

10. In the instant case, now let us examine whether the landlord has been able to satisfy the requirement of Section 2(22) read with explanation 1 of the Act no. XIII of 1972 for determining the question about the age of the tenanted accommodation. In the present case, there is absolutely no document on record filed either by the landlord or the tenant to establish when the tenanted accommodation, or for that matter, house no. 88 Sadar Bazar Road, Cantt. Mathura came into being. There is only parol testimony of the parties. What the landlord has asserted has been repelled by the tenant and her another witness. The property, in question, is situate within the limits of the Cantonment of Mathura. The statue makes it clear that reliance upon municipal records, rather than on the lips of witnesses, is indicated to determine the date of completion and the nature of construction. The court below has failed to approach the question of age of the tenanted accommodation from a right angle and has misdirected itself in determining the same by adopting a totally wrong approach. The statutory guideline, as adumbrated under Section 2(2) read with explanation 1 of the Act no. XIII of 1972 has been wholly overlooked and legal position that the burden which lay on the landlord has not been appreciated. The finding recorded by the trail court is not only speculative in nature but scrappy and jumpy. Even otherwise, the tenant-revisionist did take steps to bring on record the extract from the municipal assessment register. She applied for a certified copy of the relevant extract from the municipal assessment register but it was not supplied to her on the ground that such a copy can be issued only to the landlord. The tenant-revisionist then moved an application before the trail court with the prayer that the original assessment register may be summoned from the Cantonment Board. This application is dated 27.09.1995 on the record of the lower court. The relevant document which was highly germane for the determination of the controversy was not summoned by the trail court. It appears that the trail court was swayed

away with the consideration that the question of the age of the tenanted accommodation may be gauged or decided with reference to the oral evidence of the parties. The ipsi dixit approach adopted by the trail court cannot but be condemned. The approach adopted by the court below is wholly against the statutory provision and in violation of the guidelines laid down by the apex court as well as this court with regard to the burden of proof of the fact as to when the tenanted accommodation came into existence. At the cost of tautology, it may be made clear that the burden of proof clearly lay on the landlord to establish that the provisions of the Act no. XIII of 1972 are not applicable to the accommodation, in question and consequently, he is not required to establish one or more of the ground contained under Section 20(2) of the Act no. XIII of 1972. The landlord could discharge the burden or establish the fact by bringing on record the municipal assessment extract or to lead other evidence as is contemplated under Section 2(2) read with explanation 1 of the Act no. XIII of 1972. It was not difficult for him to have obtained the copy of the assessment register if he was sure enough that he will get the benefit of the exemption from the provisions of Act no. XIII of 1972. Since I am going to remit the case for taking evidence on the point and to decided the controversy afresh, I would do better to refrain from making any further comments on the point, lest either of the parties may unnecessarily be prejudiced by the observations of this court.

11. Sri R.N. Bhalla, Senior Advocate appeared to be of the view that this court exercising the revisional powers under section 25 of the Provincial Small Causes Courts' Act cannot lightly brush aside the finding of fact recorded by the trail court. To fortify his submission, Sri Bhalla placed reliance on the decision of this court in Laxmi Kishore and another Vs. Har Prasad Shukla-1979 A.W.C.-747 in which it was observed that the court deciding revision under Section 25 of the Provisional Small Causes courts' Act has to satisfy itself that the trail court's decree or order is according to law. It is true that a revisional court should keep in mind Hon'ble Supreme Court's dictum in Malini Ayyappa Naicker V. Seth Manghraj Udhavdas Firm – A.I.R. 1969 S.C.-1377 that a wrong decision on fact is also a decision according to law. Therefore, Sri Bhalla was of the view that even if the trail court has recorded a wrong finding would also be a decision according to law and, therefore, it enjoys the immunity from interference by the revisional court. With due deference to the submission made by Sri Bhalla, I do not feel persuaded to agree with him. The question whether the provisions of the Act No. XIII of 1972 apply to the tenanted accommodation or not is a jurisdictional fact and goes to the very root of the matter. If the trail court has arrived at a particular conclusion without following the parameters or the guidelines laid down in Section 2(2) and Explanation 1 therefore of the Act no. XIII of 1972, or against the interpretation of the said provision, this court exercising revisional powers would not sit idle or be lethargic in the matter but would certainly step-in to correct the jurisdictional error. The decision in the case of Laxmi Kishore (supra) relied upon by Sri Bhalla, if read in its entirety, may not support his contention. In the said decision, it has further been laid down that if it is found

that a particular finding of fact is vitiated by an error of law, the revisional court has power to pass such order as the justice of the case requires; but it has no jurisdiction to reassess or reappraise evidence in order to determine an issue of fact for itself. It cannot dispose of the case adequately without a finding on a particular issue of fact, it should send the case back after laying down proper guidelines. It cannot enter into the evidence, asses it and determine an issue of fact. A reference was also made to the decision of this court dated 11.01.2000 in Civil Misc. Writ No. 15447 of 1981 R.S. Bajpai Vs. 1st Addl. District Judge Allahabd and others. In the said decision, this court did not approve the setting aside of the finding of the trail court by the appellate court and relying upon the decision in Laxmi Kishore's case (supra) allowed the writ petition and quashed the impugned order passed by the revisional court with the direction that the trail court shall, however, decide the matter afresh, keeping in view the observation made by the revisional court and in accordance with law. The said decision does not squarely applies to facts of the present case. What is meant from a reading of the plethora of decisions on the point, it is clear that the revisional court should not embark upon de novo examination of the finding of a fact recorded by the trail court. It has been rightly held that the revisional court is not empowered to look into the evidence of the case and to decide whether a finding of fact arrived at by the trail court is justified by the evidence on record or not.

12. The controversy whether a particular accommodation is to be governed by the provisions of Act no. XIII of 1972 or it is excepted from the operation of the said Act is a mixed question of law and facts. As stated above, the basis question with regard to the applicability of the Act has to be determined with reference to the provisions of Section 2(2) read with explanation 1 of the U.P. Act no. XIII of 1972 and no amount of oral evidence or admission of either of the parties would be sufficient to displace the entry made in the municipal record with regard to the tenanted accommodation. In the instant case, the tenanted accommodation is located within the cantonment area and surely there must be a record of the first assessment of the house in question. The crucial question could be determined by taking on record the entries made in the assessment register maintained by the Cantonment Board. The trail court has palpably committed a serious error by not requiring the landlord to produce the copy of the assessment register or by summoning the said document, if for certain reasons, copy thereof was not available. The landlord also did not take any steps in this regard in spite of the fact that the burden of proof lay squarely on him to establish that the disputed construction came into being within a period of ten years reckoned from before the date of the institution of the suit. It is, therefore, not the question of appraising or re-appraising by the revisional court the evidence recorded by the court below. As noticed above, the revisional court is duty bound to correct the apparent and glaring mistake committed by the court below and if the decision of the trail court is apparently against the law, or say, not according to law, in that event, the revisional court has to set aside the order. Therefore, the contention of Sri R.N. Bhalla, Senior Advocate that this court exercising revisional powers cannot interfere with the finding of fact recorded

by the court below does not go too far. The decision is required to be setaside as it is not according to law.

13. I am conscious of the fact that ordinarily, higher court should refrain from remanding the case to the lower court as it results in further consumption of time. But there may be some exceptional cases, like the present one, where the controversy cannot be decided without remanding the case as this court would be chary enough to permit the parties to lead evidence in the revisional proceedings for the determination of the controversy, in hand the matter of necessity it has to be sent back to the trail court. it would not be proper for this court exercising the revisional jurisdiction to summon the documents and then to record evidence. This course would be expedient as it will be open both to the landlord as well as tenant to produce better municipal evidence in the light of what has been indicated above.

14. In the result, for the reasons mentioned above, the reasons mentioned above, the revision application is allowed and the impugned judgement and decree dated 31.03.1998 passed by 5th Additional District Judge, Mathura in S.C.C. suit no. 17 of 1989 are hereby set aside. The case is remanded to the court below for decision afresh according to law in the light of observation made in the body of this decision. In view of the fact that the case was instituted about 12 years back, the trail court, subject to active co-operation and regular participation of the parties, will decide the same with all expedition, preferably within four months. The parties are directed to appear before the trail court on 03.04.2001.

15. The Deputy Registrar concerned of the Registry of this court shall ensure that the original record of the case along with a copy of this judgement is returned so that it may reach the trail court before the date specified above.

Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2001

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

Civil Misc. Writ Petition No. 7789 of 1998

Ali Johad Naqvi ...Petitioner
Versus
Allahabad Development Authority and another ...Opposite parties

Counsel for the Petitioner:
Sri L.R. Khan

Counsel for Respondents:
Sri Ashok Mohiley
S.C.

Constitution of India –Article 226 – where the contract entered into between the State and the persons aggrieved is non statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple. (Held in para 7).

It must be held that the writ jurisdiction under Article 226 of the Constitution of India could not be invoked by the petitioner for enforcing the contract between him and the respondent – Allahabad Development Authority.

By the Court

1. On the refusal by the respondent-Allahabad Development Authority to refund Rs.1,49,250/- deposited by the petitioner for the allotment of the shop in question, the petitioner has filed this Petition under Article 226 of Constitution of India, praying for quashing the notice dated 22.12.1987 (Annexure '8' to the writ petition), and for commanding the respondent-Allahabad Development Authority to refund the said amount.

2. The case of the petitioner, as disclosed in the writ petition, is that in pursuance of the scheme floated by the Allahabad Development Authority, he applied for allotment of the shop in question and deposited in All Rs.1,49,250/- for the same, but the possession was not given to him for about two and a quarter years. His case, further, is that the parties are governed by a written contract and in terms of condition no. 1-8 thereof, he could obtain refund of the money deposited by him with interest in case no floor space is given to him within a period of two years since the date of registration. He, accordingly, moved an application dated 26.06.1987 for the refund of the money deposited by him, but the respondent-Allahabad Development Authority instead of refunding the said amount, issued a letter dated 22.12.1987 calling upon him to pay a sum of Rs.2,04,016.40, in order to get the said letter dated 26.06.1987 considered.

3. In paragraph 9 of the supplementary counter affidavit of S.C. Srivastava, Secretary of the Allahabad Development Authority, it is mentioned that out of the total amount deposited by the petitioner, a sum of Rs.1,45,165/- has been paid to the petitioner and the balance amount has been forfeited under the terms and conditions of allotment and the rules framed under the U.P. Urban Planning & Development Act, 1973 as the petitioner has failed to comply with the said terms and conditions. In paragraph 10 of the supplementary rejoinder affidavit, the petitioner has admitted the said payment. Thus, the petition is confined only to the relief of the refund of the balance amount.

4. It is relevant to notice that from the averments made in the writ petition it is evident that the petitioner is seeking to enforce condition no. 1-8 of the Contract. Thus, the basis of the claim of the petitioner is the contract between him and the respondent-Allahabad Development Authority.

5. Here the question that arises for consideration is whether the jurisdiction under Article 226 of the Constitution of India could be invoked for enforcing the contract between the petitioner and the respondent-Allahabad Development Authority.

6. In the judgement rendered in **Bareilly Development Authority and another** vs. **Ajai Pal Singh and others**, reported in A.I.R. 1989 Supreme Court 1076, the Hon'ble Supreme Court relying upon Radhakrishna Agarwal Vs State of Bihar, reported in (1977) 3 Supreme Court Cases 457, Premji Bhai Parmar Vs. Delhi Development Authority, reported in (1980)2 Supreme Court Cases 129, and D.F.O. vs. Biswanath Tea Company Limited, reported in (1981) 3 Supreme court Cases 238, has held that "there is a line of decisions where the contract entered into between the State and the

persons aggrieved is non statutory and purely contractual and the rights are governed only by the terms of the contract, no writ or order can be issued under Article 226 of the Constitution of India so as to compel the authorities to remedy a breach of contract pure and simple.

7. In view of the principles enunciated by the Hon'ble Supreme Court in the aforementioned case, it must be held that the writ jurisdiction under Article 226 of Constitution of India could not be invoked by the petitioner for enforcing the contract between him and the respondent-Allahabad Development Authority.

8. Thus, the petitioner is not entitled to the relief claimed in the petition. Accordingly, the petition is dismissed, but without any order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.02.2001

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

Criminal Misc. Application No. 3954 of 1999

Mohan Lal and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Shri Sarvesh
Shri Vimlesh Kumar

Counsel for Opposite parties:
A.G.A.
Shri R.S. Parihar

Criminal Procedure Code – Section 482 – finding of the Civil Court will operate as conclusive proof of these facts and allegations in a criminal proceeding. In the absence of this proof it is impossible for this Court to hold that proceedings, quashing of which has been sought by the applicants through this petition, are either malafide or an abuse of process of the court to coerce the applicants. (held in para 4).

The allegations made in the first information report were found true. On the absis of investigation and the evidence collected by the police charge sheet ultimately was submitted against the applicants. In these circumstances I find no ground to accept the contention of the learned counsel for the applicants that this proceedings was malafide or abuse of process of the court.

By the Court

1. Heard learned counsel for the applicants and learned AGA.

2. I have perused the annexures filed along with the affidavit filed in support of the application as well as counter affidavit and the judgement delivered by Civil Judge, Senior Division, Chtrakoot against the applicant Krishna Mohan in a suit filed by him seeking divorce under Section 13 of the Hindu Marriage Act from the daughter of respondent no. 2.

3. The allegations in the first information report are that the bride after the marriage is solemnised is not sent to the bridgroom's house according to custom prevalent in their society. She is sent there after gauna ceremony is performed. After some days of the marriage the informant has learnt thourhg Mohan Lal and Diwanpal residents of Bhawanipur that her husband and father-

in-law are demanding a sum of Rs.50,000/- as price for performing the gauna ceremony. On the failure of the informant to do so the applicants had declined to perform this second marriage ceremony and take his daughter to their house. When the informant along with his villagemen visited their house the demand of Rs.50,000/- was repeated and they were turned out of their house by the applicants after abusing them. On 22.03.1998 the informant conducted a panchayat of his community at Chitrakoot. The applicant were summoned there by the panchayat and their conduct was condemned by the panchayat. On 05.09.1998 these persons visited the village of the informant, they stayed at the outskirt of the village and sent for the informant. When the informant along with some villagers reached there he was abused and he was told by the applicants that what have you gained by conducting panchayat and unless the claimed price for performing gauna ceremony is paid they are not taking his daughter to their house. They had also threatened to eliminate the entire family. These are the allegations made in the first information report.

4. A perusal of the plaint filed by applicant no. 3 Krishna Mohan claiming divorce from his wife clearly shows that he had no sense of decency. Wild allegation of his wife having carried in her womb a child without performance of gauna ceremony was levelled against her. It was further stated that she had under gone the process of abortion. She was also, according to paragraph 7 under went virginity test and the test proved her leading on immoral life. On these allegations he had sought divorce from his wife Annexure-1 to the counter affidavit is the judgement delivered by Civil Court, Senior Division, Chitrakoot against the applicant Krishna Mohan Following issues were framed in the suit against this applicant. First issue was whether the girl show in marriage was one and the same, the photograph of which was made available to the father of applicant no.3. The second issue is whether Sushila Devi was carrying a child in her womb before the marriage. The third issue was whether Sushil Devi is a woman of easy virtue. The fourth issue was with regard to the relief to which the applicant was entitled. So far as issue nos. 1,2 and 3 are concerned they were answered in the negative by the civil court. These finding of the civil court will operate as conclusive proof of these facts and allegation in a criminal proceeding. In the absence of this proof it is impossible for this Court to hold that proceedings, quashing of which has been south by the applicants through this petition, are either malafide or an abuse of process of the court to coerce the applicants. The allegations made in the first information report were found true. On the basis of investigation and the evidence collected by the police charge sheet ultimately was submitted against applicants. In these circumstances I find no ground to accept the contention of the learned counsel for the applicants that this proceedings was malafide or abuse of process of the court.

5. The application is accordingly dismissed.

Application Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2001

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

Civil Misc. Writ Petition No. 5125 of 2001

Ganesha ...Petitioner
Versus
District Magistrate, Mahoba and another ...Respondents

Counsel for the Petitioner:
Shri Rajesh Kumar
Shri jai Singh Chandel

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

Constitution of India, Article 226 read with U.P. Scheduled Commodities Dealers (Licensing and Restriction of Hoarding) Order, 1989 – natural Justice –Violation– petitioner is a licence holder in respect of scheduled commodities under the said Order – Cancellation/Suspension of licence in violation of principles of natural justice without affording any opportunity of hearing as contemplated under clause 8(2) proviso.

Held – Paras 3 and 4)

It is thus apparent that proviso to sub-clause (2) of clause 8 of the Control Order contemplates opportunity of hearing to be given to the licensee if any order for cancellation or suspension of his licence is made.

In the instant case, since on the face of the impugned order itself it appears that no opportunity of hearing was given to the petitioner. Therefore, we are of the view that the said order is not in conformity with the proviso to clause 8(2) of the Control Order, 1989 and as such, the same cannot be sustained.

By the Court

1. We have heard learned counsel for the parties.

2. The writ petitioner is holder of licence in respect of scheduled commodities under U.P. Scheduled Commodities Dealers (Licensing and Restriction of Hoarding) Order, 1989 (hereinafter referred to as the "Control Order") His contention is that his licence was suspended without giving him any opportunity of hearing. It appears from the impugned order itself that the order was passed on the basis of certain enquiry by the District magistrate, but no opportunity of hearing appears to have been given. In this connection, we may take note of proviso to sub-clause (2) of Clause 8 of the Control Order, which reads as under:

"8. Contravention of conditions of licence – (1)……..

(2) if the licensing authority is satisfied that any such licensee or his agent or servant or any other person acting on his behalf has contravened any provision of this order or the terms and conditions of the licence, it may without prejudice to any another action that may be taken against him, by order in writing cancel or suspend his licence either in respect of all scheduled commodities covered by it or in respect of such of these commodities as it may think fit:

Provided that no order shall be made under this sub-clause unless the licensee has been given a reasonable opportunity

of stating his case against the proposed cancellation or suspension as the case may be.

3. It is thus apparent that proviso to sub-clause (2) of Clause 8 of the Control Order contemplates opportunity of hearing to be given to the licensee if any order for cancellation or suspension of his licence is made.

4. In the instant case, since on the face of the impugned order itself it appears that no opportunity of hearing was given to the petitioner. Therefore, we are of the view that the said order is not in conformity with the proviso to clause 8 (2) of the Control Order, 1989 and such, the same cannot be sustained.

5. Accordingly, the writ petition succeeds and is allowed. The impugned order of suspension dated 11.05.2000 is hereby quashed. We, however, feel that the respondent authorities shall be at liberty to take such steps as may be advised in accordance with law.

The writ petition is allowed.

Petition Allowed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2001

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

Civil Revision No. 96 of 2001

Sri K.S. Singhal ...Defendant/Applicant
Versus
The Indian Tobacco Company Ltd.
...Plaintiff/Opposite party

Between
The Indian Tobacco Company Ltd.
...Plaintiff
Versus
Sri K.S. Singhal ...Defendant

Counsel for the Petitioner:
Shri Mahadav Jain

Counsel for Respondents:
Shri Murlidhar
Shri Tarun Verma

Code of Civil procedure, 1908, Ss. 10 and 151 – malafide – Suit for ejectment – suit earlier filed for injunction and other relief – Scope of the suit, – application for stay filed after 15 years, held malafide.

Held – Paras 5,9

The suits were decided by a common judgement, dated 15.09.1998. Copy of the judgement is annexure 3. The judgement show that it has been held that the applicant is entitled to relief of injunction as prayed irrespective of the fact whether he is tenant or licencee of the shop in dispute as he is in the possession of the shop and carrying on business.

It may, also be mentioned that the application is malafide. The suit for eviction was filed, which is pending since the year 1985 and attempt is being made to delay the disposal of the suits in some way or the other. In earlier suits on the basis of which stay has been requested are of the year 1982. There is no reason as to why the application for stay of suit was moved after the expiry of period of fifteen years.

By the Court

1. The opposite party filed the suit against the revisionist, which is numbered 267/85 pending in the court of the Xth

Additional District Judge, Agra. The revisionist moved an application (130-C) under section 10 read with Section 151 C.P.C. for stay of the Suit till the decision of the pending appeals nos. 361/98 and 379/99 arising out of Suits Nos. 551/82 and 518/82. The application was opposed by objections 136-C. The Additional District Judge considered the arguments and has rejected the application for stay of Suit under Section 10 and 151 C.P.C. Aggrieved by the that order, the present revision has been filed.

2. I have heard Sri Mahdav Jain, learned counsel for the revisionist and Sri Murlidhar, Senior Advocate assisted by Sri Tarun Verma, learned counsel for the opposite party and have perused the record.

3. The present Suit No. 267/85 is a very old Suit pending since 1985 in which the relief of eviction of the revisionist from the disputed premises and for recovery of damages have been sought. The suit was filed after the termination of the licence. Request made by the defendant – revisionist was for stay of Suit till the disposal of the appeal filed against the decision of Suits nos. 518/82 and 551/82. Copy of the plaint of Suit No. 518/82 is annexure 4 to the affidavit and this Suit was filed by the revisionist against the opposite party. The relief sought in the Suit is that the opposite party be restrained from interfering with the possession and enjoyment of the shop in dispute either by withholding supply of electricity etc. or obstructing access of the applicant or his employees to the shop in dispute. Issue was framed in the Suit is whether the applicant is tenant or a licencee of the shop in dispute.

4. Copy of the plaint of Suit No. 551/82 is annexure 5 of the affidavit. This Suit was also filed by the revisionist against the opposite party and four other person. The relief sought in the Suit was for injunction restraining the opposite parties to permit any other person to exhibit for sale or sell within the Hotel premises any of the articles which are being sold by the revisionist in Hotel Mughal Sheraton, Agra. Both the Suits were decided by Common Judgement, dated 15.09.1998 (annexure 3 of the affidavit) and appeals against the same as mentioned above, are pending. It is contended that in both Suits, the point for decision is whether the applicant was the licencee or tenant in the shop of dispute and issue on this point was framed.

5. The Suits were decided by a common judgement, dated 15.09.1998. Copy of the judgement is annexure 3. The judgement show that it has been held that the applicant is entitled to relief of injunction as prayed irrespective of the fact whether he is tenant or licencee of the shop in dispute as he is in the possession of the shop and carrying on business.

6. Therefore, it appears from the judgement that the question whether the applicant is tenant or a licencee in the shop in dispute is not involved in view the relief claimed in those Suits and is not required to be decided. The plaintiff applicant was found entitled to the relief in Suit No. 518/82 only on the basis of the fact that he is in possession of the shop in dispute and he is carrying on business. The other Suit No. 551/82 was dismissed.

7. No doubt the issue whether the plaintiff is tenant or licencee has been framed, but in view of the nature of the

relief claimed this issue is unnecessary. Therefore, the point involved in the present Suit is not involved in the two earlier instituted Suits. Therefore, the application for stay of Suit was rightly rejected.

8. Apart from this the Suit for ejectment cannot be stayed because the relief in the Suit filed by the plaintiff is confined for the period till he is tenant/ licencee of the disputed premises. Therefore, the scope of both the Suits is different.

9. It may also be mentioned that the application is malafide. The Suit for eviction was filed, which is pending since the year 1985 and attempt is being made to delay the disposal of the Suits in some way or the other. In earlier Suits on the basis of which stay has been requested are of the year 1982. There is no reason as to why the application for stay of Suit was moved after the expiry of period of fifteen years.

I do not find any merit in the revision.

The revision is, accordingly, dismissed.

Revision Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD FEBRUARY 27, 2001

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

Civil Misc. Writ Petition No. 6776 of 1998

Tribhuwan Narayan Singh ...Petitioner
Versus
Varanasi Development Authority through its Secretary and others ...Respondents

Counsel for the Petitioner:
Shri Ravindra Rai

Counsel for Respondents:
Shri Ved Vyas Mishra

Constitution of India, Article 226 – Exercise of Jurisdiction under – Doctrine of non – traverse – Applicability.

Held – Para 7

The allegation of unfairness, favouritism and collusion made by the petitioner are extremely serious. It is not understandable as to why in favour of wife of a person who was in an unauthorised occupation of the flat in question lease was executed by Respondent Nos. 1 and 2 which was already allotted to the petitioner earlier who had also paid a sum of Rs.18,000/- and was prepared to pay the balance amount as per the agreement after its delivery of possession to him. No counter has been filed despite grant of repeated opportunities. Thus we invoke the doctrine on non-traverse. The net result is that we hold that the petitioner was never delivered possession of the flat in question by Respondent Nos. 1 and 2 who had also withdrawn their suit for eviction of Respondent no. 3 and proceeded to settle the flat in question with Respondent Nos. 1 and 2 to return back the amount deposited by the petitioner alongwith such interest which Respondent nos. 1 and 2 are themselves charging from such defaulting parties who had entered an agreement with Respondent nos. 1 and 2, within three months from today. We order accordingly.

By the Court

ORDER

1. The petitioner has come up for grant of following relief's:-

"(i) Issue writ order or direction in the nature of writ of mandamus directing the respondents Varanasi Development Authority to hand over the possession to the petitioner of Flat No. L-5/37 Shastri Nagar, Varanasi I pursuance of lease deed executed on 15.07.1978 ' And or in alternative Refund the money deposited by the petitioner with a arrears compound interest at the rate of 18% in every quarter of a year, the rate on which Varanasi Development Authority Charges in respect of its higher purchase transaction.

(ii) Issue a writ of certiorari to quash the document dated 23rd August, 1991 executed by the respondent No. 1 and 2 in favour of the Smt. Tara Singh w/o Shri Shitla Prasad."

2. The case of the petitioner in brief is as follows:-

He entered on 18.08.1978 (copy appended as Annexure-1) an agreement with Respondent NO.1 for purchasing one Lower Income Group Flat constructed by the latter in Chakla Bagh, now known as Shastri Nagar Development Scheme, situated in Mohalla Lallapura of City of Varanasi. In terms of the agreement he deposited Rs.18,000/- through Receipt No.27 (copy appended as Annexure-2). It was provided in the agreement that the balance amount shall be deposited by him after taking possession of Flat No. L-5/37 in question, which was allotted to him. At that time the cost of the flat was Rs.24,884.68 Paise and Rs.18,000/- already having been paid, the balance amount, was payable in instalments after the delivery of possession. Even though the building consisting the flat in question was completed in 1980 the possession of the flat in question has not been handed over to the petitioner till date even though to other allottees possession was given who are living and enjoying their flats since 1980. There was no reason for Respondent Nos. 1 and 2 hand-over possession of the flat in question to him even though for that purchase he made repeated requests orally and in writing. Only to delay the matter Respondent No. 1 filed a suit for eviction of Respondent NO. 3 Shitla Prasad Singh before the City Magistrate, Varanasi (the Prescribed Authority under section 3 of the U.P. Public Premises Eviction of Unauthorised Occupants Act, 1972) on 07.06.1980 (copy of the plaint appended as Annexure-3) who decided the same in favour of Respondent No. 1 directing him to vacate the flat in question and hand-over its possession to Respondent No. 1. It was reported to the Magistrate that Respondent No. 3 had vacated the flat in question and handed over its possession to Respondent No. 1 vide order dated 16.12.1981 (copy appended as Annexure-4). Respondent No.3, however, challenged the correctness of the order in appeal filed before the appellate authority. The appellate authority remanded the case vide its judgement dated 23rd march, 1982 (coy appended as Annexure-5). The City Magistrate, Varanasi once again vide his order dated 23rd August, 1983 (copy appended as Annexure-6) allowed the suit. Against this order also Respondent No. 3 went up in appeal but his appeal was dismissed for default. The said appeal after 8 years was restored back by the District Judge, Varanasi without any information to the petitioner. As soon as he made an effort for his impleadment as a party in order to challenge the order of restoration Respondent No.1 all of a sudden withdrew the original case itself due to connivance with Respondent No. 3 and also executed a Memorandum of

Lease (copy appended as Annexure-) in favour of Respondent NO. 4, wife of Respondent No. 3 without cancelling the Memorandum of Lease executed in his favour of Respondent No. 4, wife of Respondent No. 3 without cancelling the memorandum of Lease executed in his favour. The withdrawal and execution of the document speaks the unfairness of Respondent No. 1 and its favouritism and collusion. Despite several requests in writing vide letter as contained in Annexures 7 to 13 to the Secretary, Vice Chairman and the Chairman of the Authority no result came out and hence this writ petition.

3. After the issue of notices to Respondent Nos. 3 and 4 vide dated 06.03.1998 opportunities were granted to Respondent Nos. 1 and 2 to file their counter vide order dated 15.01.1999, 15.02.2001 and lastly vide order dated 20.02.2001 but no counter affidavit has been filed.

4. On 15.02.2001 Respondent Nos. 3 and 4 were deleted by the learned counsel for the petitioner, therefore, there cannot by any question of granting relief No. 2 in the absence of Respondent No. 4 Smt. Tara Singh Prayer No. (ii) is thus rejected.

The Submissions:-

5. Sri Ravindra Rai, learned counsel for the petitioner, in the backdrop aforementioned, contended that the facts stated by the petitioner speak for themselves, the doctrine of non-traverse be invoked and Respondent Nos. 1 and 2 be directed to refund a sum of Rs.18,000/- deposited by the petitioner pursuant to the agreement alongwith compound interest at the rate of 18% per quarter per annum, which the Varanasi Development Authority charges in respect of its higher purchase agreements from the defaulting parties.

6. Sri Ved Vyas Mishra, learned counsel appearing on behalf of Respondent Nos. 1 and 2, very fairly states that there is nothing on the record to refute the allegations made by the petitioner and accordingly this court may proceed to pass such order which it may consider expedient in the interest of justice.

Our Findings:-

7. The allegations of unfairness, favouritism and collusion made by the petitioner are extremely serious. It is not understandable as to why in favour of wife of a person who was in an unauthorised occupation of the flat in question lease was executed by Respondent Nos. 1 and 2 which was already allotted to the petitioner earlier who had also paid a sum of Rs.18,000/- and was prepared to pay the balance amount as per the agreement after its delivery of possession to him. No Counter has been filed despite grant of repeated opportunities. Thus we invoke the doctrine of non-traverse. The net result is that we hold that the petitioner was never delivered possession of the flat in question by the Respondent Nos. 1 and 2 who had also withdrawn their suit for eviction of Respondent No. 3 and proceeded to settle the flat in question with Respondent No. 4. Accordingly it would be in the interest of justice to command Respondent Nos. 1 and 2 to return back the amount deposited by the petitioner alongwith such interest which

Respondent Nos. 1 and 2 are themselves charging from which defaulting parties who had entered an agreement with Respondent Nos. 1 and 2, within three months from today. We order accordingly.

8. Since the petitioner has also been coerced to move this Court, we are of the view that he is also entitled to cost of this proceedings which we in the peculiar facts and circumstances quantify at Rs.2,000/- only.

9. This writ petition is disposed of accordingly.

10. The Office is directed to hand-over a copy of this order within one week to Sri Ved Vyas Mishra, learned counsel for Respondent Nos. 1 and 2, for its intimation to and flow up action by Respondent Nos. 1 and 2.

Petition Disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2001

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

Criminal Misc. IInd Bail Application No. 3018 of 2001

Dinesh Kumar Jain ...Applicants(In Jail)
Versus
State of U.P. ...Opposite parties

Counsel for the Applicants:
Shri Ashok Kumar Mishra
Shri Ram Shiromani Shukla

Counsel for Opposite parties:
A.G.A.

Code of Criminal Procedure Code, 1973 S. 167 (2) – Scope – Right of Accused to be released on bail when may be exercised.

Held (para 8 and 9)

In the instant case, the position is different. As mentioned above right of the applicant to be released on bail under Section 167 (2) Cr. P.C. accured on 08.12.2000 and remained inforce till 12.12.2000 as the period of 90 days expired on 07.12.2000 and charge sheet was submitted on 13.12.2000. The applicant availed his right to be released on bail under said Section on 12.12.2000 by moving an application before the Chief Judicial Magistrate concerned. No doubt the bail application before the Sessions Judge on the direction of this Court was moved much later, but it cannot be said that the applicant had not availed his right to be released on bail under Section 167 (2) Cr. P.C. When actually 'accured' to him. The observation of the learned Sessions Judge in this regard is thus erroneous, as it defeats the indefeasible right of accused under Section 167 (2) Cr. P.C.

It is, therefore, clear from the record as well as admitted position that the right of the applicant to be released on bail accured between 08.12.2000 and 12.12.2000 and the applicant availed the same on 12.12.2000 by moving bail application before the initial Court i.e. C.J.M., but his bail application was wrongly rejected. Thus, the applicant is entitled to be released on bail under proviso to Section 167(2) Cr. P.C.

Case law Discussed
1996 (33) ACC 136
1994 (31) ACC (SC)

By the Court

1. This is second bail application. The first bail application was disposed of 19.01.2001 with a direction to move fresh

bail application before learned Sessions Judge on the ground of proviso to Section 167 (2) Cr. P.C.

2. The applicant involved in case crime no. 820 of 2000 under sections 364/302/34 I.P.C., P.S. Loni, District Ghaziabad, moved bail applications before Chief Judicial magistrate concerned, who rejected the same and thereafter he moved bail application before the Sessions Judge. The Sessions Judge, Ghaziabad, rejected his bail application on 03.11.2000 on merit.

3. Thereafter, the applicant moved another bail application before Chief Judicial Magistrate concerned on 12.12.2000 on the ground that charges sheet in the case was not submitted within 90 days from the date of first remand to judicial custody. The learned Chief Judicial Magistrate rejected the above application, vide his order dated 14.12.2000 on the ground that first remand by the Court was granted on 21.09.2000 and therefore period of 90 days did not complete on 12.12.2000, when the bail application was moved under proviso to Section 167 (2) Cr. P.C. Thereafter, first bail application was moved before this Court on 18.01.2001. The above bail application was moved before this Court on 18.01.2001. The above bail application was disposed of with a direction to move bail application before Sessions Judge concerned on the ground of proviso of Section 167 (2) Cr. P.C. as this point was not raised before the Sessions Judge after rejection of the bail application on the above ground by Chief Judicial Magistrate.

4. The applicant, accordingly, moved bail application before the Sessions Judge, who rejected the same on 07.02.2001. Therefore, this bail application.

5. Heard the learned counsel for the applicant and the learned A.G.A. and perused the record.

6. It is not disputed that initially report of the occurrence was lodged at P.S. Sahadara, district North East Delhi by Sub Inspector Guru Sewak Singh and the applicant was also arrested by the police of P.S. Sahadara on 07.09.2000. The applicant was remanded to judicial custody till 22.09.2000 on 08.09.2000 by A.C.M.M. Delhi. It is not disputed that charge sheet in this case was submitted on 13.12.2000 and the applicant moved bail application under proviso to Section 167 (2) Cr. P.C. on 12.12.2000. The learned Sessions Judge has also observed that first remand was given on 08.09.2000 and 90th days expired on 07.12.2000 and charge sheet was submitted on 13.12.2000. The learned Sessions Judge rejected the bail application on the ground that since charge sheet right of hire could not have been enforced. He also relied on Apex Court decision in Mohammed Iqbal Madar Shekh and others vs. State of Maharashtra, 1996 (33) ACC, 136. On the availability of right to be released on bail under proviso to Section 167 (2) Cr. P.C. the Apex Court has held in the case of Sanjay Dutt Vs. State through C.B.I. Bombay (II), 1994 (31) ACC, 702 (SC) as follows:-

"The "indefeasible right" of the accused to be released on bail in accordance with Section 20 (4) (bb) of the TADA Act read with Section 167 (2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur is a right which enures to, and is

enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on the challan being filed. If the accused applies for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested and committed to custody according to the provisions of the Code of Criminal Procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provisions relating to the grant of bail application at that stage."

7. Thus, the settled position is that the right to be released on bail in accordance with Section 167 (2) Cr. P.C. in default of completion of investigation and filing of the challan within the allowed enures to, and is enforceable by the accused only from the time of default till the filing of the challan and it does not survive or remain enforceable on challan being filed. In the case of Mohammed Iqbal Madar Sheikh (supra) though the charge sheet was submitted beyond the statutory period of Section 20(4(b) of TADA Act were applied in respect of appellants. It was admitted position in the said case that no application for bail on the said ground was made on behalf of the appellant and therefore, it was held that unless applications had been made on behalf of the appellants, there was no question of their being released on ground of default in completion of the investigation within the statutory period.

8. In the instant case, the position different. As mentioned above right of the applicant to be released on bail under Section 167 (2) Cr. P.C. "accrued" on 08.12.2000 and remained enforce till 12.12.2000 as the period of 90 days expired on 07.12.2000 and charges sheet was submitted on 13.12.2000. The applicant "availed" his right to be released on bail under said Section on 12.12.2000 by moving an application before the Chief Judicial Magistrate concerned. No doubt the bail application before the Sessions Judge on the direction of this court was moved much later, but it cannot be said that the applicant had no "availed" his right to be released on bail under Section 137 (2) Cr. P.C. when at actually "accrued" to him. The observation of the learned Sessions Judge in this regard in thus erroneous, as it defeats the indefeasible right of accused under Section 167 (2) Cr. P.C.

9. It is, therefore, clear form the record as well as admitted position that the right of the applicant to be released on bail accrued between 08.12.2000 and 12.12.2000 and the applicant availed the same on 12.12.2000 by moving bail application before the initial Court i.e. C.J.M., but his bail application was wrongly rejected. Thus, the applicant is entitled to be released on bail under proviso to Section 167(2) Cr. P.C.

10. Let the applicant Dinesh Kumar Jain involved in case crime no. 820 of 2000 under Section 364/302/34 I.P.C., P.S. Lone, District Ghaziabad be enlarged on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Chief Judicial Magistrate, Ghaziabad

Application Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED : ALLAHABAD : FEBRUARY 16,2001

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

Criminal Appeal No. 1502 of 1980

Sartaj Mohammad and others
...Appellants (in jail)
Versus
The State ...Respondents

Counsel for the Appellants:
Shri N.P. Midha

Counsel for the Respondents:
A.G.A.
Shri G.S. Hajela

Indian Penal Code – section 302/34 – presumption of common intention is also subject to the same kind of restrictions as other presumptions and in no case it must take the form of conjectures, surmise or suspicion. Inference of common intention should never be drawn unless it is a necessary inference deducible from the circumstances of the case. (Held para 38)

In the facts and circumstances appearing in the case there is a reasonable doubt that these accused persons shared the common intention with co-accused Sartaj Mohammad and it cannot be said with certainty that murder of Mazharul Haque was committed in furtherance of common intention of all the accused persons.

By the Court

1. This appeal is directed against the judgement and order dated 10.7.1980 passed by Sri V.K. Sircar, the then IV Additional Session Judge, Allahabad in Session Trial No. 286 of 1997, whereby appellant Sartaj Mohammad has been convicted and sentenced to life imprisonment under Section 302 I.P.C. Appellants Vakilwa, Lal Mohammad and Imamuddin have been convicted and sentenced to life imprisonment under Section 302 I.P.C. read with Section 34 I.P.C. Appellants Sartaj Mohammad, Lal Mohammad and Imamuddin have also been convicted and sentenced to 2 years rigorous imprisonment and a fine of Rs. 300/- each under Section 324 read with Section 34 I.P.C. Appellant Vakilwa is further convicted and sentenced to 2 years rigorous imprisonment and a fine of Rs. 300/- under Section 324 I.P.C. Appellants Lal Mohammad and Imamuddin have further been convicted and sentenced to two years rigorous imprisonment under Section 323 read with 34 I.P.C. However, Sartaj Mohammad and Vakilwa have been acquitted for the offence punishable under Section 323 read with Section 34 I.P.C.

2. The wood-cut profile of the prosecution case is that appellants Sartaj Mohammad and Lal Mohammad are real brothers being sons of Yar Mohammad Appellant Imamuddin is uncle of Appellant Vakilwa. They all belonged to one group.

3. Some time before the occurrence in question Anisuddin, brother of accused Vakilwa had been murdered. Shamim, maternal uncle of Aftab, P.W. 2 was an accused in that case. Aftab Ahmad was doing pairvi for Shamim.

4. It is stated that on 27.5.79 at about 6.20 P.M. in day light Masroorul Haque, P.W. 1 alongwith Aftab Ahmad, P.W. 2 and Mazharul Haque, deceased of the

present case were returning from School and proceeding towards Aftab's house, and when they reached in the lane in front of the house of Matin, the four appellants met them. Accused Vakilwa addressing and abusing Aftab Ahmad said that Aftab Ahmad's maternal uncle shamim had murdeed his brother Anisuddin and why Aftab was doing pairvi for him. Mazharul Haque took ill of these utterances and remonstrated accused Vakilwa saying that he should talk properly else it would not be good. If he was doing pairvi he was not doing any crime. Every person does pairvi for his family members. As soon as Mazharul Haque uttered these words, accused Lal Mohammad and Imamuddin alias Chottan exhorted whereupon accused Sartaj Mohammad fired upon Mazharul Haque while accused Vakilwa fired from his pistol on Aftab Ahmad. Mazharul Haque fell down on the ground while Aftab Ahmad sustained fire arm injuries on his lift scapula. Masroorul Haque and some other persons who were attracted to the scenen of occurrence challenged the accused persons whereupon accused turned back and escaped towards south in the lane. Masroorul Haque, P.W. 1 chased the accused persons and when he was near the south west corne of the mosuqe, accused Imamuddin alias Chottan and Lal Mohammad assaulted him with lathis resulting in injuries on his forearm and shoulder. Both of them then managed to escape. The incident was also witnessed by Faizanul Haque, P.W. 1, Atiq Ahmad alias Attan and Afsar Ahmad. When Masroorul Haque returned at the place of occurrence he found Mazharul Haque dead.

5. On the dictation of Faizul Haque, P.W.4 Hifzur Rahman scribed the first information report. Ex. Ka 2 and the same was lodged at Police Station Puramufti on the same night at 9.10 P.M. Case was registered and injured Aftab Ahmad and Masroorul Haque were sent to S.R.N. Hospital, Allahabad in the police escort for their medical examination. Dr. Udai Pratap Singh, P.W. 7 examined Aftab Ahmad at 1.40 A.M. and found following injuries :-

(1) Lacerated wound over left fore arm 5" x 2-1/2" , muscle deep and 2-1/2" below shoulder joint sorsum aspect, bleeding on cleaning, margin were irregular, and blackening and charring present.

(2) Multiple lacerated wound over lateral half of left scapula in an area of 4" x 3" with blackening and charring of wounds, margins bleeding on cleaning.

In the opinion of doctor injuries were caused within 24 hours. They were kept under observation and were suspected to be of fire-arm. Injury report of Aftab Ahmad is Ex. Ka 4.

Masroorul Haque was medically examined in the same night at 1.50 A.M. and following injuries were found :-

(1) Contusion 2" x 1" over apex of left shoulder.

(2) Contusion 1-1/2" x 1/2" over left medical border of left forearm. 2" above the left wrist joint.

In the opinion of doctor both the injuries were caused by blunt object, and were simple and caused within 24 hours. Injury report of Masroorul Haque is Ex. Ka 3.

Dr. Ramesh Chand, P.W. 3 conducted the autopsy on the dead body of Mazharul Haque on 28.5.79 at 4.30 P.M. Deceased was aged about 18 years. Following ante mortem injuries were found :-

1. Five gun shot wounds of entry each measuring about 1cm. X 1/2 cm., margins black, in the area of 4" x 1-1/2" on the left side of chest, 2-1/2" lateral and superior to the nipple, directed medially.
2. Abrasion 1/6" x 1/6" on the interio aspect of left shoulder.
3. Abraded contusion ¼" x ¼" on the left side of neck 4" below and posterior to the ear.
4. Lacerated wound 1-1/2 cm x 1 cm. Cavity deep on the right side of chest 3" above the lateral to the right nipple.
5. Lacerated wound 1-1/2 cm. X 1cm. on the interior aspect of right shoulder.

6. In the internal examination 3rd & 4th ribs on left side were fractured, 3 pea sized pellets were recovered from right chest wall. Pleura and both lungs were lacerated, heart was empty and thoraic cavity was full of blood. In the stomach semi-digested food was found. The small intestines and large intestines were half full.

7. In the opinion of Medical Officer, death had occurred due to shock and hemorrhage. Dr. Ramesh Chand further opined that injuries no. 4 & 5 could be exit wounds of injury no. 1.

8. After case was registered, the same was investigated by Sri Dharam Vir Singh, P.W. 14, who was posted as Station Officer of Police Station Pura Mufti. The investigating officer on reaching the place of occurrence found the dead body of deceased Mazharul Haque lying in the lane near the house of Matin. Inquest was held by sub-Inspector, D.C. Srivastava under the orders of investigating Officer. He also collected one empty cartridge lying by the side of the dead body and sealed the same in the presence of witnesses, vide memo Ex. Ka 14. The investigating officer also prepared site plan, Ex. Ka 19 and interrogated the witnesses. On completion of investigation, he submitted charge sheet, Ex. Ka 20 against all the accused persons.

9. Before the trial court, prosecution examined 14 witnesses in all; of whom P.W. 1 Masroorul Haque, P.W.2, Aftab Ahmad and P.W.4, Faizul Haque were witnesses of the fact. Both P.W. 1 Masroorul Haque and P.W. 2 Aftab Ahmad themselves suffered injuries in the course of incident.

10. In their statements recorded under Section 313 Cr. P.C. accused denied the prosecution allegations and stated of their false implication due to enmity. No. witness was, however, examined in defence.

11. On an evaluation of evidence on record, he learned Session Judge found the appellants guilty and accordingly convicted and sentenced them as indicated above.

12. We have heard Sri G.S. Chaturvedi, Senior Advocate for the appellants and Sri K.C. Saxena, learned A.G.A. for the State.

13. Before us factum of death of Mazharul Haque due to ante mortem injuries has neither been challenged nor disputed. This fact is also otherwise fully

established from the evidence of three eye witnesses and statement of Dr. Ramesh Chand P.W. 3, who had performed autopsy on the dead body of Mazharul Haque.

14. As far as motive part is concerned the prosecution case is that one Anisuddin had been murdered prior to the present occurrence. Shamim, the maternal uncle of Aftab Ahmad, P.W. 2 was being prosecuted for the same. Aftab Ahmad was doing pairvi on behalf of Shamim. On the day of incident at about 6.30 P.M. when Masroorul Haque, P.W.1 alongwith Aftab Ahmad, P.W.2 and Mazharul Haque deceased were going from the School towards Aftab's house, the accused persons met them in the lane in front of the house of Matin. Accused Vakilwa had an altercation with Aftab Ahmad, P.W. 2 and he stated to him that "SALE TERE MAMOON SHAMIM NE MERE BHAI ANISUDDIN KA QATAL KIYA HAI TUM SALE AAJKAL USKI BARI PAIRBI KAR RAHE HO AUR GOL BAKAYA GHOMTE HO" Mazharul Haque took ill of these utterances and protested saying that "SALE ZABAN SANBHAL KAR BAT KARO VARNA THIK NAHIN HOGA ? ISMEN YEH KAUN GUNAH KAR RAHE HAIN, GHAR KA HAR ADMI APNE ADMI KI PAIRVI KARTA HAI" and it is stated that thereafter accused Sartaj Mohammad fired with his pistol on Aftab Ahmad, on the exhortation of Lal Mohammad and Chottan accused. It is thus, apparent form the prosecution evidence that accused Vakilwa was applying pressure on Aftab Ahmad not to do pairvi for Shamim, the killer of his brothr Anisuddin. This was protested by deceased Mazharul Haque and thereafter accused Sartaj Mohammad and Vakilwa opened fire on Mazharul Haque and Aftab Ahmad respectively. The incident thus occurred at a spur of moment in a heat of passion and without any premeditation and in the said incident Mazharul Haque sustained fatal fire arm injuries and Masroorul Haque received simple blunt object injuries when he was chasing appellants Chottan@ Imamuddin and Lal Mohammad.

15. According to the prosecution case Mazharul Haque was fired upon by Appellant Sartaj Mohammad from his gun and Aftab Ahmad was fired upon by appellant Vakilwa from his country made pistol and when Mazharul Haque had fallen on the ground appellants Chottan @ Imamuddin and Lal Mohammad started fleeing and when they were chased by Mazharul Haque, they assaulted him with lathi. To establish these allegations prosecution produced three witnesses before the trial court namely P.W. 1 Masroorul Haque, P.W. 2 Aftab Ahmad and P.W. 4 Faizanul Haque. Both Masroorul Haque, P.W. 1 and Aftab Ahmad, P.W. 2 sustained injuries at the hands of the assailants in the same incident in which Mazharul Haque had received gun shot injuries. Dr. Ramesh Chand, P.W. 3 who had conducted autopsy on the dead body of the deceased Mazharul Haque has stated in the trial court that the ante mortem injuries were of fire arm and probable time of death of the deceased was 6.30 P.M. on 27.5.79. A futile attempt was made by the defence counsel to challenge this opinion of the medical officer, but nothing concrete could be brought in his cross examination, which could demolish it in any manner whatsoever.

16. From the evidence of Dr. Udai Pratap Singh P.W. 7 it is also fully established that Aftab Ahmad had also sustained fire arm injuries on his person. The injury report of Aftab Ahmad, Ex. Ka. 4 and the evidence of the eye witnesses leaves no room for doubt that Aftab Ahmad also sustained fire arm injuries in the course of the same incident in which deceased Mazharul Haque was fired upon. Injuries of Masroorul Haque were also examined on the same day and the doctor found 2 contusions one on the apex of left shoulder and the other on the left medial border of left forearm.

17. It is thus apparent that both Masroorul Haque and Aftab Ahmad suffered injuries in the same incident in which Mazharul Haque had received fatal fire arm injuries and their presence at the scene of occurrence is thus not open to doubt. Since the incident had occurred in broad daylight they could have easily seen the faces of the persons assaulting them and the deceased. In the circumstances they could not said to be interested in roping in innocent persons by shielding the real accused, who had assaulted them. Their evidence also gets full support from the statement of P.W. 4, Faizanul Haque, the first informat. According to him he had gone to perform Namaz in the mosque and when he sat down in the northern-western corner of the mosque to urinate his attention was attracted by verbal and heated altercation which ensued between the accused persons and Aftab Ahmad. He has also given a graphic account of the incident. His presence at the scene of occurrence also gets support from the fact that within a short period he got the first information report scribed from Hifzur Rahman and carried injured Masroorul Haque and Aftab Ahmad to Police Station and reached there on the same night as early as 9.10 P.M. after covering a distance of about 6 kms. The promptitude with which the F.I.R. was lodged lends support to the truthfulness of the prosecution version.

18. The place of occurrence is also established not only from the ocular testimony of the witnesses, but also from the spot situation found by the investigating officer at the time of his inspection. The investigating officer had found one empty cartridge near the dead body and also blood of the deceased.

19. Therefore, we agree with the learned Session Judge that the incident occurred in the manner and at the time and place as alleged by the prosecution and all the four appellants participated in the incident.

20. The next question that arises for consideration is as to for what offence the appellants could be held guilty? So far as Sartaj Mohammad is concerned, he is alleged to have caused fatal fire arm injuries to the deceased Mazharul Haque. As already stated above, Dr. Ramesh Chand, P.W. 3 has stated in clear terms that ante mortem fire arm injuries of the deceased Mazharul Haque were sufficient to cause death in ordinary course of nature. The act of this accused was thus fully covered by clause thirdly of Section 300 I.P.C.

21. Learned counsel for the appellants argued before us that since the incident had occurred in the course of exchange of hot words at a spur of moment and in a heat of passion, it would be reasonable to hold that accused Sartaj Mohammad was deprived of his self

control due to grave and sudden provocation given to him by Mazharul Haque, who remonstrated accused Valilwa and therefore, the offence will be culpable homicide not amounting to murder due to applicability of Exception I of Section 300 I.P.C. It was further submitted that the mere fact that Sartaj Mohammad has not pleaded this Exception in his statement under Section 313 of the Cr. P.C. benefit of the same can not be denied to him if it otherwise looks probable from the prosecution evidence itself.

22. It is well settled law that though burden of proving an exception is on the accused, but the mere fact that the accused adopted defence of denial in his examination under Section 313 Cr.P.C. without referring to Exception I of Section 300, will not be enough to deny him the benefit of that Exception, if the court can cull out material from the evidence pointing to the existence of circumstances leading to that Exception. It is not the law that failure to set up such a defence would foreclose the right of the accused to rely on the Exception once and for all. (See Apex court's decision in State of U.P. Vs. Kakshmi JT. 1988(1) SC 679.

23. Rule of pleadings of civil law does not apply to criminal cases. Unlike a civil case, it is open to a criminal court to give benefit to the accused of a plea even if the same is not stated by him in his statement under Section 313 Cr.P.C. In a given case even if the accused does not raise the plea of an exception, yet if it is found from the evidence brought on record from the prosecution side and from the circumstances appearing in the case that the accused acted within the confines of an Exception, benefit of that Exception cannot be denied to the accused. If from the evidence the circumstance, established on the test of preponderance of probabilities, bring the case within the four corners of any Exception, benefit of the same should be awarded to the accused, and that benefit can not be denied merely for the reason that the accused has not pleaded the same in his statement recorded before the court, or suggested to the prosecution witnesses during their cross examination.

Exception I of Section 300 I.P.C. reads as under :-

"Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisions :-

First -- That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly – That the provocation is not given by anything done in the lawful exercise of the right of private defence.

24. From a combined reading this provision along with First provision it will follow that provocation should not only be grave and sudden, but it must be

unexpected. If an accused plans in advance to receive a provocation in order to justify the subsequent homicide, the provocation can not be said to be sudden.

25. In the famous case of K.M. Nanavati, A.I.R. 1962 S.C. 605 the Apex Court held that in order to bring the case within Exception 1, the following conditions must be complied with :-

(i) that the deceased must have given provocation to the accused;
(ii) the provocation must be grave;
(iii) the provocation must be sudden;
(iv) the offender, by reason of the said provocation, shall have been deprived of the power of self-control;
(v) he should have killed the deceased during the continuance of deprivation of the power of self control; and
(vi) the offender must have caused the death of person who gave the provocation or that of any other person by mistake or accident.

Whether the provocation was grave and sudden enough to bring the case within this Exception is a question of fact. The court has to apply an objective test for deciding whether the provocation was grave or not and the best test for deciding this question is whether a reasonable man belonging to the same class of society as the accused, placed in the situation in which the accused was placed, would be so provoked as to lose his self-control. The expression "reasonable man" means a normal and average person. The concept of "reasonable man" is a legal fiction which changes from time to time and from society to society. No. abstract standard of reasonableness can be laid down.

26. In the light of the above principles, we now proceed to examine whether from the prosecution evidence and the circumstances appearing in the case, benefit of Exception I could be extended to appellant Sartaj Mohammad.

27. In the present case the prosecution evidence as furnished by the witnesses is to the effect that when Masroorul Haque P.W. 1, Aftab Ahmad, P.W. 2, Faizanul Haque, P.W. 4 along with deceased Mazharul Haque were returning from School towards the house of Aftab Ahmad, P.W. 2 all the four accused jumped form the Dalan of Hafiz Kallan and had come into the lane. They were armed with firearm and lathi. Hot words were exchanged between Aftab Ahmad, P.W. 2 and accused Vakilwa. The altercation began when Vakilwa accused abused and askee Aftab Ahmad why he was doing pairvi for his maternal uncle Shamim, who had killed Anisuddin, brother of Vakilwa and thereby accused Vakilwa put a pressure on Aftab Ahmad not to do pairvi for Shamim. At this juncture Mazharul Haque who did not like the utterances of accused Vakilwa remonstrated him saying that he should have a control on his tongue and if Aftab Ahmad was doing pairvi he was not committing any sin or crime. Every man does pairvi for his own family members. On this both appellants Sartaj Mohammad and Vakilwa opened fire from their respective weapons upon Mazharul Haque and Aftab Ahmad respectively. In this factual situation when accused Vakilwa himself was responsible in inviting provocation, subsequent act of Sartaj Mohammad and Vakilwa of firing upon

Mazharual Haque and Aftab Ahmad can not be brought within the four corners of Exception 1.

28. It was argued by the learned counsel for the appellant that since mazharul Haque had unnecessarily intervened and remonstrated accused Vakilwa and uttered abusive words the possibility of accused Sartaj Mohammad having been deprived of power of self-control on account of provocation which was grave and sudden cannot be ruled out. This submission of the learned counsel is devoid of any force. Accused Vakilwa had initiated the altercation by abusing Aftab Ahmad and asking h9Imamuddin as to why he was doing pairvi for his maternal uncle Shamim, killer of his brother Anisuddin. Mazharul Haque then simply remonstrated and told Vakilwa that Aftab Ahmad was justified in doing paorvi of his maternal uncle Shamim. Since Vakilwa had himself initiated the altercation he was expected to receive a provocation from the person on victim side. The case is fully covered by First proviso of Exception 1 and therefore, no benefit of Exception 1 could be extended to Sartaj Mohammad for causing fatal fire arm injuries to Mazharul Haque.

29. It is now next to be seen what offence or offences have been committed by each of the appellants. Undisputedly Mazharual Haque sustained fire arm injuries at the hands of accused Sartaj Mohammad only. Cause of death was ante mortem fire arm injuries and those injuries were sufficient to cause death in ordinary cause of nature. The case is thus fully covered by Clause Thirdly of Section 300 I.P.C. Accordingly the conviction and sentence of improsonment for life of appellant Sartaj Mohammad under Section 302 I.P.C. for the murder of deceased Mazharul Haque are maintained.

30. Now coming to the case of other appellant we find that they have been found guilty under Section 302 I.P.C. with the aid of Section 34 I.P.C. for the murder of Mazharul Haque by co-accused Sartaj Mohammad. The question that arises for consideration is whether in the facts and circumstances of the case has it been proved beyond doubt that the murder of Mazharul Haque was committed by co-accused Sartaj Mohammad in furtherance of common intention of all the appellants?

31. It is well settled that the constructive liability under Section 34 can arise only if the following conditions are fulfilled :-

1. There must be a common intention to commit a criminal act, and
2. There must be participation by all the accused persons in doing such act in furtherance of that intention.

The Privy Council in the famous case of Mahboob Shah A.I.R. 1945 P.C. 118 observed:

"To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the Section 34 implies a pre-arranged plan and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan."

32. This pre-arranged plan and prior concert in a given case may even develop on the spot during the commission of offence, but the said plan must precede the act constituting the offence. Therefore the crucial test is whether the said plan preceded the actual act constituting the offence.

33. In the case of Ram Tahal Vs. State of U.P. (1972) I.S.C.C. 136 it was held that the common intention should be anterior in time to the commission of the crime showing a pre-arranged plan and prior concert, and, it is difficult in most cases to prove the intention of an individual, it has to be inferred from the act or conduct or other relevant circumstances of the case. In other words totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence with which they could be connected. The pre-arranged plan may develop on the spot during the course of commission of offence, but the crucial circumstances is that the said plan must precede the act constituting the offence.

34. It is also well settled that presumption of common intention is also subject to the same kind of restrictions as other presumptions and in no case it must take the form of conjecture, surmise or suspicion. Inference of common intention should never be drawn unless it is a necessary inference deducible from the circumstances of the case.

35. We now proceed to examine the question of applicability of Section 34 I.P.C. on the touch-stones of the principles which we have enumerated above. While dealing with motive part the learned Sessions Judge has himself recorded a categorical finding. “However, the fact remains that there is no evidence from the side of the prosecution that any of the accused person had any prior enmity either with Mazharul Haque deceased or Masroorul Haque, P.W. 1. Aftab Ahmad, P.W. 2 has also admitted this fact in his statement, “ This finding of the learned Sessions Judge is based on the evidence on record. It may further be pointed out that Aftab Ahmad, P.W. 2 also admitted in his statement that accused had no enmity with him. Even as per the prosecution case there is no evidence even to indicate that the accused persons had any prearranged plan to commit6 the murder of Mazhaul Haque. The case is that all the four accused persons assembled to put pressure on Aftab Ahmad, P.W. 2 not to do paorvi for his maternal uncle Shamim, killer of Vakilwa’s brother Anisuddin, and for that purpose and with that intention they had come together and the accused Vakilwa asked Aftab Ahmad why he was doing pairvi for Shamim. This utterance of Vakilwa was not liked by deceased Mazhaul Haque and he remonstrated accused Vakilwa where upon accused Imamuddin @ Chottan & Lal Mohammad exhorted their companion saying “MARO SALON KO BAHUT AKAR KAR BAAT KARTE HAIN” and on this exhortation accused Sartaj Mohammad fired upon Mazharul Haque while accused Vakilwa fired on Aftab Ahmad. It is of common experience that allegation of exhortation is often made to make a person vicariously liable for the acts committed by the other accused. Unless evidence in support of the said allegation is clear, cogent and reliable it is not safe to fasten guilt of that person with the aid

of Section 34 I.P.C. In the first information report of the present case it was stated that Lal Mohammad and Chottan exhorted saying "SALE BARI AKAR KAR BHAAT KARTE HO MARO SALON KO" and thereafter they uttered some filthy language. At the trial P.W. 1 Masroorul Haque stated that Lal Mohammad and Chottan exhorted saying "MARO SALON KO BARI AKAR KAR BAAT KARTE HAIN", Faizanul Haque, P.W. 4 also stated likewise. However, none of the witnesses has specified as to what actual words were uttered by each accused. Their evidence indicates as if both these accused persons in chorus and in a parrot like manner uttered same words simultaneously which is beyond our comprehension. In any view of the matter all the accused persons had come with a plan to put a pressure on Aftab Ahmad for not doing pairvi for Shamim in the murder case of Anisuddin. These two persons are said to have given exhortation only to give a beating. The words "MARO SALON KO" did not necessarily mean that they had asked their companion to kill Mazharul Haque or Aftab Ahmad. The very fact that only simple injuries were caused to Aftab Ahmad on account of firing made by Vakilwa lend support to our conclusion that even if we assume that accused Imamuddin and Lal Mohammad had exhorted their companions to make an assault on the victim, it would not necessarily follow that they had asked their companions to shoot and kill Mazharul Haque or Aftab Ahmad. Therefore, it may not be very safe to hold appellants Imamuddin @ Chottan and Lal Mohammad guilty under Section 302 with the aid of Section 34 I.P.C. for the offence of murder committed by accused Sartaj Mohammad. Similarly, we find it difficult to hold appellant Vakilwa guilty of the offence of murder with the aid of Section 34 I.P.C. As already pointed out above, the pre-arranged plan was only to put a pressure on Aftab Ahmad not to do pairvi for his maternal uncle Shamim, in the murder case of Anisuddin. With this end in view accused Vakilwa made utterances to Aftab Ahmad. Aftab Ahmad did not say anything in reply, but Mazharul Haque intervened and remonstrated Vakilwa. There is nothing on record to indicate that accused persons had any plan to make assault on Mazharul Haque, but he abruptly came in between the altercation which accused Vakilwa was having with Aftab Ahmad. The other three accused persons, in such circumstances, could not have even a shost of ideal that Mazharul Haque would intervene and raise protes using bad language. He did not ask nor excited accused Sartaj Mohammad to open fire on Mazharul Haque. It was an individual act of accused Sartaj Mohammad, which could not have been anticipated by accused Vakilwa. Therefore, conviction of appellant Vakilwa of the murder of Mazharul Haque at the hands of appellant Sartaj Mohammad with the aid of Section 34 I.P.C. can not be sustained.

36. Learned A.G.A. appearing for the State argued that accused Vakilwa fired upon Aftab Ahmad while Chottan and Lal Mohammad assaulted Masroorul Haque in the same course of incident and therefore, they facilitated commission of murder of Mazharul Haque by Sartaj Mohammad appellant and in this view of the matter all the appellants should be held guilty under Section 302 read with Section 34 I.P.C. We have already pointed out that there is no evidence, direct or indirect, that the murder of

Mazharul Haque was committed by Sartaj Mohammad in furtherance of common intention of all the accused persons under any pre-arranged plan.

37. The prosecution case further is that as soon as Mazharul Haque intervened and remonstrated accused Vakilwa, Sartaj Mohammad suddenly fired upon Mazharul Haque. It is true that the common intention may develop at the spot during the commission of offence, but it has to be further established that the said plan preceded the act constituting the actual offence. It was, therefore bounded duty of the prosecution to bring on record evidence or other circumstances from which it could conclusively be inferred that there was a prior concert or meeting of mind of all the accused persons for commission of murder of Mazharul Haque before the act of firing was done by accused Sartaj Mohammad. In the absence of any such evidence or circumstances, it would not be safe and proper to hold these three appellants guilty of the offence of murder with the aid of Section 34 I.P.C.

38. As far as the case that the two accused Chottan and Lal Mohammad assaulted Masroorul Haque when he was chasing them is concerned, it is suffice to state that we have already doubted the prosecution allegation that these two appellants had exhorted their companions to kill Mazharul Haque when Sartaj Mohammad opened fire upon Mazharul Haque. When Mazharul Haque fell down on the ground after sustaining fire arm injuries it was natural for these two appellants to flee as they themselves might have been stunned to see the killing of Mazharul Haque at the hands of one of their companions. They could very well have apprehension that if they stayed back they might be apprehended and attacked by those, who were attracted to the scene of occurrence. Therefore, in such a situation their act of causing simple injuries to Masroorul Haque cannot be connected directly or indirectly with the commission of murder of Mazharul Haque at the hands in Sartaj Mohammad. In the facts and circumstance's appearing in the case there is a reasonable doubt that these accused persons shared the common intention with co-accused Sartaj Mohammad and it cannot be said with certainty that murder of Mazharul Haque was committed in furtherance of common intention of all the accused persons.

39. For the reasons assigned above, we find appellant Sartaj Mohammad guilty under Section 302 I.P.C. and we maintain his conviction and sentence of imprisonment for life there under. His conviction and sentence under Section 324 read with Section 34 I.P.C. for causing injuries to Aftab Ahmad at the hands of accused Vakilwa are set aside. The appeal filed by Sartaj Mohammad is allowed to this extend.

40. Conviction and sentence of imprisonment for life under Section 302 read with Section 34 I.P.C. of appellant Vakilwa are set aside. His conviction under Section 324 I.P.C. for causing injuries to Aftab Ahmad is maintained but the sentence is reduced to R.I. for one year and a fine of Rs. 300/-. In default of payment of fine he shall undergo a further R.I. for three months.

41. Conviction and sentence of life imprisonment under Section 302 read

with Section I.P.C. of appellants Lal Mohammad and Imamuddin as well as their conviction and sentence of 2 years rigorous imprisonment and a fine of Rs. 300/- each under Section 324 I.P.C. read with Section 34 I.P.C. are set aside. Their conviction under section 323 I.P.C. read with section 34 I.P.C. is maintained. However the sentence is reduced to the period already undergone and a fine of Rs/ 500/- each. In default of payment of fine each of these appellants shall undergo R.I. for a period of three months.

42. The appeal is accordingly partly allowed. All the appellants are on bail. Appellants Sartaj Mohammad and Vakilwa shall surrender to their bail bonds to serve out their respective sentences as imposed by this Court. On their doing so their bail bonds shall stand cancelled. In case they do not comply with this order within fifteen days. The trial Court shall take prompt and appropriate steps for their arrest and shall put them back in jail for serving out their respective sentences as modified by this Court. Appellant Lal Mohammad and Imamuddin @ Chottan are allowed one month's time to deposit the fine imposed on them, failing which the trial Court shall take appropriate steps against them in accordance with law.

43. Compliance report shall be sent to this Court within two months.

Partly Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.02.2001

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

Habeas Carpus Petition No. 1224 of 2001

Nanha Pahalwan ...Petitioner (In Jail)
Versus
Union of India & others ...Respondents

Counsel for the Petitioner:
Shri K. Shahi

Counsel for the Respondents:
A.G.A.
S.C.
Shri S.M. Misra

National Security Act – Distinction between Law and Order and public order – Detention Order – ground of breach of law and order –not the Public Order – It is for the Court to decide on its own and not on the basis of order passed by the authorities.

Held – Para 2

The distinction between law and order and public order is wall known as it has been discussed in the large number of cases decided by the Supreme Court and this Court. It is well settled that a detention order can be passed not for breach of law and order but for the breach of public order vide State of U.P. vs. Hari Shankar Tiwari AIR 1987 SC 998. In the present case we are of the opinion that there was breach of law and order but not of public order. No doubt the grounds of detention mentions that public order was breached, but we have not to go merely by what the authorities say, otherwise in every case the authorities can say that there was breach of public order and that will be the end of the matter. The Court has to

make its own determination as to whether there was breach of public order.

Case law discussed:

AIR 1987 Section 998

By the Court

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

2. The petitioner is challenging the impugned detention order dated 20.11.2000 under the N.S.A. (Annexure 3 to the writ petition). Several arguments have been raised before us but in our opinion one argument is itself sufficient for this petition to succeed, that is, that it is a case of breach of law and order and not public order. A perusal of the grounds of detention (Annexure 4 to the petition) shows that the dead body of one Pintoo was found and a case under Section 302 was registered. It is very significant that the petitioner was not named in the F.I.R. (copy of which is Annexured). The distinction between law and order and public order is well known as it has been discussed in a large number of cased decided by the Supreme Court and this Court. It is well settled that a detention order can be passed not for breach of law and order but for the breach of public order vide State of U.P. vs. Hari Shankar Tiwari A.I.R. 1987 S.C. 998. In the present case we are of the opinion that there was breach of law and order but not of public order. No doubt the grounds of detention mentions that public order was breached, but we have not to go merely by what the authorities say, otherwise in every case the authorities can say that there was breach of public order and that will be the end of the matter. The court has to make its own determination as to whether there was breach of public order.

3. In view of the above the petition is allowed. The impugned order dated 20.11.2000 is quashed. The petitioner shall be released forthwith unless he is required in some other preventive detention or criminal case.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 2.2.2001

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

Civil Misc. Writ Petition No. 52172 of 1999

Gaya Prasad Upadhyay ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Sanjay Kumar

Counsel for the Respondents:
S.C.
Shri S.K. Pandey
Mr. R.G. Padia

Constitution of India, Article 226 – Acceptance of Tender for collection of Toll Tax – grant of Tender in favour of Respondent no. 4 – after expiry of the period the security withdrawn – the offer given by the Respondent no. 4 came to an end – authorities wrongly given recommendation in favour of Respondent no. – held illegal – direction issued for fresh advertisement and to proceed in accordance with law. Held – (Para 9). The facts of the case in hand clearly show that the authorities of the State have gone out of their way to help respondent no. 4 in the matter and have awarded contract to him in a wholly illegal manner. The order of the

commissioner dated 5.10.1999 awarding the contract to respondent no. 4 cannot, therefore, be sustained and is liable to be set aside.

Case law discussed

AIR 1987 SC 344 AT 350
AIR 1984 SC – 1722
1987 ALJ 590
AIR 1994 SC 988

By the Court

1. This writ petition under Article 226 of the Constitution has been filed praying that the order dated 8.10.1999 passed by the Commissioner, Allahabad Division, Allahabad, awarding contract of collection of toll over Kara pantoon bridge/ferry over river Ganga in District Pratapgarh to Vinod Kumar Pandey, respondent no. 4 may be quashed.

The main ground on which the contract awarded to respondent no. 4 has been assailed is that the same was done. Without any advertisement and without inviting any tender, and on the basis of the private negotiations. The facts averred in the writ petition are not clear and are confusing. The complete facts have been given in the counter affidavit and supplementary counter affidavit sworn by Vinod Kumar Singhal, Assistant Engineer, Construction Division, Public Works Department (hereinafter referred to as the PWD), Pratapgarh, which have been filed on behalf of respondent no. 3. Since these are the only affidavits filed on behalf of the State agencies, namely, respondent no. 1 to 3 and no facts to the contrary have been stated in the counter affidavit filed by Vinod Kumar Pandey, respondent no. 4, we will decide the writ petition on the basis of the facts stated therein.

2. The PWD makes arrangement for a pantoon bridge/ferry over river Ganga at Kara Ghat in district Pratapgarh. The right to realise toll over the said bridge/ferry is let out in accordance with the Northern India Ferries Act, 1878 (in short, the Act). An advertisement was published on 2.8.1997 inviting tenders for realisation of toll over the aforesaid pantoon bridge/ferry for a period of three years. In pursuance to the advertisement 5 tenders were submitted. However, 4 tenders were not found to be in order. The tender submitted by Sri Sarvesh Kumar Misra alone was found to be in order and the Executive Engineer, PWD, Pratapgarh, forwarded the papers to the Commissioner, Allahabad Division, for his sanction. The commissioner vide his order dated 4.11.1997 held that as there was only one tender, it would not be proper to award the contract on its basis. He accordingly directed that fresh tenders be invited. This order was challenged by Sarvesh Kumar Misra by filing C.M. Writ Petition no. 688 of 1998 in which the State was directed to file counter affidavit. On the application for grant of interim relief it was directed that any step taken by the respondents in pursuance to the order of the Commissioner dated 4.11.1997 will be subject to the result of the writ petition. In pursuance to the order of the Commissioner, fresh advertisement was issued in three newspapers inviting tenders upto 3 p.m. on 13.1.1998, which were to be opened at 3.30 p.m. in presence of the tenderers. This time also there was only one valid tender which was submitted by Vinod Kumar Pandey, respondent no. 4 and he had made an offer of Rs. 7 lakhs per year (Rs. 21,00,000/- for three years). It is averred in paragraph 9 of the counter affidavit that the papers were not forwarded to the

Commissioner, as there was only one tender and the amount offered by him was less than the amount of Rs. 7.5 lakhs offered in the earlier advertisement. Subsequently, respondent no. 4 enhanced his offer to Rs. 8 lakhs and then the Executive Engineer vide his letter dated 31.5.1999 forwarded the papers with his recommendation to the Commissioner and the same was accepted by him by his order dated 5.10.1999 and the contract was awarded to respondent no. 4.

3. A copy of the advertisement by which tenders were invited upto 13.1.1998 has been filed as annexure – CA-4 to the counter affidavit. Condition nos. 2 and 3 of the advertisement provide that the tenderer will have to give security of Rs. 1 lakh in the form of Fixed Deposit Receipt of a nationalised Bank of National Savings Certificate pledged in favour of the Executive Engineer and the period of validity of the tender was three months only. The copies of the two letters sent by the Executive Engineer, PWD, Pratapgarh, to the Commissioner, Allahabad Division, Allahabad on 31.5.1999 and 27.9.1999 have been filed as annexures CA-6 and CA-7 to the counter affidavit. It is mentioned therein that as there was only one valid tender which was of respondent no. 4 and he had made an offer of Rs. 7 lakhs only, which was less than the offer of Rs. 7.5 lakhs made in pursuance of the earlier advertisement dated 2.8.1997, the papers had not been forwarded for approval. It is also mentioned that respondent no. 4 had taken back the Fixed Deposit Receipt which had been submitted by him by way of security in September,1998, but he had again submitted the same on 27.5.1999 and, consequently, prior to the said date, it was not possible to make any recommendation in his favour. However, as he had submitted the Fixed Deposit Receipts on 27.5.1999 and had also agreed to enhance the amount of offer to Rs. 8 lakhs per year, the papers were being forwarded for approval. It appears that thereafter the Commissioner, Allahabad Division, passed an order on 5.10.1999 for awarding the contract to respondent no. 4. The case of the petitioner that he had submitted a tender offering Rs. 10 lakhs per year is denied in praragraph 5 of the supplementary counter affidavit. It is also stated therein that after the tender had been opened, the petitioner moved an application on the next day, i.e. on 14.1.1998 offering Rs. 10,16,670 per year (Rs. 30,50,000/- for 3 years).

4. As stated earlier, condition no. 2 of the advertisement notice clearly provided that a tenderer shall have to furnish a security of Rs. 1 lakh by way of Fixed Deposit Receipts of a nationalised bank or National Saving Certificates pledged in favour of the Executive Engineer, and in absence of such a security, the tender shall not be taken into consideration. In condition no. 3 it was mentioned that the period of validity of the tender shall be three months. The facts mentioned above show that respondent no. 4 submitted the tender on 13.1.1998 and, therefore, its validity expired on 13.4.1998. He also withdrew the Fixed Deposit Receipts of Rs. 1 lakh which had been submitted by way of security on 3.9.1998. Therefore, in the eyes of law, there was no valid tender in existence after 13.4.1998 and after withdrawal of security on 3.9.1998 there was no tender at all by respondent no. 4 which could be taken into consideration. A very curious procedure was adopted here by the

Executive Engineer and respondent no. 4 was permitted to furnish security again after about 9 months i.e. on 27.5.1999. There appears to have been private negotiations between the executive engineer and respondent no. 4, and he seems to have enhanced his offer to Rs. 8 lakhs. Thereafter, a letter was sent by the Executive Engineer to the Commissioner, Allahabad Division, on 27.9.1999 recommending that the tender of respondent no. 4 be accepted, which was actually done by the Commissioner vide his order dated 5.10.1999. The respondent no. 4 having withdrawn his security on 3.9.1998, his tender, which was merely an offer to take the contract, came to an end and there was no question of revival of the same after 8 months. No decision was taken on the tender made y respondent no. 4 within the period of three months, which was the period of validity of tender. After he had withdrawn his security on 3.9.1998, the tender made by him also stood withdrawn and ceased to be a valid tender. The authorities acted wholly illegally in thereafter entering into private negotiations with respondent no. 4, giving him an opportunity to furnish security again and in accepting the fresh offer made by him. The only proper course after 3.9.1998 was to issue a fresh advertisement. The award of contract to respondent no. 4 on these facts will clearly amount to grant of contract by way of private negotiations and without any advertisement.

5. It is noteworthy that the executive engineer himself has written in his letter dated 27.9.1999 that as respondent no. 4 had withdrawn his security, it was not possible to make any recommendation in his favour and forward the papers till such time he again furnished the security. Soon after fresh security had been furnished by respondent no. 4 on 27.5.1999 the executive engineer forwarded the papers to Commissioner on 31.5.1999. Another reason given in this forwarding letter is that from April,1998 March,1999 the tolls had been realised by the department it and the income had been only Rs. 4,02,040/- and now respondent no. 4 had made an offer of Rs. 8 lakhs. This can hardly be a ground to award contract to respondent no. 4. If the employees of the department had not discharged their duty properly or had misappropriated the amount realised or they were handicapped on account of some reasons, it can be no ground to award contract to respondent no. 4 by way of private settlement. It is the own case of the respondents (paragraph 5 of the supplementary counter affidavit of the Assistant Engineer) that the petitioner sent an application on the very next day i.e. on 14.1.1998 offering Rs. 10,01,667/- per year (Rs. 30,50,000/- for three years). The offer made by the petitioner was obviously much higher than the offer made by respondent no. 4, and if the amount offered was the sole criteria, there was no reason why an opportunity was not given to the petitioner to fulfil the other requirements of the advertisement. It may be noted here that the case of the petitioner is that he could not submit a tender on 13.1.1998 as he was forcibly prevented by criminal elements to submit tender and he sent the copy of the tender on the same day through Fax and had moved an application on the very next day.

6. The advertisement provided that the tenders would be opened on 13.1.1998 and the period of validity of tender would be three months. The recommendation in favour of respondent no. 4 has been made

by the executive engineer to the Commissioner for the first time on 31.5.1999 and then again on 27.9.1999 and the order in his favour has been passed by the Commissioner on 5.10.1999 long after the expiry of the period of validity of the tender. Respondent no. 4 having withdrawn his security on 3.9.1998, his tender could not be taken into consideration view of clear stipulation to the effect in condition no. 2 of the advertisement. In the opening part of the advertisement, it was mentioned that a defective, conditional or incomplete tender shall not be considered. After withdrawal of security the offer made by respondent no. 4 came to an end, and whatever has been done subsequent thereto, was a case of a fresh offer by respondent no.4. All proceedings taken after 3.9.1998 have obviously been done by way of private negotiations, and they cannot be treated to have been done in pursuance of the advertisement which had been issued. It is well-settled that where the State is awarding contracts, it should be done only after an advertisement, so that public at large gets an opportunity to participate and there is fair competition. In Fertilizer Corporation Kamagar Union Vs. Union of India. AIR 1981 SC 344, at 350, a Construction Bench observed as follows:

"……we want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicly. The vendors are not necessarily bound to accept the higher or any other offer, but the public at least gets the satisfaction that the Government has put all its cards on the table."

7. In State of U.P. Vs. Shiv Charan Sharma AIR 1981 SC 1722, the dispute was with regard to grant of lease for excavating sand and minor minerals. It was observed that the State should sell the right by public auction and not on application of a party as public auction with open participation and a reserved price guarantees public interest being fully subserved. In Khilodhar Vs. Addl. District Magistrate (RA), Allahabad and others, 1987 ALJ 590, a Division Bench of this Court, speaking through K.J. Shetty,CJ (as his lordship then was) held as follows with regard to grant of fisheries rights:

"When the statute prescribes particular procedure for disposing of certain rights the authorities should not be permitted to circumvent that procedure. The disposal of any right by public auction is a wholesome procedure. It is advisable to follow that procedure even if it has not been specifically prescribed but when prescribed it must be faithfully followed. It must not be disregarded."

8. In Union of India Vs. Hindustan Development Corporation, AIR 1994 SC 988, it was observed that the Government while entering into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. An action should not be arbitrary, irrational or irrelevant. It was further held that in the matter of awarding contracts inviting tender is considered to be one of the fair ways. Thus, it is well-settled by a catena of decisions that while entering into cont4acts or granting other form of largesse the Government cannot act arbitrarily at it sweet-will and it cannot chose to deal with any person as it

pleases. An open auction guarantees fairness as everyone gets a chance to participate and the Government gets the best price for its goods.

9. The facts of the case in hand clearly show that the authorities of the State have gone out of their way to help respondent no. 4 in the matter and have awarded contract to him in a wholly illegal manner. The order of the Commissioner dated 5.10.1999 awarding the contract to respondent no. 4 cannot, therefore, be sustained and is liable to set aside.

10. In the result, the writ petition succeeds and is hereby allowed. The order dated 5.10.1999 passed by the Commissioner, Allahabad Division, awarding the contract to respondent no. 4 to realise the toll on Kara Ghat in district Pratapgarh is hereby quashed. The authorities are directed to issue a fresh advertisement and proceed in accordance with law expeditiously, preferable within one month from today, for awarding the contract to realise the toll in question on Kara Ghat in district Pratapgarh. In order to avoid any public hardship and loss to public exchequer, it is further directed that respondent no. 4 shall be permitted to continue to realise toll on the ghat in question till a fresh arrangement is made. He shall pay the amount for the period for which he will collect the toll which shall be calculated on the basis of Rs. 8 lakhs per year.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 06.02.2001

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

Civil Misc. Writ Petition No. 55722 of 2000

M/s Hindustan Ferro & Industries Ltd. and another ...Petitioners
Versus
Debt Recovery Tribunal and others ...Respondents.

Counsel for the Petitioners:
Shri R. N. Singh
Shri A.K. Kalara
Shri Rakesh Kumar

Counsel for the Respondents:
Shri Satish Chaturvedi

Constitution of India, Article 226 and 227 – Writ Petition against the order passed by the Tribunal u/s 19 of Recovery of Debt Dues to Banks and Financial Institution Act 1993 – Petitioner seeking direction to the Appellate Tribunal to stay the recovery proceeding till the appeal is decided – despite of statutory remedy High Court can exercise the supervisory power.
Held – Para 4
Case law discussed
AIR 1999 SC 1975

By the Court

1. The woodcut profile of the case of the petitioner no. 1, a company duly registered under the Companies Act, 1956, carrying on the business of manufacturing Ferro Silicon and of which the petitioner no. 2 is the director is that an agreement was executed in 1990 between petitioner company and respondent no. 2 – State Bank of India, Industrial Finance Branch, Sarvodaya

Nagar, Kanpur for grant of credit facility. It was renewed on 03.11.1997. The credit facility was granted to the petitioners on hypothecation of stock, stores, spares and finished goods etc. That apart, U.P. Financial Corporation Limited and Pradeshiya Industrial and Investment Corporation of U.P. have also granted term loans to the petitioners and they have the first priority/charge to claim fixed assets of the company, such as land, building, plant, machineries etc. On the amount of loan, the respondent no. 2 – Bank had charged interest of about Rs. 20 lacs, with the result that the petitioner company could not pay off the loan amount, and it became sick unit in 1998. Thereafter, the promoters had taken over the company and the respondent no. 2-bank had issued clean credit to the tune of Rs. 70 lacs to the promoters. The petitioner claim that they have repaid a sum of Rs. 46,56,565 to the Bank. However, despite this, the Bank continued to charge excess interest from the petitioner. The amount of interest sought to be charge excess interest from the petitioners. The amount of interest sought to be charged by the Bank swelled to Rs. 13,25,000. The petitioners filed a complaint and referred the matter to the Banking Ombudsman, Kanpur an authority constituted under a scheme (Annexure 1) formulated by the Reserve Bank of India under the Banking Regulation Act, 1949. A notice was issued to the Bank which submitted its reply on 15.07.2000, a copy of which is Annexure 3 to the petition. The Banking Ombudsman, thereafter respondent no. called upon the petitioners to furnish details, as required by the Bank. The petitioners submitted their reply and thereafter the matter remained pending before the Banking Ombudsman. During the pendency of the aforesaid matter before the Banking Ombudsman, the respondent no. 2 – Bank called upon the petitioners through a notice dated 12.06.2000 (Annexure 5) to make payment of cash credit to the Bank within 10 days from the date of receipt of the notice. The petitioners were warned that in case they fail to make aforesaid payment, proceedings under Section 19 of the Recovery of Debt Due to Bank and Financial Institutions Act, 1993 (hereinafter referred to as 'the Act') shall be initiated. The petitioners failed to make payment and instead they submitted a reply to the Bank on 23.06.2000. The respondent no. 2-Bank, therefore, moved an application before Debt Recovery Tribunal (for short called 'the D.R.T.') registered as O.A. No. 90 of 2000, under Section 19 of the Act for recovery of Rs. 39,24,379.52 from the petitioners. The petitioners moved an application duly supported by an affidavit praying for stay of the proceedings under Section 19 of the Act on the ground that the matter is sub judice before Banking Ombudsman. The application of the petitioners has been rejected by the D.R.T., Allahabad-respondent no. 1 by the impugned order dated 01.12.2000. Annexure 8 to the petition. It is this order which has given rise to the present writ petition under Articles 226 and 227 of the Constitution of India. The petitioners have prayed for quashing of the order dated 11.12.2000 passed by the respondent no. 1 – Tribunal and for a direction in the nature of mandamus commanding the respondent no. 2 to stay the proceedings till the complaint no. 75 of 2000 is finally decided by the Banking Ombudsman, Kanpur.

2. Heard Sri R.N. Singh, learned Senior Advocate, assisted by Sri Rakesh Kumar and Sri Satish Chaturvedi for the State Bank of India as well as learned Standing Counsel.

3. The learned Standing Counsel raised a preliminary objection that the present petition is not maintainable in view of the fact that the D.R.T. has been constituted under Section 3 of the Act and an appeal against an order passed by the Tribunal lies under Section 20 of the Act before the Debts Recovery Appellate Tribunal (for short called 'the D.R.A.T.') constituted under Section 8 of the Act, Section 17(2) of the Act, provides that an Appellate Tribunal (DRAT) shall exercise, on an from the appointed day, the jurisdiction , powers and authority to entertain appeals against any order made, or deemed to have been made by a tribunal under the Act Sri R.N. Singh, learned Senior counsel repelled the aforesaid submission and urged that this court has the jurisdiction, under Articles 226 and 227 of the Constitution, to analyse and scrutinise the correctness, propriety or otherwise of the interim order passed by a tribunal or subordinate court. To fortify his submission, he placed reliance on a decision of the apex court in **Industrial Credit and Investment Corporation of India Vs. Grapco Industries Ltd. and others** – AIR 1999 Sc-1975. The provisions of Sections 3(1) and 19(6) of the Act came to be interpreted in the said case. In paragraph 14 of the report, it was held :-

"14. …..There was no bar on the High Court to itself examine the merits of the case in the exercise of it jurisdiction under Article 227 of the Constitution if the circumstances so require. There is no doubt that High Courts and tribunals even interfere with interim orders of the Courts and tribunals under Article 227 of Constitution if the order is made without jurisdiction. But then a too technical approach is to be avoided. When facts of the case brought before the High Court are such that High Court can itself correct the error, then it should pass appropriate orders instead of merely setting aside the impugned order of the Tribunal and leaving everything in vacuum."

4. The provisions of Section 18 of the Act bars the jurisdiction of other court or authority, in relation to the matters specified in Section 17, except the Supreme Court and a High Court exercising jurisdiction under Article 226 and 227 of the Constitution. Therefore, this legal position that this court has the power to interfere, if the circumstances so require, is beyond the pale of challenge. In appropriate matters, this court will not hesitate to intervene if the justice demands even though there is an alternative statutory remedy of appeal under Section 20 of the Act.

5. Now the moot point for consideration is whether on account of the complaint pending before the Banking Ombudsman under the Banking Ombudsman Scheme, 1995 (hereinafter referred to as 'the Scheme') the proceedings in O.A. No. 90 of 1999 before the D.R.T. are required to be stayed. At the outset, it may be pointed out that the scope, object and purpose of the Scheme and that of the Act are entirely distinct and different. They operate in entirely different fields. While the object of the Scheme is to enable resolution of complaints relating to provisions of banking services and to

facilitate the satisfaction, or settlement of such complaints, the purpose of the Act is to provide for the establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. The statement of the objects and reasons in the form of prefatory note records that Bank and Financial Institutions experienced considerable difficulties in recovering loans and enforcement of securities charged with them. The procedure for recovery of debts due to Banks and Financial Institutions as was prevailing prior to the enactment of the Act has blocked a significant portion of their funds in unproductive assets, the value of which deteriorated with the passage of time. It was for this compelling reason and to obviate the difficulties in recovering debts due to the Banks and Financial Institutions that the Act was brought on the statute book. A particular procedure has been prescribed in the Scheme to entertain and process the complaints with a view to facilitate the satisfaction of its customers with regard to banking services. The scheme has nothing to do with the proceedings of recovery of debts due to the banks and financial institutions. A scheme formulated by the Reserve Bank of India under the Banking Regulation Act, 1949 cannot override or nullify the provisions of the Act. As a matter of fact, the application moved by the petitioners to stay the proceedings in the suit for recovery of dues on the ground of pendency of their complaint under the scheme was misconceived.

6. The contention of Sri R N Singh, learned Senior Counsel that the Presiding Officer has rejected the application of the petitioners merely on the ground that he has no power to pass interim order does not bear an impress of reality. It distorts the reasoning enumerated in the impugned order.

7. The various provisions of the Act have been drastically amended by the Amendment No. 1 of 2000. There has been substitution of new Section for Section 19. Sub-section (25) of newly substituted section 19 provides as follows:

"(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of process or to secure the ends of justice".

8. It is, thus, indubitable legal position that the D.R.T has the jurisdiction and competence to pass interim orders as may be necessitated to prevent the abuse of its process or to secure the ends of justice. An application seeking interim orders cannot be shelved or rejected on the mere assumption that the D.R.T. has no power to pass interim orders. The amendment and substitution of Section 19 explodes the myth. Indubitable, now the D.R.T. has power to pass interim orders.

9. A bare reading of the impugned order clearly shows that the Presiding Officer, D.R.T. has nowhere mentioned that he has no power to pass an interim order. The Tribunal has refused to pass an interim order on the application of petitioners solely on the ground that the application was not maintainable as reference to the Scheme was otiose and uncalled for.

10. In the conspectus of the above facts, even though a petition under Article

226 and 227 of Constitution may be entertained, in appropriate cases in view of the decision of the apex court in **Industrial Credit and Investment Corporation of India Ltd.** (Supra), I feel persuaded to observe that it is not a case, fit enough requiring invocation of the extraordinary writ jurisdiction by this court. Accordingly, the writ petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 06.02.2001

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

Special Appeal No. 282 of 2000

District Judge, Bulandshahr and another ...Petitioner
Versus
Bhudev Sharma ...Respondent

Counsel for the Petitioners:
Shri K.R. Sirohi
Shri Sudhir Agrawal

Counsel for the Respondents:
Shri Y.S. Bohra
Shri V.K. Shukla

Limitation Act – Condonation of delay of 2 years 212/213 days in filing Special Appeal – Sufficient cause – Writ by respondent against order of District Judge denying respondent appointment to Class III post under physically handicapped quota as per two G.O.s – Writ allowed by Single Judge directing D.J. to appoint petitioner to Class III post – No vacancy existing – Respondents totally blind – Totally unfit for work – Being paid full salary etc. without any work – District Judge sought direction from High Court on its Administrative side – Ultimately High Court on administrative side permitted appellants to prefer Special Appeal – Held, that sufficient cause made out – Application for condonation of delay allowed.

Held-Para 7

Undisputedly the appellants are constitutionally subordinate to the High Court under Article 235 of Constitution of India. They were parties to the judgement passed by this Court which was thus binding on them. The Appellant No. 1 sought for a guidance, on the administrative side of this court. The court on its administrative side asked them to file a Special Appeal and that is how this appeal was filed. These facts have not been put in dispute by Sri Shukla before us. True it is that we cannot express ourselves at this stage in regard to the merits of the Special Appeal nor we intend to do so in view of the decision strongly relied upon by Sri Shukla. However, in view of the three decisions cited at the Bar by Sri Agarwal we are of the view that a sufficient cause has been successfully made out by the appellants through the condonation application and their rejoinder to the Counter Affidavit of the respondent. Thus we are satisfied of the sufficiency of cause pleaded and condone the delay occurred in preference of this Special Appeal.

Case law discussed
(1988)2 SCC 142
(1996)3 SCC 132
(1998)7 SCC 123
AIR 1981 SC 1921

By the Court

1. Through this Special Appeal filed on 25.05.2000 the Appellants – the District Judge, Bulandshahr and Chairman of the Selection Committee, assail validity of the Judgement and order dated 25.09.1997 passed by a learned

Single Judge of this Court allowing Respondent's Civil Misc. Writ Petition No. 5649 of 1997 filed for quashing the order dated 21.01.1994 passed by Appellant No. 1 rejecting his representation dated 15.1.1994 with a further prayer to command the appellants to consider his appointment against Class III post is reserved category pursuant to the 1992 examination. By the impugned Judgement and Order the learned Single Judge had disposed of the writ petition directing the Appellant No. 1 to offer an appointment to the Respondent against Class III post which may be existing on that day with a further direction that if no vacancy is in existence at the moment, then he shall be appointed against the very next vacancy which may occur in near future after holding that the Respondent has made out an iron-cast case for being appointed in one of post in Class III under the quota of physically handicapped persons.

2. Delay of 2 years 212/213 days in filing of the Special Appeal is sought for in the following backdrop constituting sufficiency of the cause:- Even though vacancy for physically handicapped persons to be appointed as a Class III employee pursuant to 1992 Examination Test stood filled up and thereby there was no vacancy on which the Respondent, who because of his total blindness cannot work at all and had not even qualified in the written examination could not be appointed in terms of his prayer made in his writ petition bearing Civil Misc. Writ Petition No. 5649 of 1997, yet a learned Single Judge of this Court, without considering the true factual and legal position emerging out of two G.O.'s, issued a mandamus commanding the District Judge, Bulandshahr to offer an appointment to him against Class III post which may be existing today or if no vacancy is in existence at the moment in that event he shall be appointed against the very next vacancy which may occur in judgeship in near future, showing all respect and obedience to the aforesaid direction the then District Judge, Bulandshahr gave an appointment to the Respondent on Class III post vide his order dated 07/11/1997 (Annexure-I); the Respondent was/is not in a position to work due to his total blindness; despite this, the matter was being considered as to what remedy may be sought for against the order passed by the learned Single Judge of this Court, as it was not legally possible to accommodate the Respondent as there was no vacancy; finally the District Judge, Bulandshahr sought guidance vide letter dated 17.04.1999 (Annexure-2); the matter was placed before the Hon'ble Acting Chief Justice of this Court on 25.04.2000 proposing that the District Judge, Bulandshahr may be asked to file Special Appeal; the Hon'ble Acting Chief Justice was pleased to approve the proposal vide order dated 26.04.2000; thereafter a communication was made on 08.05.2000 by the Joint Registrar of the Court to the District Judge, Bulandshahr vide letter No. 6451/22A Admin(D) which was received by the District Judge, Bulandshahr on 12.05.2000 (copy of the letter appended as Annexure-3); immediately on receipt of the same steps were taken to file this Special appeal; the appellants have neither committed wilful default nor negligence in moving this Court; the appellants shall suffer irreparable harm and injury and as such in the facts and circumstances the delay be condoned.

3. In the counter affidavit filed by the respondent the prayer has been opposed stating, inter alia, that with effect from 13.11.1997 till date he has been regularly discharging his duty as Class III employee of the judgeship of Bulandshahr on the basis of an order issued by the then District Judge on 07.11.1997; there has been no complaint whatsoever against his functioning; no explanation whatsoever has been given for the period commencing with effect from 07.11.1997 up to 17.04.1999 and there has been a gross delay and latches on the part of the appellants in moving this Court; it has not at all been disclosed as to in what way and manner after offering his appointment the matter was being considered; factually incorrect, fictitious and false affidavit has been filed without any semblance of truth; the letter dated 17.04.1999 (Annexure-2) was not at all in respect of preference of the appeal the contents of which he was never apprised at any point of time earlier; the counter affidavit filed by the appellants in the writ petition also contained incorrect facts, and that thus in all factuality the delay condonation application is liable to be dismissed with cost.

4. The appellants in their Rejoinder reassert the correctness of facts stated in the Affidavit filed along with the limitation petition.

5. Sri Sudhir Agrawal, learned Special Counsel of the Court appearing in support of the delay condonation application, contended as follows:- It would be in the interest of justice to condone the delay occurred in view of the apparent facts and the legal position specially that the quota for physically handicapped persons against which the writ petitioner claimed appointment had already filled up and there was no other vacancy at all against that quota or any other quota and thus the learned Single Judge could not have issued the mandamus for his appointment against a non-existing vacancy; there was no prayer of the Respondent for commanding the State to create a post for him; since 07.11.1997 the Respondent being totally blind has not at all discharged any function of a Class III employee, yet he was paid full pay, dearness allowance etc. as a result of which there is possibility of growing in-discipline in other employees as he was getting his salary etc. without any work; and in this backdrop it was requested from this Hon'ble Court on its administrative side for giving a proper direction in regard to taking work by him of a Class III employee and utility of his services; ultimately this Hon'ble Court on its administrative side permitted the appellants to prefer the Special Appeal; by now it is well settled by a catena of decisions of the Apex Court viz. a viz. (I) **G.Ramguda Vs. Special Land Acquisition Officer** 1988(2) SCC 142 (ii) **State of Haryana Vs. Chandra Mani** 1996 (3) SCC 132 and (iii) **N.Balakrishnan Vs. M.Krishnamurti** 1998(7) SCC 123 that when the question of public justice or expenditure of public exchequer are involved the Court should hear the matter on merits after condoning the delay and the facts and circumstances of this case are such in which an opportunity be granted to the appellants so that the questions involved in the Special Appeal be finally adjudicated by this Hon'ble Court.

6. Sri V K Shukla, learned counsel for the respondent, on the other hand contented that the appellants have failed

to allege and prove sufficiency of the cause justifying condonation of delay. He also contended that in view of the decision of the Apex court is State of Gujarat Vs. Sayed Mohd. Baquir El Edross 1981 SCC 1921 a strong case for acceptance of this Special Appeal on merits is no good ground for condonation of delay.

7. The question before us is as to whether the Appellants have established sufficiency of the cause for condonation of delay occurred in preference of this Special Appeal. Undisputedly the appellants are constitutionally subordinate to the High Court under Article 235 of Constitution of India. They were parties to the judgement passed by this Court which was thus binding on them. The Appellant No. 1 sought for a guidance on the administrative side of this Court. The Court on its administrative side asked them to file a Special Appeal and that is how this appeal was filed. These facts have not been put in dispute by Sri Shukla before us. True it is that we cannot express ourselves at this stage in regard to the merits of the Special Appeal nor we intend to do so in view of the decision strongly relied upon by Sri Shukla. However, in view of the three decisions cited at the Bar by Sri Agrawal we are of the view that a sufficient cause has been successfully made out by the appellants through the condonation application and their rejoinder to the Counter Affidavit of the respondent. Thus we are satisfied of the sufficiency of cause pleaded and condone the delay occurred in preference of this Special Appeal.

8. The delay condonation application is allowed.

9. Let the Stamp Reporter submit a further report and thereafter the office will place this Special Appeal for its admission at the earliest.

Application Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 03.01.2001

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

Civil Misc. Writ Petition No. 50723 of 2000

Subhash Chand and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri Narendra Kumar Yadava
Shri S.N. Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Practicedure and Procedure – Prayer for rechecking or revaluation – B.T.C. Entrance Examination – Petitioner by unsuccessful candidate in absence of any Statutory Rules High Court not interfered.
Held – Para 4
Case law discussed
1992(2) SCC – 220 (AIR 1992 SC 917)
1984 (Supply) SCC – 372
AIR 1984 SC 1543

By the Court

1. The short question that arises for consideration in this petition is whether the answer books of the petitioners can be rechecked or revalued in absence of any statutory rule.

2. For appointment of teachers in Government Primary Schools, B.T.C. Entrance Examination was held for the session 1998-99 by the Principal District Education and Training Centre, Saidpur, District Ghazipur. The petitioners being qualified and eligible for appointment as teacher applied. They appeared in the examination but the result was not declared. This court issued a direction on 06.02.2000 for declaration of results and the respondents declared results of both sessions 1997-98 and 1998-99. In the merit list declared by the respondents, the petitioners were not selected.

3. This petition has been filled by the petitioners on the allegations that the petitioners should have been awarded 90% marks in the B.T.C. entrance examination 1998-99, but the respondents intentionally disqualified the petitioners though they were sure that they would get sufficient marks and qualify in the entrance examination. It is prayed that the answer book of the petitioners be summoned and be rechecked and revalued with model answer books and thereafter declare the result of the petitioners of B.T.C. entrance examination 1998-99.

4. Shri Narendera Kumar Yadav the learned counsel for the petitioners has vehemently urged that the petitioners are good students and according to their self-assessment they should have secured about 90% marks in the B T entrance examination session 1998-99, but the respondents intentionally declared the petitioner to be unsuccessful. He urged that the answer books of the petitioner be summoned and rechecked and revalued with model answer books and the result of the petitioners be declared. The learned counsel further urged that this court has summoned the answer books of the petitioner on 23.11.2000. Since the respondents have not produced answer books, therefore, this petition cannot be decided till the respondents comply with the order of this court.

5. On the other hand, Shri S N Srivastava the learned standing counsel appearing for respondents has urged that there is no provision under which rechecking or revaluation of the answer book can be done by the respondents and in absence on any statutory provision the petitioner are not entitled for any relief. He further urged that self-assessment made by the examiners to the petitioner in the entrance examination were incorrect. The learned counsel further urged that even though the answer books have not been produced by the respondents nor any counter affidavit has been filed this court may accept the allegations made in the writ petition and decide it on merits.

6. The question is whether in absence of any statutory rule this court can direct rechecking or revaluation of the answer books of the petitioners. The petitioners appeared in B.T.C. entrance examination 1998-99 and were declared unsuccessful. Answer books could be revalued or rechecked if the rules provide for it. In absence of any statutory rule the answer books cannot be rechecked or revalued by the respondents nor such a relief can be granted by this court. The petitioners may be good students but that cannot entitle them to make self assessment and claim that they should have been awarded 90% marks. If self assessment is adopted as the basis of evaluating answer books in an examination and this court is asked to interfere on this ground then the entire

system of competitive examination shall come to a standstill and this court shall stand converted into an evaluating body of answer books.

7. The apex court in "Bhushan Uttam Khare Vs. Dean B Jurisdiction Medical College, 1992 (2) SCC 220: (AIR 1992 SC 917) has held as under :

"In deciding the matters relating to orders passed by authorities of educational institutions, the Court should normally be very slow to pass orders in its jurisdiction because matter falling within the jurisdiction of educational authorities should normally be left to their decision and the Court should be interfere with them only when it thinks it must do so in the interest of justice."

8. The apex court in "Arun Desai Vs. High Court of Bombay through Chief Justice, reported in 1984 (Supp) SCC 372, has held as under:

"Students who fails in their examinations are generally prone to make allegations that the assessment of their answer script is defective, arbitrary or partial to explain their faliure and to console themselves with the thought that not they but the examiners are to be blamed for that"

9. The learned counsel for the petitioner could not point out any statutory rule which permits rechecking or revaluation of answer books. Therefore, in absence of any statutory rule permitting rechecking or revaluation of the answer books in BTC entrance examination the petitioners have no right to claim rechecking or revaluation of their answer books.

10. The other argument of the learned counsel for the petitioner is that the respondents intentionally declared the petitioner unsuccessful. No material has been filed alongwith the petition to establish that the examiners or the respondents were actuated by any malice or bias or any other consideration for which the petitioners were given lesser marks that what they actually deserved. Self-assessment has been made by the petitioner without any basis. The court in writ jurisdiction cannot direct for rechecking or revaluation of the answer books of the petitioners.

11. The apex court in "Maharastra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupesh Kumarasheth, AIR 1984 SC 1543 has held as below:

"a process of evaluation of answer papers or of subsequent verification of marks does not attract the principles of natural justice since no decision making process which brings about adverse evil consequences to the examines is involved. The principle of natural justice cannot be called to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners.

It was further held in this decision that it is in public interest that the results of public examination when published should have some finality attached to

them. If inspection and verification in the presence of the candidates and revaluation are to be allowed as of right, it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking etc. of the candidates, besides leading to utter confusion on account of the enormity of the labour and time involved in the process.

It was further held in the instant case that the Court should be reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them."

12. The petitioner have neither given facts nor they have filed any material to show that the respondents intentionally declared them unsuccessful. The vague allegations made in this petition cannot be accepted.

13. The next argument of learned counsel for the petitioners is that once this court summoned the answer books the petition could not be decided unless the respondents complied with the order. The argument of the learned counsel for the petitioners is devoid of any merit. Interim order is not binding and the court can decide the petition finally or merits. The learned standing counsel has very fairly urged that the order of this court has not been complied nor any counter affidavit has been filed, therefore, the court may accept the allegations made in the writ petition to be correct and decide the petition on merits. I have examined the records of the petition but I am not able to persuade myself to accept the claim of the petitioners. The petitioners cannot succeed on the basis of self-assessment made by them now this court can issue a director for rechecking or revaluation of the answer books of the petitioners in absence on any statutory rule.

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

This writ petition fails and is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 06.02.2001

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

Civil Misc. Writ Petition No. 3388 of 2001

Smt. Sumitra Devi and others...Petitioner
Versus
District Judge, Chitrakoot and others
...Respondents

Counsel for the Petitioners:
Shri A.K. Singh

Counsel for the Respondents:
Shri N.C. Tripathi

Code of Civil Procedure – Order 22 are applicable in proceeding before small causes court Act – held 'No' – Question of abatement does not arise when the parties are already on record.

Held- Para 5

The purchase of share of Bhairo Prasad and Rajeshwar Prasad by Onkar Nath was not disputed before the Revisional Court and was admitted in the objection against the above application. Therefore, it was rightly held by the Revisional

Court that on the death of Bhairo Prasad Goyal the suit has not abated, as the plaintiff no. 1 on whom his interest devolved was already on record and as held by the Apex Court in the case of Mohammed Arif Vs. Allah Rabbani Alamin and others, AIR 1982 SC 948 when party was already on record sufficiently representing property of the deceased respondent there is no necessity of application to bring the legal representative of deceased on record.

Case law discussed

AIR 1982 SC 940
AIR 1983(2) ARC-85
AIR 1997 Alld 551

By the Court

1. This writ petition has been filed for quashing the order dated 17.11.2000 passed by respondent no. 1 in Civil (SCC) Revision no. 15 of 98 allowing the revision and setting aside the order dated 06.11.1998 passed by Judge, Small Causes Court and allowing the substitution application moved on behalf of the respondents.

2. The plaintiff respondent no. 1 filed suit for ejectment and arrears of rent against the defendant petitioners on the ground of default in payment of rent. Defendants contested the suit on the ground that provisions of U.P. Act no. 13 of 1972 were applicable to the premises in question and he was entitled to the protection of the said Act. Therefore, by simple notice under Section 106 of Transfer of property Act his tenancy could not be terminated. The Trial Court decreed the suit holding that provisions of U.P. Act no. 13 of 1972 were not applicable to the premises in question and tenancy was terminated on service of notice under Section 106 of Transfer of Property Act.

3. Aggrieved with the above order the tenants preferred revision before this Court being Civil Revision no. 3327 of 1997. The above revision was allowed and case was remanded on question of benefit of provisions of U.P. Act no. 13 of 1972 to the defendants and the question of validity of notice, vide order dated 30.06.1980.

4. After remand the defendant Onkar Nath Dwivedi died on 31.01.1996. Application for substitution of his legal representatives was moved on 14.08.1981 along with application under Section 5 of Limitation Act for condonation of delay in moving application for setting aside the abatement/substitution. The Trial Court rejected the above application on the ground that it was moved beyond time, the case had already been abated and there was also no sufficient ground for setting aside the abatement. The landlord thereafter preferred revision before the District Judge who allowed the revision by the impugned order setting aside the order of the Trial Court and allowed the substitution application on payment of Rs 200/- as costs.

It have heard the learned counsel for the petitioners and learned counsel for respondents no. 2 and 3.

5. It was contended by learned counsel for the petitioner that Bharro Prasad Goyal also died, but no substitution application of his legal representatives was moved and thereafter, the case has already abated. In his application for substitution /amendment Omkar Nath Agarwal had categorically mentioned that he had purchased share of Bhairo Prasad Goyal and Rajeshwar Prasad Goyal and therefore they ceased

their interest in the property. A request was made to mention "dead" against the name of Bhairo Prasad Goyal. The purchase of Share of Bhairo Prasad and Rajeshwar Prasad by Onkar Nath was not disputed before the Revisional Court and was admitted in the objection against the above application. Therefore, it was rightly held by the Revisional Court that on the death of Bhairo Prasad Goyal the suit has not abated, as the plaintiff no. 1 on whom his interest devolved was already on record and as held by the Apex Court in the case of Mohmmad Arif Vs. Allah Rabbani Alamin and others AIR 1982 SC 948 when party was already on record sufficiently representing property of the deceased respondent there is no necessity of application to bring the legal representative of deceased on record.

6. The next contention of the learned counsel for the petitioner was that the application moved by petitioners was not a substitution application but an amendment application. This contention is too technical. By moving application Annexure no. 3 the respondent has prayed for making amendment by bringing heirs of defendant no. 1 on record. It may be said that application was not happily worded incorporating word "substitution" in the prayer, but on that technical ground the application cannot be rejected as justice should not be denied on technicalities.

7. The next contention of the learned counsel for the petitioners was that the direction of this Court in revision was that provisions of U.P. Act no. 13 of 1972 are applicable and therefore the provisions of Order XXIII C.P.C. are also not applicable consequently no substitution application can be moved. He also placed reliance on case law Smt. Premwati and others Vs. The IVth Additional District Judge, Bareilly and others 1983(2) ARC, 85. The above contention of the learned counsel for the petitioners is misconceived as in the case realied on by him, it was held that provisions of Order XXII of Code of Civil Procedure have not been made applicable to the proceedings under Section 21 of U.P. Act no. 31 of 1972 nor there is any analogous provisions in the Act or the Rules framed thereunder. The proceeding in question was not under Section 21 of U.P. Act no. 31 of 1972 but it was a proceeding under Provincial Small Cause Courts Act and in proceeding governed by Provincial Small Cause Courts Act certain provisions of C.P.C. are applicable. Assuming that the provisions of Order XXII C.P.C. are not applicable to the present proceeding them there was no question of abatement or bringing the legal representatives of deceased defendant on record as held in the said case.

8. It was further contended by the learned counsel for the petitioners that substitution application was beyond time and it could not be allowed. The respondents had also moved application for condonation of delay in moving the substitution application and setting aside the abatement. The Revisional Court has considered the above application and condoned the delay. It is not disputed that Onkar Nath died on 13.09.1996 and application was moved on 14.08.1997 i.e. after lapse of one year and 7 months. Limitation for moving is 150 days (90 days for moving substitution application + 60 days for moving application for setting aside the abatement) and therefore the application was 14 month beyond time. The Revisional Court has considered the

ground for delay and rightly condoned the same. The discretion of the Revisional Court condoning delay therefore cannot be interfered with in exercise of jurisdiction under Article 226 of the Constitution.

8. Lastly it was contended that case had already abated and therefore the separate applications for substitution and for setting aside abatement would have been moved, but only one application was moved. This contention has also no force. It was held by this Court in case of Smt. Shakuntala Devi Vs. Banwari Lal AIR 1977 All. 551 that the application for substitution can be treated as an application for setting aside the abatement and for bringing on record heirs and legal representatives of the deceased respondent. It was further held in the said case that separate and formal application under Section 5 of Limitation Act is also not necessary. Court can decide whether delay deserves to be condoned on facts stated on affidavit in the application for setting aside abatement. Therefore separate applications were not required.

9. Lastly it was also contended by learned counsel for the petitioners that since no specific prayer for setting aside abatement and substitution was made the Revisional Court wrongly allowed application. Reliance was also placed on case of Apex Court decision in Shre Jain Swetamber Terapanthi vid(S) Vs. Phundan Singh and Others, J.T. 1999(1) SC 380. The above case is not applicable to the facts of the present case as in the said case it was held that relief should be granted on pleadings of parties and no relief in interlocutory proceeding should be granted beyond the scope of the suit. The above case was totally on different point.

10. In view of above discussions and observations I find that there is no scope for interference in the impugned order in the exercise of jurisdiction under Article 226 of the Constitution.

The writ petition having no force and is liable to dismissed.

The writ petition is accordingly dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 17.01.2001

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

Criminal Misc. Application No. 104 of 2001

Surendra Nath Singh alias Bharat Singh ...Applicant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri Rakesh Chandra Upadhyay
Shri Gopal S. Chaturvedi

Counsel for the Respondents:
Shri Girdhar Nath

Code of Criminal Procedure, 1973 SS 173(8) and 154 challenge the order of Special Court CBI was authorised by State Government to investigate this case after the charge sheets were submitted by the local police before CJM, Court taken cognisance in the matter for commitment alone is entitled to proceed with the CBI charge sheet – Two cross versions – one pending before CJM Court at Varanasi and another by Special Court

(CBI) at Lucknow – Hence Special Court (CBI) at Lucknow – directed to transfer. The charge sheet submitted by CBI to CJM, Varanasi.

Held – Para 12

In my opinion, CBI had to submit its reports after conclusion of its investigation to the Government of the State, which was competent to forward it to the court, which had already taken cognisance of these offences before CBI was called upon to take up the investigation by State Government. Two proceedings at two different courts for the same offence between the same parties is not permissible on law. They have to be tried at one place. C.J.M., Varanasi having taken cognisance first is entitled to proceed with the matter and the trial and therefore report submitted by CBI is required to be transferred to CJM court at Varanasi since it shall be simply a report under section 173(8) Cr.P.C.

Case law discussed

1999 SCC(Crl) 397
1999 SCC(Crl) 393
2000 SCC(Crl) 847

By the Court

1. Heard learned counsel for the applicant and Sri Girdhar Nath, learned counsel for the Central Bureau of Investigation.

2. By this petition the applicant has sought for quashing of the order summoning him and 14 others on the basis of a charge-sheet submitted by the Central Bureau of Investigation (hereinafter referred to as 'CBI') before the Special Court (CBI) at Lucknow.

3. The contention raised by the learned counsel for the applicant is that CBI was authorised to investigate this case after the charge-sheet were submitted by the local police before the Chief Judicial Magistrate, Varanasi and that court having taken cognisance in the matter for the purposes of commitment of the case alone is entitled to proceed with the CBI charge-sheet. CBI was entrusted with the investigation by the State of U.P. There were two cross versions. One of these versions is now pending before the court at Varanasi. The contention, therefore, is that CBI is not authorised to submit independently a charge-sheet before designated CBI Court the charge-sheet ought to have been submitted by CBI Before the same court which was seized of the cases.

4. Sri Girdhar Nath, learned counsel for CBI has challenged the above submission on the ground that CBI is an independent investigating body. It derives its authority to investigate any offence in the entire Indian territory from the Delhi Special Police Establishment Act, 1946. Notification by the Government of U.P. was made under Section 6 of that Act and according to him, therefore, CBI is competent to prefer its own forum after concluding the investigation. He has also placed reliance upon Annexure '5' to his counter affidavit, which is a general notification by the State with regard to submission of charge-sheets by CBI in designated CBI Courts at Lucknow and Dehradun. This notification is dated August 24, 2000. On the strength of these notifications, therefore, he submits clearly that CBI is right in submitting charge sheet at designated court at Lucknow and the summons issued by that court on that charge-sheet cannot be interfered with by this Court.

5. Before embarking upon adjudication of these contentions, it shall be relevant to refer to few facts, which have a bearing upon the result of this application. An incident had occurred on 13.11.1998 and in that incident both sides had lodged their FIRs on 12.02.1198 local police had submitted charge-sheet in one of those FIRs in the court of the Chief Judicial Magistrate, Varanasi against the appellant and others. The case was entrusted on an intervention by a Minister of State of Government of U.P., Sri Virendra Singh to C.B. C.I.D. C.B. C.I.D. took over the investigation on 09.03.1998, in all probability with the permission of the court. No charge sheet was submitted by C.B. C.I.D. However, when bail application of one of the co-accused, Sushil Kumar Singh came up before this Court, Hon'ble P.K. Jain (J) was of the opinion that in the course of investigation by C.B. C.I.D. the witnesses had changed the weapons. Danda, Lathi, Bhala were introduced and only three accused were found to have used the firearms in the incident. Considering all these developments and improvements during C.B. C.I.D. investigation, he found it expedient in the interest of justice that the investigation be done by some independent agency like CBI. In pursuance to this direction buy this Court the State Government entrusted the investigation of the offence to CBI. The above said order was passed by Hon'ble P.K. Jain, J on 17.09.1998. CBI submitted its charge-sheet before designated CBI Court at Lucknow on 30th August, 2000.

6. The question that is to be gone into in this application is whether the notification by the State Government directing CBI to take up the investigation amounts to a fresh investigation or simply a further investigation in accordance with the provisions of Section 173(8) Cr.P.C. Contrary to the submission, the suggestion of the learned counsel for CBI is that it shall amount to a fresh investigation and CBI is competent to prosecute these accused before its own designated court. In that regard he has cited before this Court two judgements of the Apex Court, one 1999 SCC(Crl) 397 (M. Krishna Vs. State of Karnataka) and 1999 SCC (Crl.) 393 (Rajendra Kumar Sitaram Pande Vs. Uttam and another).

7. So far as first case cited in this connection is concerned in my opinion this case has absolutely no application to the facts of the present case. This case before the Apex Court was for quashing of the subsequent F.I.R., which pertained to the period of offence commencing from 01.08.1978 and culminated on 25.07.1995. Before this investigation was taken up, investigation was already conducted for the period commencing from 01.08.1978 to 24.08.1989. Thus, apparently the subsequent FIR against that very accused was for a much larger period that the first FIR and therefore the Apex Court was of the opinion that the subsequent FIR cannot be quashed. However, it had observed that "we would make it clear that the investigating authority will certainly look into the earlier proceedings and the result of investigation thereunder and the submission of a 'B' Form which was duly accepted by the competent court while investigating into the present proceedings as well as the observations made by us in this judgement". This observation by the Apex Court, by implication means that the subsequent investigation by and large for the period which was subject matter of the first investigation on a different FIR

was nothing but a reinvestigation. The Apex Court did not agree to quash the subsequent FIR because it had taken into its periphery period from 1989 onwards upto 1995. Thus, clearly the subject matter of the petition before the Apex Court and its judgement was based absolutely on different considerations in wholly different context. It has no bearing whatsoever on the facts and circumstances of the present case. No quashing of subsequent FIR or charge sheet is sought by applicants. They only desire this summoning order based on CBI charge sheet be quashed against them.

8. As earlier observed, the question in issue in this application hinges on the resolution of the question whether, after submission of a charge-sheet by the local police and after taking of cognisance by the concerned court on that charge-sheet any investigation conducted by any agency, may it be C.B. CID or CBI would amount to fresh investigation or an investigation called 'further investigation', as contemplated by the provisions of Section 173(8), Cr.P.C.

9. So far as the second case cited by the learned counsel for CBI is concerned, in my opinion it too has no application. This is a case, which pertains to territorial jurisdiction to try the case by a Magistrate. The High Court in this case had quashed the compliant on the ground that the Magistrate taking cognisance was not having territorial jurisdiction over the place of offence. The Apex Court was of the view that a 1st Class Magistrate has power to take cognisance of any offence whether committed in his jurisdiction or not. Therefore, it had unsettled the High Court's judgement as reported in 2000 SCC (Crl) 847 (Trisuns Chemical Industry Vs. Rajesh Agarwal & others).

10. The other case that is cited by Sri Girdhar Nath relates to an interlocutory order. According to him, order directing issuance of process is not an interlocutory order and therefore amenable to Revisional jurisdiction. He thereby contends that this application under Section 482, Cr.P.C. is not maintainable. No doubt the learned counsel for the applicant could have preferred a revision also, but merely because they have preferred an application under Section 482, Cr.P.C., it cannot be gainsaid that this Court is precluded from entering into the controversy in exercise of its power under Section 482, Cr.P.C. These technicalities should not come in the way if this Court in deciding this application. The question raised before this Court is of general importance it can be gone by the Court under this jurisdiction also. The issue, therefore, is decided accordingly.

11. Except Section 173, Cr.P.C. there is no provision in the Code of Criminal Procedure under which any investigating agency can submit a charge-sheet. Section 154 Cr.P.C. empowers the police to register a case and investigate the same. Even CBI also registers a case and investigate the same under Section 154, Cr.P.C. Section 173(8) Cr.P.C. is of some importance in the facts of this case. It reads thus, "Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and where upon such investigation the officer in charge of the police station obtains further evidence oral or documentary he shall

forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of sub-section(2) to (6) shall as far as may be apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)." Sub-section (2) marks the culmination of an investigation in the nature of submission of a charge-sheet by the police or any other agency. In the present case, as earlier pointed out a charge-sheet was already submitted after conclusion of the investigation by the local police and cognisance was taken by the Court. In between re-investigation was handed over to C.B. C.I.D. by the Government of the State. Investigation was taken over with permission of the court. It is not known whether C.B. C.I.D. has submitted any charge-sheet in the case or not, but the order of Hon'ble P.K. Jain, J., referred to above clearly refers to the conflict between the result of the investigation by the civil police and CB CID and that necessitated re-investigation/further investigation by CBI.

12. The only procedural law under which any investigating agency, whether it is CBI or local police or any other special agency of the State can investigate a case is the Code of Criminal Procedure, 1973. There is no other procedural law which entitles any investigating agency to proceed with the investigation of an offence. Therefore, this submission of a second report on the conclusion of an investigation by CBI cannot be treated a fresh investigation. Re-investigation is not known to Code of Criminal Procedure. It recognises only further investigation once a charge sheet has been submitted, by any agency, in court. If it is not a fresh report then this cannot be submitted before the special courts meant for trial of the cases investigated by CBI. The notifications dated November 10,1998 and March 26,1999 have been persuade by me and I do not find any authorisation to CBI to submit the charge-sheet before its special courts in such cases. When it was pointed out to the learned counsel for CBI, he specifically referred to Annexure '5' to his counter affidavit, which is a general power conferred on CBI to submit a charge-sheet before the special courts constitute for the trials of its investigations. Learned counsel for CBI wants this Court to read this power flowing from earlier notifications in league with this general notification for CBI. I am at a loss to suggest that I am not in agreement with the contention advanced on behalf of CBI. This is a general notification for the cases, which were exclusively investigated by CBI and no charge-sheet by any other agency was submitted before it started investigation. In the present case the set of facts are quite different. We cannot loose sight of the fact nor we can close our eyes to the situation that these very offences, which were at a later stage investigated by CBI, were already taken cognisance of by a court of law on a charge-sheet submitted by the local police. In the result, it cannot be said that these investigations are first investigations and CBI is competent to present its charge-sheet before its own special courts. In my opinion, CBI had to submit its reports after conclusion of its investigation to the Government of the State, which was competent to forward it to the court, which had already taken cognisance of these offences before CBI was called upon to take up the investigation by State Government. Two proceedings at two different courts for the same offence between the same parties in

not permissible in law. They have to be tried at one place C.J.M., Varanasi having taken cognisance first is entitled to proceed with the matter and the trial and therefore report submitted by CBI is required to be transferred to CJM court at Varanasi since it shall be simply a report under Section 173(8), Cr.P.C.

13. All the witness in the case belong to Varanasi and the accused also are all hailing from this very district. In the circumstances, it will be highly expedient to have this trial conducted at Varanasi.

14. It will also be another question whether the trial should proceed on the basis of the local police challani report or the report submitted by CBI. As earlier stated, that the report submitted by CBI in my opinion is clearly a supplementary report in accordance with the provision of Section 173(8) Cr.P.C., it shall be open for the court concerned to look into it and if anything new is there, it can frame charges in accordance with it treating it as a supplementary report. If some new accused are also introduced in the report of CBI, the court can take cognisance against them as well. It shall be called supplementary charge sheet and will be received in accordance with law in Varanasi Court.

15. In the result, the prayer that the summoning order be quashed cannot be entertained. However, in the interest of justice the charge sheet submitted by CBI at its special court at Lucknow stand transferred to the court of Chief Judicial Magistrate, Varanasi before whom the earlier charge-sheet is pending for commitment. Special Judge (CBI), Lucknow is directed to send this charge sheet to the court of CJM, Varanasi as soon as a copy of this order is received by it.

With the above direction, this application is disposed of finally.

Application Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2001

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

Civil Misc. Writ Petition No. 3993 of 2001

Sanjeev Kumar Gangwar ...Petitioner
Versus
The Secretary Board of High School and Intermediate, U.P. Allahabad and others ...Respondents

Counsel for the Petitioner:
Shri Ashwani Kumar Mishra

Counsel for the Respondents:
S.C.
Shri A.K. Banerjii

U.P. Intermediate Education Act, 1921, Regulations- Chapter XII- Regulation 36(2)- Petitioners appeared in Intermediate Examination 1998-99 as regular candidate, but failed- Next year they appeared in Intermediate Final Exams of 2000 under correspondence course scheme- and were declared passed in second division- Subsequently Regional Secretary Madhyamik Shiksha Parishad directed petitioner to deposit their Original Mark sheets of Inter Examination 2000- on their failure a public notice was published in Newspaper that were of Mark sheet of Intermediate Examination 2000 by petitioners was illegal- Petitioners have challenged the said notice in present writ-Eligibility-Estoppal.

Held- Para 4

The correspondence course education scheme has been provided in Chapter XII of the Regulations. It clearly provides that academic session shall be normally for a period of two years. It clearly means that the student in the first year has to pass class XI examination under correspondence course scheme and the next year he has to appear in final examination. The scheme does not provide that the candidate who has failed in Class XI examination as a regular student can appear next year in final year Intermediate Examination as a provide candidate under the correspondence course scheme. The argument of the learned counsel for the petitioner that there is no bar under the correspondence course scheme that a regular student who has failed in Class XI examination could appear in final examination cannot be accepted. It is true that the Additional Director of Education (Correspondence Course) could make modification in the academic session but it does not mean that two years session can be reduced to one year or it has to be read as one year. Moreover, no order has been passed by Additional Director of Education (Correspondence Course) reducing the correspondence course from two years to one year. Therefore, the petitioners were not eligible to appear in final year examination of Class XII under correspondence scheme as they had not studied for two academic sessions under the correspondence course scheme.

By the Court

1. The short question that arises for consideration in this petition is whether a student who has failed Class XI examination can appear next year in Class XII Intermediate Examination?

2. Both the petitioners were regular students of A.S.N.. College, Gopalpur Azizpur Bareilly (in brief institution). They passed High School Examination in 1998. They studied in Class XI as regular student for the session 1998-99 in Group Cha "Krishi Varg". They could not get through and failed in Class XI in the home examination 1999. Next year they appeared Intermediate Examination 2000 correspondence course under the Correspondence Education Scheme as private candidates with subjects Literary Hindi, Economics, Sociology and Wood Craft. They were declared to have passed in second division. By letter dated 18.7.2000 the Regional Secretary Madhyamic Shiksha Parishad, U.P. Bareilly directed the petitioners to deposit their original mark sheet of Intermediate Examination 2000 with the Principal Government Inter College, Bareilly. The guardians of the petitioners contacted the Principal of Government Inter College, Bareilly who issued a show cause notice on 21.7.2000 that petitioners had failed in Class XI examination in Group Cha "Kishi Varg" in academic session 1998-99, therefore, they could not appear in Intermediate examination 2000 correspondence course as private candidates. On 8.8.2000 Regional Secretary the respondent no.2 again directed the petitioners to deposit their mark sheet of Intermediate Examination 2000 with Principal Government Inter College Bareilly otherwise penal action will be taken against the petitioners. Another letter was written on 12.9.2000 by Principal the respondent no.3 directing the petitioners to deposit the mark sheet of Intermediate Examination 2000. On 13.9.2000 a notice was published in the newspapers having wide circulation stating that user of the mark sheet of Intermediate Examination 2000 by the petitioners was illegal and if the petitioners obtain admission or use the

mark sheet for any purposes it shall be the sole responsibility of the petitioners. It is this notice published in the newspaper dated 13.9.2000, which has been challenged by the petitioners in these writ petitions. The petitioners had prayed that a direction be issued to the respondents not to force the petitioners to surrender the mark sheet of Intermediate Examination 2000 issued to the petitioners.

3. Shri Ashwani Kumar Mishra the learned counsel for the petitioners has urged that even if the petitioners failed in Class XI examination in the session 1998-99 they could appear in Intermediate Examination of session 1999-2000 as private candidate under the correspondence course scheme as there is no bar that a candidate who has failed in Class XI examination conducted by the institution cannot appear next year as private candidate in Intermediate Examination 2000 in correspondence course. The learned counsel further urged that in Chapter XII Regulation 36 (2) of the Regulations framed under the U.P. Intermediate Education Act 1921 the correspondence course shall be normally for a period of two academic sessions but Additional Director of Education(Correspondence Course) can make necessary changes. Chapter XII Regulation 36(2) of the Regulations is extracted below:-

36 (2) उपर्युक्त श्रेणी के व्यक्तिगत परीक्षार्थीयों के लिए संस्थान द्वारा निर्धारित पाठयक्रम पूरा करने हेतु पंजीकरण की व्यवस्था की जायेगी। पत्राचार पाठयक्रम के अनुसरण की अवधि सामान्यतः दो शैक्षिक सत्र होगी । अपर शिक्षा निदेशक (पत्राचार शिक्षा) आवश्यकतानुसार इसमें परिवर्तन कर सकते हैं ।

The learned counsel relying on the Regulation extracted above argued that the academic session could be of one year as well. The learned counsel submitted that in any case the petitioners having appeared and their results having been declared in which they passed the respondents are estopped from cancelling the result of the petitioners or treating the candidature of the petitioners in Class XII of the correspondence course to be illegal. On the other hand, Shri A.K. Banerjii the learned standing counsel for the respondents has urged that unless the student is declared pass in Class XI examination he cannot appear in Class XII examination or final Intermediate Examination either as a regular candidate or as a private candidate under the correspondence course scheme.

4. The correspondence course education scheme has been provided in Chapter-XII of the Regulations. It clearly provides that academic session shall be normally for a period of two years. It clearly means that the student in the first year has to pass Class XI examination under correspondence course scheme and the next year he has to appear in final examination. The scheme does not provide that the candidate who has failed in Class XI examination as a regular student can appear next year in final year Intermediate Examination as a private candidate under the correspondence course scheme. The argument of the learned counsel for the petitioner that there is no bar under the correspondence course scheme that a regular student who has failed in Class XI examination could appear in final examination cannot be accepted. It is true that the Additional Director of Education (Correspondence Course) could make modification in the

academic session but it does not mean that two years session can be reduced to one year or it has to be read as one year. Moreover, no order has been passed by Additional Director of Education (Correspondence Course) reducing the correspondence course from two years to one year. Therefore, the petitioners were not eligible to appear in final year examination of Class XII under correspondence course scheme as the had not studied for two academic sessions under the correspondence course scheme. Even if the petitioners have appeared in the examination of Class XII and their result had been declared it could not confer any right on the petitioners. The respondents have rightly directed the petitioners to return the mark sheet of Intermediate Examination 2000 and are in process of cancelling the result of the petitioners. The argument of estoppel is not available. It is a principle of equity. It can be invoked for sake of justice and not for perpetuating illegality. If the submission founded on estoppel is accepted it would not only be against Regulations but illegal and unjust. Therefore, the petitioners were not entitled to appear in Intermediate Examination 2000. Since petitioners did not disclose correct facts, they cannot be permitted to derive any benefit of their own wrong. The respondents have rightly directed the petitioners to deposit the mark sheet of intermediate Examination 2000. I do not find any merit in all the submissions of the learned counsel for the petitioners.

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

Petition Dismissed

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2001

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

Second Appeal No. 2841 of 1979

Naim Khan (since deceased) and others
...Defendant/ Appellants
Versus
Ali Sher ...Plaintiff Respondent

Counsel for the Appellants:
Shri Ravi Kiran Jain
Shri R.B.D. Misra

Counsel for the Respondent:
Shri R.S. Misra
Shri Rajiv Gupta

Specific Relief Act, 1963- Specific performance of contract- suit for - Execution of sale deed and agreement of repurchase admitted- Contended that plaintiff was never ready and willing to perform his part of contract and he had no money to repurchase the land suit decreed by trial Court- appeal allowed by appellant Court- Second appeal- Held, that it is established that plaintiff was ready and willing the perform his part of contract.

Held- Para 18c

After considering the entire circumstances, I am of the opinion that it has been established that the plaintiff was ready and willing to perform his part of contract at the relevant time. The execution of the deed of reconveyance is admitted and, the refore, no other question arise for decision in this appeal.

Case Law discussed:
AIR 1995 SC 945
AIR 1999 SC 1104
JT 1999 (4) SC 464
JT 1999 (6) SC 179

By the Court

1. Ali Sher plaintiff, was the owner of the disputed agricultural land. He executed the sale deed of the said of the said land in favour of Naim Khan on 1.9.1970. The present appellants are the heirs of Naim Khan. An agreement of repurchase of the property on payment of Rs 12,000/= was executed on 4.9.1970. Both the documents were registered on the same day i.e. 20.20.1970. In pursuance of the agreement of repurchase the appellant Naim Khan did not executed the sale deed. Therefore, the respondent Ali Sher filed the Suit for specific performance of contract for repurchase, dated 4.9.1970. In the Suit he made necessary allegations that he was ready and willing to perform his part of the contract and also alleged that he is still in the possession of the land in dispute.

2. The appellant contested the Suit. However, he did not dispute the execution of sale deed and the agreement of the re-purchase. On the other hand he contended that the plaintiff was never ready and willing to perform his part of contract and he has no money to re-purchase the land. The trial court framed necessary issues and held that the plaintiff was not ready and willing to perform his part of contract and he has no money and, therefore dismissed the Suit. Aggrieved by the decree, the plaintiff respondent preferred Civil Appeal No. 162/98, which have been allowed by order, dated 14.7.1979 and the Suit for specific performance of contract of re-purchase on payment of Rs. 12,000/= has been decreed. Aggrieved by it, the present appeal has been preferred.

3. I have heard Sri Ravi Kiran Jain, Senior Advocate and Sri R.B.D. Misra learned counsel for the appellants and Sri R.S. Mishra, learned counsel for the respondent and have gone through the record.

4. It has been argued by Sri Ravi Kiran Jain, learned Senior Advocate that the appeal has not been correctly decided and the first appellate court has committed error of law in finding that the plaintiff respondent was ready and willing to perform his part of contract, that he misread the endorsement of the of the Post-man on the registered cover of the notice, dated 23.7.73. That he has drawn wrong presumption from the fact that the plaintiff purchased the stamps of the court fee immediately after the period of three years and this show that the plaintiff was ready and willing to perform his part of contract. That the plaintiff did not appear before the Sub-Registrar inspite of the notice, dated 26.8.1973 issued by the appellant and that the right of repurchase was not exercised in the stipulated time and the money was never tendered.

5. In this case the notice was sent by the plaintiff respondent to the appellant on 23.7.73 to come and to execute the sale-deed on 3.8.73. The appellant did not reach on that day though the plaintiff was present in the office of the Sub-Registrar and moved an application. Regarding this the contention of the appellant is that the notice was received back on 6.8.1973 with the noting that the appellant did not met the Post-man. The appellant was out of station and was in Shahjahanpur during that period and the notice was returned. That the appellant did not receive the notice, therefore, he did not go to the office of the Sub-Registrar on 3.8.1973. That the appellant himself served the notice on 26.8.1973 on the plaintiff to get

the sale deed executed on 3.9.1973 but the plaintiff did not get sale deed executed on that day and refused to accept the notice. That this circumstance show that the appellant was ready to execute the sale deed within time, but the plaintiff was not having sufficient funds and was unable to get the sale-deed executed in his favour. That he was not ready and willing to perform his part of the contract at all the times.

6. The learned counsel for the appellant in support of the argument has also referred to the decision of Jugraj Singh and another V. Labh Singh and others, AIR 1995 Supreme Court, page 945. It was observed by the Apex Court that the plaintiff should prove continuous readiness and willingness at all stages from the date of agreement till date of filing of the Suit. It was further observed that the substance of the matter and surrounding circumstances and the conduct of the plaintiff must be taken into consideration in adjudging readiness and willingness to perform the plaintiff's part of the contract.

7. In this connection it is argued that the plaintiff in his statement stated that in the year 1970 he was having Rs.500/= - 700/= only with him. That therefore, at that time the plaintiff had no sufficient means. That the appellant himself served the notice on 26.8.1973 to get the sale deed executed on 3.9. 1973 on payment of Rs. 12,000/=. That inspite of that notice the plaintiff did not appear on 3.9.1973 to get the sale deed executed. It is further contended that the plaintiff borrowed a sum of Rs. 3000/= on 4.9. 1973 from the appellant and executed the pronote regarding which the Suit has been filed. That the fact that plaintiff borrowed a sum Rs. 3000/= from the appellant show that on that day he dad no money to get the sale- deed executed. It has been argued by the learned counsel for the appellant that all these circumstances were not at all considered by the first appellate court and the judgement is totally silent regarding these circumstances. It is also contended that all these circumstances were considered by the trial court and, therefore the first appellate court has erred in reversing the finding without considering the important circumstances.

8. It is further contended that the first appellate court has considered irrelevant circumstance to record the finding that the plaintiff was ready and willing to perform his part of contract. That it has observed that the Suit was filed on the very next day of the last day fixed for the execution of the sale-deed. That court fee worth Rs. 1,307.50p. Were also purchased on that day. That filing of the Suit and purchasing of the court fee can never be a circumstance to find that the plaintiff was ready and willing to perform his part of contract it has been argued that in case it is taken as circumstances, all the Suits for specific performance of contract for sale should have decreed and there is no necessity to consider the point of readiness and willingness. The first appellate court has also erred in accepting that the plaintiff was having ready money to get the sale-deed executed. That means has not been properly considered. That the first appellate court has also erred in drawing inference from the fact that the appellant did not appear for execution of the sale-deed before the Sub-Registrar on 3.8.1973 in pursuance of the notice, dated 23.7.1973. That notice, dated 23.7.1973 was never received by the appellant and,

therefore, there is no question of appearance before the Sub-Registrar for execution of the sale -deed in pursuance of that notice. The learned counsel has also referred to the decision of Jagdish Singh V. Natthu Singh, AIR 1992 Supreme court, page 1604. It has been held by the apex Court in this case that finding of the fact arrived at by non-consideration of the relevant evidence or by essentially wrong approach is vitiated and the High Court is not precluded from recording proper findings. It is, therefore, contended that the High Court could disturb the binding of the fact in present case for the foregoing reasons.

9. Contrary to this, the learned counsel for the respondent have referred to the several cases in which the Apex Court has held that findings of fact should not be disturbed in Second Appeal by the High Court. The first is Therakhatoon V. Salambin Mohammaad, AIR 1999 Supreme Court page 1104. In this case it was found that one of the reasons given by the court below was factually incorrect. The findings however, based on other relevant material on record. It was observed that this finding cannot be interfered by the High Court.

10. The other authority referred to on this point is: Armugham (dead) by LRS & Others V. Sundarambal & Another, JT 1999 (4) Supreme Court, page 464. In this case, the High Court examined the evidence and reversed the judgement of the first appellate court. The Apex Court has held that it is not permissible for the High Court to interfere in the finding of fact

11. The third case referred to is: Ram Kumar Agarwal and Another V. Thawar Das (Dead), JT 1999 (6) Supreme Court, page 179. It was observed in this case that High Court can interfere with judgements of courts below only on substantial questions of law. Findings of facts cannot be interfered with. The study of these cases show that findings recorded by courts below cannot be interfered by the High Court unless the finding is perverse and contrary to the evidence due to the misreading of the evidence. Even if few circumstances were not considered by the first appellate court and the finding is based on other material, it cannot be disturbed in Second appeal by the High Court.

12. In the light of the above decisions, I, therefore, examine carefully the finding recorded in this case.

13. The important circumstance of this case is that the plaintiff was the owner of the property and he executed sale-deed on 1.9.1970. The agreement is an agreement for reconveyance, which was executed on 4.9.1970. The sale-deed as well as the agreement of the reconveyance both were registered on 20.10.1970 period fixed for reconveyance was three years and, therefore, the deed should have been executed by 3.9.1973. The Suit was filed on 4.9.1973 and is, therefore, within time. The facts of this case are similar to the case of : D.S. Thimmappa V. Siddaramakka, AIR 1996, Supreme Court, page 1960. It was held in this case that cause of action arose on the expiry on the fixed period. Owner of the property approached the court thereafter for specific performance of agreement of reconveyance. The Suit was held to be within limitation.

14. In the light of the observations made in the judgement of the Apex Court, the distinction to be drawn in a case where there is simplicitor agreement for sale and where agreement is for reconveyance. In the present case the plaintiff sold the land and there is agreement for reconveyance. It is implied in the agreement that the plaintiff was in need of money and, therefore, he sold the land and got executed the agreement of reconvene. If it is so, the plaintiff cannot be expected to be in possession of sufficient funds immediately after execution of the agreement of reconveyance. The period fixed for reconveyance was for three years so that the plaintiff may arrange funds. In this case it is to be seen whether the plaintiff was ready and willing to perform his part of contract within three years the period fixed in the agreement for reconveyance. In such a case the fact that immediately or sometime after of the agreement the plaintiff was not in possession of sufficient funds for the reconveyance is not material. Had he got means at that time, there was no question for plaintiff to execute the sale deed. Time of three years was granted for reconveyance with the intentions that during this period the plaintiff may collect the funds required for the reconveyance. In this light, the argument that in the year 1970 the plaintiff was having Rs. 500-700 is not material. Even, if the plaintiff was not having sufficient funds in the year 1970 it is not material. The plaintiff alleged that he collected money by the sale of his agricultural produce and served the notice on the appellants to execute the sale-deed on 3.8.1973. The plaintiff remained absent before the Sub-Registrar on that day. The plea taken by the appellant is that the notice was not served upon him. The service of the notice was considered in detail by the first appellate court, who has held that service was intentionally avoided. The circumstances narrated by the appellant show that the appellant avoided the service so that he may not bee required to appear before the Sub-Registrar on the date fixed. The allegation of the appellant that he was in Shahjahanpur in connection with his illness ad was getting treatment was found incorrect by the first appellate court and cogent reasons have been recorded for the same. It does not appear proper that a person shall go from Shaharanpur to Shahjahanpur for better treatment. Even the name of the ailment has not been disclosed and name of the person from whom the treatment was taken was also to disclosed. Therefore, the circumstance show that the appellant was not ready to execute the sale-deed and avoided service of notice.

15. Coming to the argument that the appellant served notice on 26.8.1973 to get the sale-deed executed on 3.9.1973, but the plaintiff did not appear to get the sale deed executed on that day. On this point the contention of the plaintiff is to be accepted that he did not receive the notice. The plaintiff filed the present Suit on 5.9.1973. Therefore, it shall be presumed that he had sufficient means on 3.9.1973 and had he got the notice he would have appeared before the Sub-Registrar on that day.

16. The argument that the plaintiff borrowed a sum of Rs. 3000/= on 4.9.1973 from the appellant and, therefore, it should be held that he had no means on that day cannot be accepted.

17. It is true that the Suit on the basis of the pronote has been filed for the recovery of the amount and that Suit was decreed ex-parte. The plaintiff applied for setting aside the ex-parte decree. The fact that the Suit has been filed and decided ex-parte do not establish that the money was borrowed by the plaintiff from the defendant. It may be that this evidence has been created by the plaintiff to defeat this Suite. It appears from the circumstance that the suit for this money on the basis of the pronote dated 4.9. 19733 was filed in the year 1973 itself. There is no reasonable explanation as to what was the hurry to file the Suit on the said pronote as the limitation was for three years.

18. After considering the entire circumstance, I am of the opinion that it has been established that the plaintiff was ready and willing to perform his part of contract at the relevant time. The execution of the deed of reconveyance is admitted and, therefore, no other question arise for decision in this appeal.

19. The appeal, therefore, fails and is accordingly dismissed. No orders as to costs.

Petition Dismissed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD: 10.01.2001

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

Civil Misc. Writ Petition No. 14213 of 2000.

Ram Surat and others ...Petitioner
Versus
The U.P. Public Service Commission and another ...Respondents

Counsel for the Petitioners:
Shri Ashok Bhushan
Shri Anil Bhushan
Shri Awadesh Rai
Sri S.K. Singh

Counsel for the Respondents:
Shri S.K. Singh
Shri Ashok Khare,
Shri I.R. Singh
Shri Rakesh Thapaliyal

Constitution of India – Articles 226 and 14 read with G.O. dated 26.2.1999-Selection-Reservation as per G.O. in favour of women-Policy Decision-Application of scaling system in selection process – challenge to, on ground of arbitrariness – Judicial Review – Scope. (Held – Para 7 and 18).

The object to apply the scaling system, therefore, is to modulate the marks given by different examiners in different papers. The scaling system has traditionally been applied in written examination and the result is prepared by adopting the scaling system. This system is intended to achieve the merit.

Here is the instant case, the interest of justice does not demand in the absence of any material, whatsoever, that interference of the court is called for the matter. As said above, there has been an in-built objective criteria for applying the ` scaling system' which, as said above, is an integral part of the process of selection adopted by the Commission. There is absolutely no ground to annual or scrap the selection, which has taken place. The wholly tenuous and feeble grounds taken by the petitioners to assail the selection process as well as declaration of result are not well merited.

Case law discussed:
(1979) 3 SCC 489
1986 (2) SCR 159
CMP. No. 1074 of 1986 in SCA 4597 of 1985 decided on 17.7.1986

(1997) 9 SCC 52
(1999) SCC (LBS) 1451
(1991) SCC 212
(1991) 3 SCC 91
(1991) 4 SCC 485
(1991) 3 SCC 239
(1991) SCJ 521
(2000) 9 SCC 437
AIR 1992 SC 97
AIR 1984 SC 1543

By the Court

1. The U.P. Public Service Commission (hereinafter referred to as 'the commission') initiated the process to select candidates for appointment to 100 posts of Personal Assistants in U.P. Secretariat and 3 such posts in the Commission by publishing an advertisement dated 28.3.1999. The selection was to be made on the basis of a competitive examination in two subjects, namely, Hindi essay of 100 marks and Hindi Steno-typing of 150 marks. There was no prescription for interviewing the candidates and the final selection was to be made on the basis of th total marks obtained in the aforesaid two subjects. The petitioners covered by the above mentioned four writ petitions are the persons whose names did not find place in the result of the successful candidates declared on 3.3.2000. The petitioners have assailed the selection process as being arbitrary and discriminatory. Shorn of all superfluities, the grounds taken by the petitioners to challenge the entire selection process may be categorised under the following three heads: -

(i) that the selection is against the provisions made in the advertisement and, therefore, the entire process stands vitiated:

(ii) The method of "scaling" of marks has been wrongly applied and in any case, it was wrongly applied only in respect of one paper, i.e. Hindi essay, while, if at all, it should have been made applicable in respect of both the subjects. i.e., Hindi essay and Steno-typing, and

(iii) 34 women candidates have been selected by applying unwarranted reservation though it was not contemplated in the original advertisement.

2. In these writ petitions, under Article 226 of the constitution of India, it is prayed that a direction in the nature of writ of mandamus be issued to the respondents firstly, not to give effect to the result in respect of the examination of the year 1999 held for the recruitment to the posts of Personal Assistants as published in the Daily Hindi Newspaper – 'Amar Ujala' dated 4.3.2000, and secondly, to declare the result of the Personal Assistants Examination, 1999 to the basis of original marks secured by the candidates including the petitioners, without applying "scaling" system.

3. The selected candidates also appeared to contest the petitions.

4. On behalf of the Commission – respondent no.1, a counter affidavit has been filed by Sri G.C. Upadhyay, Section Officer, On behalf of the selected candidates, a counter affidavit, in the representative capacity, has been filed by one Ram Lal Maurya. The pleas taken in both the set of counter affidavits are almost identical. It is stated that the selection ahs been made strictly in accordance with the procedure prescribed and that the application of scaling system is a part of the process of selection. It has

further been averred that in view of the Government order dated 26.2.1999, reservation in respect of women candidates was rightly applied. There is also assertion that the commission was duly bound to implement the policy decision taken by the State Government for reservation in respect of women candidates. Rejoinder affidavit ahs also been filed.

5. Heard Sri Ashok Bhushan, Anil Bhushan, Awadhesh Rai and S.N. Singh learned counsel for the petitioners as well as Sri S.K. Singh for the commission and Sri Ashok Khare, Senior Advocate assisted by S/Sri I.R. Singh and Rakesh Thapliyal for the selected candidates.

6. Sri Ashok Bhushan, who took the lead for arguing the case and whose arguments were adopted by other learned counsel for the parties, urged that reservation for women candidates and scaling system should not have been applied by the commission in the preparation of the final selection result as such a course was not contemplated in the advertisement and consequently the whole process of selection was vitiated. It was clarified on behalf of the petitioners that the selection by the Commission has not been held in accordance with the conditions as stipulated in the advertisement dated 28.3.1999, which clearly contemplated in condition 16-(Gha) that the merit list of the selected candidates will be prepared on the basis of the marks obtained by them in Hindi Essay and Steno-Typing. According to Sri Ashok Bhushan, the commission in its counter affidavit has admitted that the system of scaling has been applied in Hindi Essay paper and the marks of the candidates have been sealed. According to Sri Ashok Bhushan, selection by the commission has not been held on the terms and conditions as stipulated in the advertisement. It was pointed out that the selection made is in violation of the advertisement will be arbitrary and bad on the principles as laid down by the apex court in the case of Ramanna Daya Ram Shetty Vs. International Airport Authority – 1979 (3) S.C. – 489. It was further urged that reservation in favour of the women candidates was also not contemplated by the advertisement and since there was no compulsion for effecting such a reservation, the Commission has wrongly earmarked 34 posts for women candidates, Emphatic reliance was also placed on the decision of the Bombay High Court (Nagpur Bench) in Jayant Jairam Rohi V. Maharashtra Public Service Commission – 1986 (20 S.L.R.-159 in which the advertisement prescribed qualifications for appointment to the post of Civil Judge. It was paid down that those candidates who have ordinarily practiced in the High Court or subordinate court for not less than three years, prescribed in the advertisement, shall be eligible for making an application. Subsequently, Public Service Commission called for interview only such persons who had put in five years of practice. It was in this context that the Bombay High Court held that the commission contravened the statutory rules and travelled beyond the statutory provisions. On behalf of the commission, it was argued in that case that the candidates who have practiced for a period of five years or more would be more meritorious and suitable than a candidate who ahs practiced less than five years. The court took the view that the assumption of the commission in this regard was entirely without any basis. It is

not a secret that some competent Advocates who have practiced for a period of three years are far better suited than an Advocate who ahs merely put in practice for five years. It was held that it was not permissible to the commission to totally eliminate all the candidates who have practiced three year to five years at the Bar. The Court further held that the criteria employed by the Commission had no relevance, whatever, with the merit of the candidates and by adopting this new method to determine as to which candidate should be called for interview, the Commission has contravened the statutory rules. It was found that the selection procedure was against the rules and the conditions as stipulated in the advertisement but refused to grant relief to the petitioners lamenting on the hardship suffered by them because if the relief was granted that would have led to greater complications and more serious hardship to those who has already been selected and appointed. There can be no quarrel about the observations made and the law laid down in the aforesaid two decisions. The observations, however, cannot be taken to be of universal application and they have to be viewed and applied in the context of set of facts in hand.

The advertisement simply provided that the selection shall be held, or say, the result shall be declared on the basis of the marks obtained by the candidates in two subjects, namely, Hindi Essay and Steno Typing, Obviously, the advertisement was silent as to in what manner and by what method the evaluation of the answer books is to take place. As a matter of fact, such a provision could not have been made in the advertisement as the evaluation of the answer books is made according to rules and the policy decision taken by the Commission.

7. Sri S.K. Singh, appearing on behalf of the Commission pointed out that application of scaling system is a part of the process of selection, which is applied in all the examinations and in all the papers. It was urged that the commission has not adopted any novel procedure in the case of the instant procedure and as a matter of fact the system of scaling has been borrowed from the Union Public Service Commission, which has been applying the said system in the Civil Service Examinations as well as other examinations conducted by it During the course of arguments, the guidelines with regard to scaling of the marks means the moderation of the marks. The system intends to remove the disparity in evaluation. A thousand of candidates appear in a particulars exam nation and answer books are evaluated by score of examines who are prone to have different standards in evaluating the answer books. In the instant case, the Hindi Essay paper was examined by as many as 23 examiners. It is common knowledge that some of the examiners are tough, some are easy going and the result of this human tendency or projection is that some candidates secure high marks in easy papers and as a result of easy marking and those, who are comparatively less fortunate, may get low marks on account of tough marking in a tough paper. Therefore, in order to bring about the objectively and to eliminate the element of subjectively, moderation is arrived at in the marks obtained in general by the candidates. A mean is adopted from the score marks after giving allowance to the standard deviation. The object to apply the scaling system, therefore, is to

modulate the marks given by different examiners in different papers. The scaling system has traditionally been applied in written examination and the result is prepared by adopting the scaling system. This system is intended to achieve the merit. The result undisputedly is to be prepared on the basis of the performance of the candidates in the examination and evaluation by some competent examiners. The method of moderation has some to be approved by the apex court in its decision dated 17.7.1986 in C.M.P. No. 1074/86– in S.C.A. No. 1547/85-Surjeet Kumar Das Vs. Chairman Union Public Service Commission. It was observed that the system of moderation of marks adopted and followed by the Union Public Service Commission in evaluating the performance of the candidates appearing for the Civil Services Examination cannot be said to be vitiated by the arbitrariness or illegality of any kind.

8. In m guest to reach the truth and to ascertain as to whether any of the petitioners has been prejudiced on account of the application of the scaling system, I have waded through the mark sheets of the selected candidates as well as unsuccessful candidates, particularly, the petitioners. The comparative position of some of the petitioners by way of illustration emerges as under:

Sl. No	Name of the Petitioner	Original Marks	Marks Scaling	Total marks after adding marks in Steno-Typing
Writ Petition No. 1412 of 2000				
1.	Ram Surat	40	45	173
2.	P. K. Agarwal	23	37	181
3.	Shatrughan Singh	48	56	190
4.	Shailendra Kumar Singh	52	63	206
5.	Dinesh Chandra Pandey	53	48	190
Writ Petition No. 19072 of 2000				
6.	Ajai Kumar	49	56	186

The above figures indicate that by and large, the petitioners have not been losers due to the application of the scaling system. Out of the above seven candidates, who have been taken for random survey, six of them were put to an advantageous position as their original marks got a boost after scaling. The successful candidates of the general category have in total secured 210 or more marks. The candidates belonging to other backward class and who have been successful have secured 204 or more marks while the candidates belonging to Scheduled Caste category have secured 200 or more marks to find their names in the select list. None of the petitioners have been successful in securing the minimum target-marks and therefore, they were declared unsuccessful in the examination. The application of the scaling system has not turned their table.

9. Sri Ashok Bhushan was very much critical of the fact that the commission though, has accepted the scaling system in the paper of Hindi Essay only and it has deliberately and in an arbitrary manner failed to apply the same standard in the case of Steno Typing paper. The reasons for not doing so are not too far to seek. There is a striking distinction in the two sets of subjects, mainly, Hindi Essay Hindi Steno Typing papers. The evaluation of Hindi Essay paper is more or less subjective in nature depending upon variegated circumstances and imponderables flowing from the

nature and human tendency of the examiner concerned, while in the case of evaluation of Steno-Typing paper such an eventuality would not arise as its evaluation can be, in view of the technical nature of the paper, is supposed to be objective and almost mathematical. As a matter of fact, application of scaling system in the case of Steno Typing paper would be almost impracticable. Therefore, the Commission has taken precaution in the matter by prescribing the mistakes, which are to be counted in evaluating Steno Typing paper. An exemption in mistake committed by a candidate in Steno Typing test up to five percent as per rules has been allowed. The Commission is further vested with the discretionary power to allow examination up to percent in mistakes if the circumstances so warrant. Thus, examination of mistakes up to 8 percent may be granted and this fact would be determinative in drawing an eligibility mark in Shorthand and Typing test for appointment. There is thus an in-built assurance of uniformity in the system of evaluation of steno typing paper. It was for this reason that the scaling system was not applied in the Shorthand Typing paper.

10. Sri Ashok Bhushan relied on the decision of the apex court in Raj Kumar and others Vs. Shaktiraj and others (1997) 9 s.C.C.-52, in which it was observed that where the procedure of selection and the exercise of power to exclude the posts from the purview of the State Service Selection Board (SSS. .8) Suffered from glaring illegalities, the candidates appearing for selection and remaining unsuccessful are not barred from questioning the selection and the principle of acquiescence/estoppel is not applicable. His case was on an entirely different footing. The recruitment of Patwaris in that case was made under the Rules of 1995 ignoring the amendment notified in the year 1970. Reliance on this decision is misplaced.

11. Sri Ashok Khare, Senior Advocate appearing on behalf of the selected candidates pointed out that even if the criterion adopted by the Commission might be defective, it would be inappropriate for this court to reallocate the marks as the criteria has been uniformly applied and no prejudice ahs been caused to any one of the petitioners. In support of his contention, Sri Khare placed reliance on the decision of the apex court in Haryana Public Service Commission Vs. Amarjeet Singh and others – 1999 S.C.C. (L&S)-1451 in which it was observed that when ujiform process had been adopted in respect of all and selection had been made, it was highly inappropriate for the High Court to have examined the matter in further detail and to have allocated the marks with a view to issue a direction to the commission to select the aggrieved candidates. After having scrutinised the scaling system, which resulted in moderation of the marks of the candidates who appeared in the examination as well as the result sheets, find that the petitioners failed to secure the minimum target marks and could not be selected even if the scaling system was not applied. It is normal human instinct that when a candidate fails in the recruitment examination, he is generally prone to make some wild allegations with a view to explain his failure with the thought that not he but the examiners, are to blame. One can easily understand the anguish of the petitioners at their failure but this court has no power to select them. It is in

the public interest that the result of the public examinations when published should have some finality attached to them.

12. Now it is the time to consider and examine the other ground taken on behalf of the petitioners to challenge the result of the selection. It is stated that 34 women candidates have been illegally extended the benefit of reservation while in the advertisement there was no such stipulation. This submission has been stated simply to be rejected, the reason being that the State Government had issued order no. 18/1/99/ka-2 of 1999 dated 26.2.1999 a copy of which is Anneure C.A.1 to the counter affidavit of the commission, issued by the Chief Secretary to all concerned. The Government order provided that 20 of the posts, which fall within the purview of the Commission, shall be reserved for women candidates. The aforesaid Government order came into force with immediate effect though it excepted the advertisements issued on or before the said date and process of selection for which had started prior to 26.2.1999. In the instant case, the advertisement was published in Mach 1999. i.e. much after the issuance of the government order dated 26.2.1999. The Commission was duly bound to implement the orders of the State Government with regard to the policy of reservation. Accordingly, horizontal reservation for Women candidates was rightly applied in the preparation of the final result. As against 173 posts, which were advertised and for which final selection was made, 34 posts were rightly reserved for women candidates. The result declared by the commission cannot, for any reason, be faulted on account of reservation made pursuant to the Government order dated 26.2.1999.

13. I am conscious of the fact that the selection process is not sacrosanct. It can be cancelled, sorapped or annulled of there is concrete and reliable evidence of large scale bungling, mal practice, corruption, favouritism and nepotism or the like or if there is a violation of fundamental procedural requirements. It is true that fabrication would obviously either be not known or no one could come forward to bear the burnt. Nevertheless, there should be wealth of material to take the extreme and drastic step of scrapping the whole recruitment process, particularly when it has reached the final stage. The cancellation or scrapping of the recruitment has very serious repercussions and impact not only on the candidates who have undergone the rigours of the test but on the general public and the examining body. In the instant case there is no allegation on behalf of the petitioners that the commission has been guilty of any corrupt practice, nepotism or favouritism. The only grievance of the petitioners is that the procedure adopted was not in consonance with the stipulations made in the advertisement.

14. Sri Ashok Bhushan founded his submissions on the observations made by the apex court in Ramanna Daya am Shetty's case (supra) that it must, therefore, be taken to be the law that where the Government is healing with the public whether by way of giving jobs or entering into contracts or issuing quotas or licence or granting other forms of largesses the Government cannot act arbitrarily at its sweet will and, like a private individual to deal with any person it pleases but its action must be in

conformity with the standards or norms which is not arbitrary, irrational or irrelevant. Sequel to this submission is the controversy about the extent of power of the court to interfere with the administrative actions of the examining bodies. While non-arbitrariness being a necessary concomitant of the rule of law, it is umperative that all actions of every public functionary, in whatever sphere, must be guided by reason and not humour, whim, caprice or personal predilections of the person entrusted with the task on behalf of the State and exercise of all power must be for public good instead of being an abuse of the power (See Km. Srilekha Vidyarthi Vs. State of U.P. (1991) SCC-212). The power of judicial review is an integral part of our Constitutional system. The Supreme Court has taken the view that if here is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, part of the basic structure of the Constitution (1991) 3 S.C.C.–91 G.B. Mahajan and others Vs. Jalgeor Municipal Council and others; (1991) 4 S.C.C-485-H.C. Suman and others V. Rehabilitation Ministry and others; (1991) 3 S.C.C-239-U.P. State Road Transport Corporation Vs. Mohd. Ismail and others; (1991)1 S.C.J-521-Subhas Sharma Vs. Union of India- by Hon'ble Rangnath Misra (ex Chief Justice of India). In the recent pronouncement, the apex court in Dadu alias Tulidas Vs. State of Maharahtra – (2001) 9 S.C.C 437, has held that judicial review "is the heart and soul of the Constitutional Scheme."

15. It is well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. Over the years the Supreme Court as well as High Courts have shown a great deal of vitality in controlling administrative discretion of the executive authorities.

16. The parameters of the judicial review are now firm and well embedded. In Km. Srilekha Vidhyarthi's case (supra), the apex court crystallised the whole position in the following words: -

"It has been emphasised time and again that arbitrariness is anathesis to State action in every sphere and wherever the vice percolates, the courts would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India."

The things as have emerged; the petitioners have acquired the fundamental right that they shall not be subjected to arbitrary, unfair, unreasonable and irrational action of the Government or its instrumentalities, meaning thereby, a citizen has a right that his matters be considered in a manner, which is non-arbitrary. The State action which defeats any constitutional mandate and is directly in violation of the guarantees enshrined in Article 14 of the Constitution, is per se, arbitrary.

17. The matter may be viewed from yet another angle. The apex court, time and again, has cautioned the High Courts to approach the cases like the present one with circumspection. In Bhushan Uttam Khare Vs. Dean B.J. Medical College,

reported in A.I.R. 1992 S.C. – 917 it was held that in deciding matters relating to orders passed by authorities of educational institutions the court should normally be very slow to pass orders in its jurisdiction because matters falling within the jurisdiction of educational authorities should normally be left to their decision and court should interfere with them only when it thinks that it must do so in the interest of justice. Earlier in the case of Maharashtra State Board of Secondary and Higher Secondary Education end another Vs. Paritosh Bhupesh Kumar Seth Etc. – A.I.R. 1984 S.C. – 1543, the Hon'ble Supreme Court reminded that as has been repeatedly pointed out the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make pedantic and purely idealistic approach to the problems of this nature isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences, which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. The above guiding principles of law laid down by the apex court in a series of cases with regard to educational matters are also equally applicable in cases where examinations are conducted by the public service commission a constitutional authority.

18. Here in the instant case, the interest of justice does not demand in the absence of any material, whatsoever, that interference of the court is called for in the matter. As said above, there has been a in-built objective criteria for applying the scaling system which, as said above, is an integral part of the process of selection adopted by the Commission. There is absolutely no ground to annul or scrap the selection, which has taken place. The wholly tenuous and feeble grounds taken by the petitioners to a said the selection process as well as declaration of result are not well merited.

19. In the result, all the four writ petitions fail and are, therefore, dismissed without any order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 5, 2001

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

Civil Misc. Writ Petition No. 22326 of 2000

Dr. M.P. Singh ...Petitioner
Versus
The State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Rakesh Bahadur

Counsel for the Respondents:
Shri Jai Praakassh Rai
Shri V.K. Shukla
Shri Shashi Kant Sharma
Shri U.N. Sharma
Shri R.K. Porwal
S.C.

Chatrapati Sahuji Maharaj University-Statute-113.20 Seniority of an affiliated Post graduate College- Basis of seniority shall be the length of service- teaching in

Post Graduate or Decree Department held no significant- admittedly the petitioner is senior to the Respondent no.4- entitled to work as officiating Principal till the Regularly selected candidate join.

Held - Para 5 and 6

This Court in the case aforesaid has clearly held that the Statute make no distinction between teachers of the Degree Department or those of Post Graduate Department appointed in the same cadre and same grade.

In our opinion, the criterion for appointment as officiating Principal in an affiliated College is seniority. The Petitioner being senior to the fourth respondent is entitled to work as officiating Principal. The fourth respondent has no right to work as officiating Principal.

Case law discussed

W.P. No. 42 347 of 2000 decided on 12.12.2000 relied on.

By the Court

1. The petitioner, a teacher in K.K. Post Graduate College, Etawah (hereinafter refereed to as the College) has filed this writ petition for issuance of a direction to the respondents to give effect to the seniority list dated 15.11.1996 and permit the petitioner to function as officiating Principal of the College and/ or handover the charge of the office of the Principal of the College to the petitioner. The College is affiliated to Chatrapati Sahuji Maharaj University of Kanpur, in short the University

2. It is not disputed that the permanent Principal Dr. Om Shankar Srivastava was suspended by the Management on 6.8.1997 and in the resulted vacancy, Dr. Vidya Kant Tiwari, respondent no. 4, was appointed as officiating Principal on 8.8.1997. The grievance of the petitioner is that although according to Statute 13.20 of the First Statutes of the Kanpur University, the Management have had the discretion to appoint "any teacher to officiate as Principal for a period of three months or until the appointment of a regular Principal, whichever is earlier" but they have no right to allow the fourth respondent to continue beyond the period of three months. Continuance of the 4th respondent beyond the period of three months is in utter disregard of the provisions of Statute 13.20 of the First Statutes of the Kanpur University. The petitioner who is senior to Dr. Vidya Kant Tiwari staked his claim for working as officiating Principal of the College on or after 8.11.1997 but since the Management and the Vice Chancellor of the University were in collusion with Dr. Vidya Kant Tiwari they paid no heed in the matter and accordingly a writ petition being Civil Misc. Writ Petition No. 3006 of 1999 was filed by the petitioner and two others for appropriate direction to ensure compliance of Statute 13.20. The writ petition came to be disposed of with the direction to the Vice Chancellor to consider and dispose of the representation dated 23.11.1998 and pass appropriate order expeditiously. The Vice Chancellor by his order dated 11.7.1999 held that since the permanent Principal Dr. Om Shankar Srivastava joined the post after his suspension order was recalled by the committee of Management, the representation had been rendered anfractuous. The permanent Principal Dr. Om Shankar Srivastava has since attained the age of superannuation but the fourth respondent a junior teacher in the College was again appointed as

officiating Principal and has continued for more than three months.

3. We have had heard Sri Rakesh Bahadur for the petitioner and Sri Jai Prakash Rai, Sri V.K. Shukla, Sri Shashi Kant Sharma holding brief of Sri U.N. Sharma and Sri R.K. Porwal for the respondents.

Statute 13.20 of the First Statute of Kanpur University being relevant to the question involved herein is quoted below:

"When the office of the Principal of an Affiliated College falls vacant, the Management may appoint any teacher to officiate as Principal for a period of three months or until the appointment of a regular Principal, whichever is earlier. If on or before the expiry of the period of three months, any regular Principal is not appointed, or such a Principal does not assume office, the senior most teacher in the college shall officiate as Principal of such College until a regular Principal is appointed"

4. It is evident from the provision aforestated that in the event of occurrence of a vacancy in the post of the Principal, the Management of an affiliated college has been given a discretion to appoint 'any teacher', to officiate as Principal for period of three months or until appointment of a regular Principal whichever is earlier. If on or before the expiry of the period of three months, any regular Principal is not appointed, or such a Principal does not assume office, the senior most teacher in the college shall officiate as Principal of such College until a regular Principal is appointed. The language employed in Statute 13.20 makes it abundantly clear that if a regular Principal is not appointed within three months or such Principal does not join before the expiry of three months, the senior most teacher in the College 'shall' officiate as Principal of such College until a regular Principal is appointed. The right of the senior most teacher in the College to officiate as Principal till a regular Principal is appointed, is not dependent on any formal order of appointment by the Management or Vice Chancellor. It is not disputed that the fourth respondent is not the senior most teacher in the College and the petitioner is admittedly senior the fourth respondent. In paragraph no. 14 of the writ petition it has been averred that Prof. B.B.L. Agarwal, the senior most teacher of the College, has already retired and Dr. A.K.Gupta next in order of seniority has proceeded on long leave since the last several years and has, perhaps taken job in United Stated of America and Dr. T.N. Verma, the third teacher in order of seniority, has also retired and Dr. D. K. Agarwal, ranking fourth in the seniority list has declined to work as officiating Principal an, therefore, the petitioner being the next senior most teacher became entitled to officiate as Principal after expiration of period of three months from the date the fourth respondent was appointed ass officiating principal of the College.

5. However, for the respondents it has been submitted that the fourth respondent being the senior most teacher in the Post Graduate Department of the College, is entitled to work as officiating Principal of the College in the absence of a regular Principal. Reliance has been placed upon the communication dated 12.9.1993, annexed as Annexure No. CA 3 to the counter affidavit, addressed by the Assistant Registrar of the University

to the Secretary of the Committee of Management of the College. The communication contained in the letter dated 12.9.1993 cannot override the specific provisions contained in the Statute 13.20 which makes no distinction between a teacher of the Post Graduate Department and a teacher in the Degree Department. It is settled that in the same cadre, seniority of a teacher of an affiliated College, as provided in Statute 18.05 read with Statute 18.16 of the first Statute of the Kanpur University, is determined " according to the length of his continuous service in substantive capacity" Statute 18.10 provides that seniority of Principal and other teachers shall be determined by the length of continuous service from the date of appointment in substantive capacity. No provision in the Statutes provides that a teacher in the Post Graduate Department will be senior to a teacher in the degree department. The contention raised by the learned counsel appearing for the respondent that the petitioner being a teacher in the Degree Department is not entitled to work as officiating Principal in preference to the fourth respondent who is a teacher in the Post Graduate Department cannot be countenanced in view of the specific provision contained in Statute 13.20 read with Statute 18.10 A common seniority list of teachers in the same cadre and same grade, whether working in the Degree Department or in the Post Graduate Department, is prepared and admittedly the petitioner as well as fourth respondent are in the same cadre and same grade. Merely because the fourth respondent is teaching in the Post Graduate Department is no ground to hold him senior to the petitioner. In **Civil Misc. Writ Petition No. 42347 of 2000 Dr. Shyam Badan Singh Versus Chancellor, Deen Dayal Upadhyay Gorakhpur University, Gorakhpur and others** decided on 12th December, 2000 Government Order dated 9.7.1968 came up for consideration in which it was, inter alia provided that if two teachers are in the same grade, one belonging to the Post Graduate Department would be senior with one belonging to the Degree Department. This Court held that such provision contained in the Government Order was "incompatible with the scheme laid down in the Statutes for determination of seniority" for the reason that qualification and manner of appointment and inter se seniority of teachers of affiliated Colleges in the same cadre and grade is to be determined b the length of service to be reckoned with reference to the date of their substantive appointments irrespective of whether appointment is made in the Degree department or Post Graduate Department. This Court in the case aforesaid has clearly held that the Statute makes no distinction between teachers of the Degree Department or those of Post Graduate Department appointment appointed in the same cadre and same grade.

6. It was then contended by the counsel appearing for the respondents that the petitioner was not qualified for appointment as a Principal in the post Graduate Department. In our opinion, the criterion for appointment as officiating Principal in an affiliated College is seniority. The petitioner being senior to the fourth respondent is entitled to work as officiating Principal. The fourth respondent has no right to work as officiating Principal.

7. In the facts and circumstances of the case the writ petition succeeds and is allowed. The respondents are directed to handover the charge of officiating Principal of the College to the petitioner within ten days of furnishing certified copy of this order before the Secretary/Manager of the College. The petitioner shall be entitled to work as officiating Principal until replaced by a regularly selected/ appointed Principal unless, of course, Dr. A.K. Gupta or Dr. D.K. Agarwal, who are senior to the petitioner, stake their claim for appointment as officiating Principal.
