ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.8.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 9075 of 1984

Narendra Kumar Sharma and another
...Petitioner
Versus
The Rent Control and Eviction Officer, Aligarh and another ...Opposite Parties

Counsel for the Petitioners:
Sri V.K. Gupta

Counsel for the Opposite Parties:
S.C.

Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972- Ss. 16 and 12- Declaration of vacancy by RC & EO- No opportunity of hearing given to owner-quashi-judicial function- violation of principles of natural justice -violated Impugned order set aside.

Held- Para 1

The Rent Control and Eviction Officer, Aligarh has passed an order under Section 16 read with Section 12 of U.P. Act No. 13 of 1972 declaring the vacancy in accommodation in dispute, which is owned by the petitioner. It is admitted case, as would be clear from the assertions made in the writ petition as well as in the impugned order that before passing the impugned order the petitioner, owner/landlord has not been afforded any opportunity of hearing by the Rent control and Eviction Officer as held in the case reported in 1984 (2) ARC page 7 and 2002 (2) ARC 434 that the District Magistrate while declaring the vacancy or passing an allotment order exercises quasi judicial function, therefore, even if there is no such provision either in the provisions of Section 16 of U.P. Act No. 13 of 1972 or in the Rules 8 and 9 of U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Rules, 1972, the petitioner being owner and landlord was entitled for opportunity before passing the impugned order.

Case law discussed:
1984(2) ARC 7
2002(2) ARC 434

(Delivered by Hon'ble Anjani Kumar, J.)

1. The proceedings initiated on the application of respondent no. 2, Mahesh Chand Sharma who in spite of due service of notice has chosen not to appear before this court the Rent Control and Eviction Officer, Aligarh has passed an order under Section 16 read with Section 12 of U.P. Act No. 13 of 1972 declaring the vacancy in accommodation in dispute, which is owned by the petitioner. It is admitted case, as would be clear from the assertions made in the writ petition as well as in the impugned order that before passing the impugned order the petitioner, owner/landlord has not been afforded any opportunity of hearing by the Rent control and Eviction Officer as held in the case reported in 1984 (2) ARC page 7 and 2002 (2) ARC 434 that the District Magistrate while declaring the vacancy or passing an allotment order exercises quasi judicial function, therefore, even if there is no such provision either in the provisions of Section 16 of U.P. Act No. 13 of 1972 or in the Rules 8 and 9 of U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Rules, 1972, the petitioner being owner and landlord was entitled for opportunity before passing the impugned order.

2. In this view of the matter, the writ petition succeeds and is allowed only on this point. The matter is sent back to the Rent Control and Eviction Officer,

Aligarh to be decided in accordance with law after affording opportunity to the petitioner. Since the matter is fairly old, therefore, the Rent Control and Eviction Officer is directed to decide the same within three months from the date of presentation of certified copy of this order before him.

Petition Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.8.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 23013 of 1988

Harnam Das ...Petitioner
Versus
IInd Additional District Judge, Shahjahanpur and another ...Opposite Parties

Counsel for the Petitioner:
Sri V.K. Barman
Sri B.B. Jauhari
Sri R.Mohan
Sri H.P. Pandey

Counsel for the Opposite Parties:
Sri R. Asthana
Sri S.P. Singh
Sri G.N. Verma
Sri A. Srivastava
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972-S. 20(d)- Suit for ejectment on ground of material alteration- For ejectment of tenant material alteration has to be of such a nature that diminishes value of accommodation in question- Neither any pleading nor any finding the revisional court in this regard- Hence impugned order quashed.

Held. Para 3

However, to me it appears that the ground of material alteration does not sufficient for ejectment of the tenant even if the finding is that the tenant has materially altered the accommodation in question. In view of the provision of Section 20 (2) (d) of the Act, this material alteration is of such a nature, which diminishes the value of the accommodation in question. There is neither any pleading, nor any finding by the revisional Court, in this regard. In this view the matter, the order passed by the revisional Court deserves to be quashed.

(Delivered by Hon'ble Anjani Kumar, J.)

1. Heard Sri Bhanu Bhushan Jauhari, learned counsel appearing on behalf of the petitioner and the learned Standing Counsel for the State as well as Sri Ramendra Asthana, learned counsel for the contesting respondent.

2. The petitioner tenant aggrieved by an order passed by the revisional court dated 16th November, 1988, whereby the revisional court set aside the judgment and decree passed by the trial court dismissing the suit filed by the land lord for ejectment of the petitioner on the ground that there is material alternation, approached this Court by means of present writ petition under Article 226 of the Constitution of India.

3. Learned counsel appearing on behalf of the petitioner argued that the finding regarding material alteration ifs perverse and based on a report, which cannot be said to have been proved according to the evidence, which is inadmissible and the said report was submitted by the Commissioner in connection with some other suit, he therefore submitted that this report is

inadmissible. Learned counsel for the petitioner has not been able to demonstrate that the evidence, which has been relied upon is inadmissible, as such this argument deserves to be rejected and is hereby rejected. However, to me it appears that the ground of material alteration does not sufficient for ejectment of the tenant even if the finding is that the tenant has materially altered the accommodation in question. In view of the provision of Section 20 (2) (d) of the Act, this material alteration is of such a nature, which diminishes the value of the accommodation in question. There is neither any pleading, nor any finding by the revisional Court, in this regard. In this view the matter, the order passed by the revisional Court deserves to be quashed.

4. In the result, the writ petition succeeds and is allowed. The order dated 16th November, 1988, Annexure-VI to the writ petition, passed by the revisional Court is quashed. The matter is send back to the revisional Court with the direction to decide the same afresh in the light of the observations made above. Since the matter if fairly old, the revisional Court shall decide the matter within three months from the date of production of a certified copy of this order.

Petition Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.8.2004

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 198 of 1977

Lalta Prasad and others ...Petitioner
Versus
The Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioners:
Sri I.N. Singh
Sri Ajay Yadav
Sri Anil Yadav

Counsel for the Respondents:
Sri Anuj Kumar Singh
S.C.

U.P. Consolidation of Holdings Act-1952, S.9- Objection questing the validity of lease- consolidation authorities have no jurisdiction to decide question of validity of lease or allotment made by the Gaon Sabha–writ allowed.

Held- Para 4

The question about the jurisdiction of the consolidation authorities to go into the validity of the lease deed executed by Gaon Sabha has been subject matter of consideration before a Full Bench of this Court in the case of Similesh Kumar vs. Gaon Sabnha, Uskar, Ghazipur & others, reported in 1977 RD 408. The Full Bench held that consolidation authorities do not have jurisdiction to decide the question of validity of lease or allotment made by the Gaon Sabha and they cannot go beyond the same. The facts of the case being identical of the facts of case of Similesh Kumar (supra), the law declared by the Full Bench is applicable with full force. In view of the law laid down by the Full Bench, this writ petition deserves to be allowed.

Case law discussed:
1977 RD 408 (All) (FB)

(Delivered by Hon'ble Krishna Murari, J.)

1. I have heard I.N. Singh, learned counsel for the petitioners and learned Standing Counsel for the respondents.

2. The dispute in the present writ petition to plot no. 1679 M area 3-10-0 and plot no. 1677 M area 10-0-0 situate in village Lacchmanpatti, Tehsil Gyanpur

district Varanasi. The plots belong to Gaon Sabha which executed lease deed of different area of the said plots in favour of the petitioners in the year 1963. The Tehsildar made a report that lease executed in favour of the petitioner no. 1 by the land management committee being against the provision of the U.P.Z.A. & L.R. Act and the rules framed thereunder was invalid and liable to be cancelled. On the said report proceedings for cancellation were initiated against the petitioner no. 1 and he was put to notice. He contested the proceedings and filed objections. The Assistant Collector, First Class vide order dated 13.10.1969 held that lease was executed in accordance with the provision of the U.P.Z.A. & L.R. Act and the rules framed thereunder and was valid. The said order was not challenged and became final. With respect to other petitioners, no such proceedings for cancellation were ever initiated. The village where the land is situated, was notified for consolidation operations under the U.P. Consolidation of Holdings Act (hereinafter referred to as the Act). In the basic year, the plots in dispute were recorded in the name of Gaon Sabha. The petitioners filed objection under Section 9 of the Act claiming rights on the basis of the lease deed in their favour. The Consolidation Officer vide judgment and order dated 8.10.1966 rejected the objection on the ground that procedure prescribed for grant of lease was not followed as such the same are invalid and confers no right upon the petitioners. The said judgment of the consolidation officer was affirmed in appeal by the Settlement Officer of Consolidation also met the same fate.

3. It has been urged by the learned counsel for the petitioner that consolidation authorities have no jurisdiction to go into the validity of the lease deed and the orders passed, rejecting their claim holding the lease deed in their favour to be invalid, are illegal and without jurisdiction.

4. The question about the jurisdiction of the consolidation authorities to go into the validity of the lease deed executed by Gaon Sabha has been subject matter of consideration before a Full Bench of this Court in the case of ***Similesh Kumar vs. Gaon Sabnha, Uskar, Ghazipur & others***, reported in 1977 RD 408. The Full Bench held that consolidation authorities do not have jurisdiction to decide the question of validity of lease or allotment made by the Gaon Sabha and they cannot go beyond the same. The facts of the case being identical of the facts of case of ***Similesh Kumar (supra)***, the law declared by the Full Bench is applicable with full force. In view of the law laid down by the Full Bench, this writ petition deserves to be allowed. It is noteworthy that the dispute started in 1967 and has remained pending for about thirty seven years and no useful purpose would be served by remanding the matter back. The claim of the petitioners based on the lease deed was rejected by the consolidation authorities only on the ground that the same was not valid and legal for which they had no jurisdiction. The lease executed by Gaon Sabha in favour of the petitioners has never been cancelled by any competent authority and thus is a valid lease.

5. In this view of the matter, the writ petition stands allowed. The judgment and order dated 13.8.1976, 22.8.1968 and 8.2.1967 passed by respondent nos. 1,2 & 3 respectively are hereby quashed. The objection filed by the petitioner under Sections 9 of the Act stands allowed. A writ of mandamus is issued to the consolidation authorities to correct the

record and enter the name of the petitioners in the revenue records accordingly on the basis of the lease deed in their favour.

6. However, in the facts and circumstances, there shall be no order as to costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.7.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 430 of 2003

High Court Bar Association ...Petitioner
Versus
Deputy Labour Commissioner, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Ajit Kumar
Sri Mohit Kumar

Counsel for the Respondents:
Sri A.S. Diwakar
S.C.

Payment of Gratuity Act, 1972- S. 1 (3)-Applicability-Held, S. 1 (3) is not applicable to High Court Bar Association since it is not a factory, nine outfield, plantation, post or railway company, nor any shop or establishment–Further no notification under S. 1 (3) (c) by Central Government bringing High Court Bar Association within purview of Act.

Held: Para 6

As regards clause (c) of Section 1 (3) of the Payment of Gratuity Act this will apply only when there is Central Govt. notification in this behalf. We have not been shown any Central Govt. notification under clause (c) of the Section 1 (3) which brings the High Court Bar Association, Allahabad within the purview of the Payment of Gratuity Act. Hence it is clear that the Payment of Gratuity Act 1972 does not apply to the High Court Bar Association, Allahabad at all.

(Delivered by Hon'ble M. Katju, J.)

1. Heard Sri Mohit Kumar learned counsel for the High Court Bar Association, Allahabad. None appears for respondents although the name of Sri A.S. Diwakar has been shown in the cause list.

2. This special appeal has been filed against the impugned judgment dated 7.5.03 of the learned Single Judge which dismissed the writ petition of the High Court Bar Association challenging the order under the Payment of Gratuity Act.

3. In our opinion this special appeal deserves to be allowed on the short point that the Payment of Gratuity Act does not apply to the High Court Bar Association at all.

"Section 1(3) of the Payment of Gratuity Act states :

(3) It shall apply to -
(a) every factory, mine, oilfield, plantation, port and railway company,

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.
(c) such other establishments or class of establishments, in which ten or more employees are employed or were employed, on any day of the preceding twelve months as the Central government may, by notification, specify in this

behalf.

4. An establishment comes within the purview of the Payment of Gratuity Act 1972 only if it belongs to one of the three categories specified in Section 1 (3) of the Act.

The High Court Bar Association is surely not a factory, mine oilfield, plantation, port or railway company. Hence clause (a) of Section 1(3) of the Act does not apply to it.

5. As regard clause (b) of Section 1(3) this too will not apply because this relates to a shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in the State in U.P. This law is the U.P. Dookan Aur Vaniya Adhisthan Adhiniyam, 1962. The High Court Bar Association, Allahabad is not a shop or establishment which comes within the purview of the aforesaid U.P. Act 1962.

6. As regards clause (c) of Section 1(3) of the Payment of Gratuity Act this will apply only when there is Central Govt. notification in this behalf. We have not been shown any Central Govt. notification under clause (c) of the Section 1 (3) which brings the High Court Bar Association, Allahabad within the purview of the Payment of Gratuity Act. Hence it is clear that the Payment of Gratuity Act 1972 does not apply to the High Court Bar Association, Allahabad at all. Hence the order dated 15.3.91 challenged before the learned Single Judge and any order passed under the Payment of Gratuity Act so far as it relates to the High Court Bar Association, Allahabad was wholly without jurisdiction.

7. Hence this special appeal is allowed and the impugned judgment dated 7.5.2003 is set aside. The order dated 15.3.91 is quashed.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.8.2004

BEFORE
THE HON'BLE M. KATJU, A.C.J.
THE HON'BLE V.C. MISRA, J.

Civil Misc. Recall Application No. 62452 of 2004

M/s Beltek India Limited ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Vijay Prakash

Counsel for the Respondents:
Sri Pradeep Kumar
Sri Uma Nath Pandey
S.C.

Land Acquisition Act-Ss. 4,6,11-A-Acquisition of land for planned Industrial development–It is for public purpose in urgently- Normal made of taking possession is by executions possession memo by Amin-once it is done, it will be deemed that possession has been taken by respondents- Hence, application for recall of judgment dismissing writ petition, rejected.

Held: Para 7

Thus it is evident from these decisions that once possession memo has been executed it has to be deemed that possession has been taken by the respondents. It may be mentioned that normal mode of taking possession by the authorities is that the Amin goes to the spot and executes a possession memo.

Once this is done it has to be deemed that possession has been taken by the respondents.

Case law discussed:

JT 1996 (3) SC 60
JT 1995 (6) SC 248
AIR 1975 SC 1767
AIR 1996 SC 122
2002(2) AWC 1629
2002 (5) AWC 3665
W.P. 27317 of 2001 decided on 5.3.2004

(Delivered by Hon'ble M. Katju, J.)

1. This is an application to recall the judgment dated 31.3.2004 by which petition was dismissed following the decision of this Court in Kaloo Ram v. State of U.P. and others, writ petition no. 27317 of 2001.

2. In paragraph 5 and 6 of the affidavit filed in support of this application it is stated that the writ petition was dismissed in the absence of the learned counsel for the petitioner who could not attend due to his illness. Hence we have heard the petitioner again on merits of the case but we are not inclined to recall the judgment dated 31.3.2004.

3. Learned counsel for the petitioner has alleged that actual physical possession of the land was not taken from the petitioner as stated in paragraph 27,32 and 33 of the writ petition. However, in a counter affidavit it has been stated in paragraph 18,24 and 25 that possession was taken by the respondents on 27.11.99. True copy of the possession memo is Annexure CA-1 to the counter affidavit.

4. In Balmokand v. State of Punjab, JT 1996 (3) SC 60 it was held by the Supreme Court that the normal mode of taking possession and giving delivery to the beneficiaries is the accepted mode of taking possession of the land. Subsequent thereto the retention of possession would tantamount only to illegal or unlawful possession. Hence merely because the appellant subsequent to 27.11.99 retained actual possession of the acquired land the acquisition cannot be said to be bad in law.

5. In **Awadh Bihari Yadav v. State of Bihar, JT 1995 (6) SC 248 (vide paragraph 11) following the earlier decision in Balwant Narayan Bhagde v. M.D. Bhagwat and others, AIR 1975 Sc 1767** it was held that once possession of the land was taken by the Government even if thereafter the owner of the land entered upon the land and resumed possession such act does not have the effect of obliterating the consequences of vesting.

6. It has been repeatedly held that once possession memo has been executed it will be deemed that possession has been taken by the respondents vide **Awadh Bihari Yadav v. State of Bihar, AIR 1996 SC 122, Bal Mukund Khatri Educational and Indusrial Trust v. State of Punjab JT 96 (3) SC 60 Mahendra Singh v. State of U.P. 2002 (2) AWC 1629, Kaloo Ram v. State of U.P. Writ petition no. 27317 of 2001 decided on 5.3.2004** etc. The acquisition proceedings will not lapse under section 11-A in this situation vide **Patharoo v. U.P. Awas Evam Vikas Parishad, 2002 (5) AWC 3665**.

7. Thus it is evident from these decisions that once possession memo has been executed it has to be deemed that possession has been taken by the respondents. It may be mentioned that normal mode of taking possession by the authorities is that the Amin goes to the spot and executes a possession memo. Once this is done it has to be deemed that

possession has been taken by the respondents. After all, the Amin is not expected to remain on the spot day and night after executing the possession memo. The land in question is required for planned industrial development and as held in Kaloo Ram vs. State of U.P. (supra) this is for public purpose and is urgent as the country requires industrialization for its progress. The relevant case law has been discussed in great detail in Kaloo Ram's case (supra) and we fully agree with the same. Application rejected.

Recall application rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.8.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 960 of 2004

Managing Director, U.P. State Ware Housing Corporation and another ....Appellants
Versus
Sri Radhey Shyam ...Respondent

Counsel for the Appellants:
Sri O.P. Singh

Counsel for the Respondent:
Sri V.K. Singh

Service Law-Dismissal-Chargesheet-served-not replied by the delinquent employee-disciplinary authority is bound to hold ex-party enquiry-without enquiry dismissal order-held illegal.

Held- Paras 4, 5 & 6

From the above facts it is evident that in fact on enquiry was held against the writ petitioner after giving him the charge sheet.

The Division Bench of this Court has held that after the charge sheet is given the date, time and place of the enquiry should be intimated to the employee and on that date the oral and documentary evidence against the petitioner should be led in his presence and he should be given opportunity of cross examination. If despite intimation the employee fails to appear in the enquiry then an exparte enquiry should be held, but the employee's service cannot be terminated without holding an enquiry, the enquiry officer must hold an exparte enquiry in which the evidence must be led against the employee.

In the present case a perusal of the enquiry report (Annexure 28 to the writ petition) shows that merely because the petitioner did not reply to the charge sheet it was deemed that he accepted the charge. This is not legally correct as held in Subhash Chandra Sharma's case.

Case law discussed:
AIR 1962 SC 1348
1999 (4) AWC 3227

(Delivered by Hon'ble M. Katju, J.)

1. This special appeal has been filed against the impugned judgment of the learned Single Judge dated 9.7.2004.

2. We have heard the learned counsel for the parties and have carefully perused the impugned judgment and find no infirmity in the same.

3. The facts are set out in great detail in the judgment of the learned Single Judge and hence we are not repeating the same. However, we may mention that a charge sheet dated 21.3.1993 in respect of caste certificate was issued to the petitioner but the enquiry in this regard was subsequently dropped. Thereafter no enquiry was held against the writ petitioner and instead the enquiry report dated 29.7.1999 was submitted by the

enquiry officer, copy of which is Annexure 28 to the writ petition. A perusal of the enquiry report shows that all that is stated therein is that since several opportunities were given to the writ petitioner for replying to the charge sheet but he did not do so, hence it would be deemed that he has accepted the charges against him. Thereafter a show cause notice was issued to the petitioner on 10.8.1999 to which he gave a reply and thereafter the impugned dismissal order dated 14.2.2000 was passed. Against that order the writ petition was filed in this Court which has been allowed by the learned Single Judge.

4. From the above facts it is evident that in fact on enquiry was held against the writ petitioner after giving him the charge sheet.

5. The facts of the case are covered by the decision of the Supreme Court in the Imperial Tobacco company of India Ltd. vs. Its workmen, AIR 1962 SC 1348 which has been followed by a Division Bench of this Court in Subhash Chandra Sharma vs. Managing Director, 1999 (4) AWC 3227. The Division Bench of this Court has held that after the charge sheet is given the date, time and place of the enquiry should be intimated to the employee and on that date the oral and documentary evidence against the petitioner should be led in his presence and he should be given opportunity of cross examination. If despite intimation the employee fails to appear in the enquiry then an exparte enquiry should be held, but the employee's service cannot be terminated without holding an enquiry, the enquiry officer must hold an exparte enquiry in which the evidence must be led against the employee.

6. In the present case a perusal of the enquiry report (Annexure 28 to the writ petition) shows that merely because the petitioner did not reply to the charge sheet it was deemed that he accepted the charge. This is not legally correct as held in Subhash Chandra Sharma's case (supra).

7. For the reasons given above there is no force in this appeal and it is dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.7.2004

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 27737 of 2004

Ram Prasad and another ...Petitioners
Versus
Moti Singh and others ...Respondents

Counsel for the Petitioners:
Sri D.V. Jaiswal

Counsel for the Respondents:
S.C.

Code of Civil Procedure-O.IX R. 13- Ex parte decree- order of restoration and condonation of delay by appellate court by common order, held, not illegal, where ground for restoration of suit and condonation of delay is same.

Held: Para 5

After hearing learned counsel for petitioners and considering materials on record, I am of the view that as reasons disclosed for non-appearance on the date fixed in the suit and delay in filing restoration application are same, appellate court rightly allowed restoration application after condoning delay.

Case law discussed:
(2002) 3 SCC 156

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Heard learned counsel for petitioners.

This writ petition is directed against the judgment and order dated 18.3.2004 passed by Special Judge, J.P. Nagar in Civil Misc. Appeal No. 52 of 2002.

2. From perusal of record it transpires that by an ex parte decree dated 9.5.1997 plaintiff- petitioners' suit was decreed by Civil Judge (J.D.), Hasanpur, Moradabad. Applications for restoration of suit and for condoning delay supported by an affidavit were rejected by trial court by order dated 22.5.2002. The judgment and order passed by appellate court in appeal is impugned in the present writ petition.

3. By the impugned judgment, appellate court allowed restoration application and condoned delay, ex parte decree dated 9.5.1997 was set aside at the cost of Rs.1,000/- and suit was restored to its original number.

4. Learned counsel for petitioners urged that trial court passed an order on the question of delay only and did not pass any order so far as restoration application is concerned. He further urged that appellate court erred in law while allowing the restoration application also and order impugned is vitiated in law on this ground.

5. After hearing learned counsel for petitioners and considering materials on record, I am of the view that as reasons disclosed for non-appearance on the date fixed in the suit and delay in filing restoration application are same, appellate court rightly allowed restoration application after condoning delay.

6. Where ground for restoration of the suit as well as condonation of delay is the same, order restoring the suit and condoning delay could be passed by one and common order and in case restoration application is allowed, delay shall be deemed to be condoned.

My view is supported by a judgment of Apex Court reported in (2002) 3SCC 156 Devinder Pal Sehgal and another Vs. Pratap Steel Rolling Mills Pvt. Limited.

7. There is no error of law in the impugned order. It was rightly passed in accordance with law. Now parties get full opportunity of hearing.

Writ petition lacks merits and is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.7.2004

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

Civil Misc. Writ Petition No. 33892 of 1999

Hira Prasad ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Sri A.K. Singh

Counsel for the Respondents:
S.C.

Essential Commodities Act- Seeds Control Order, 1983 - R. 3 (i)-

Applicability–Notice under- validity- Petitioner preparing plants of certain fruits, trees and selling them-This cannot be called selling, exporting or importing seeds under R. 3 (1)-Impugned notice quashed.

Held: Para 5

In our opinion, this cannot be called selling, exporting or importing the seeds. Hence the petitioner cannot be required to take licence under the Seeds (Control) Order. He has already obtained a licence under the Fruit Nursery (Regulation) Act, 1976, as stated in paras 8 and 10 of the writ petition. The writ petition is, therefore, allowed and the impugned notice dated 26.7.1999 is quashed.

(Delivered by Hon'ble M. Katju, J.)

1. Heard counsel for the parties.

2. This petition has been filed for quashing the impugned notice 26.7.1999, annexure 1 to the writ petition by which the petitioner has been directed to obtain a licence under the Seeds (Control) Order, 1983 which was issued under the Essential Commodities Act.

Rule 3 (1) of the Seeds (Control) Order states that:

"No person shall carry on business of selling, importing and exporting seeds on any place except under and in accordance with the terms and condition of licence granted to him under this order."

3. Shri Ajay Kumar Singh, learned counsel for the petitioner has stated that the petitioner does not sell, import or export seeds as stated in para 10 (1) of the writ petition. Hence his business is not covered by the Seeds (Control) Order 1983.

4. Learned Standing counsel has invited our attention to annexure CA 1 to the counter affidavit which is a copy of the petitioner's application dated 4.8.1999 to the addressed to the District Agricultural Officer, Varanasi. In this application, the petitioner has stated that he prepares plants of certain fruit, trees and sells them.

5. In our opinion, this cannot be called selling, exporting or importing the seeds. Hence the petitioner cannot be required to take licence under the Seeds (Control) Order. He has already obtained a licence under the Fruit Nursery (Regulation) Act, 1976, as stated in paras 8 and 10 of the writ petition. The writ petition is, therefore, allowed and the impugned notice dated 26.7.1999 is quashed.

Petition Allowed.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.8.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE U. PANDEY, J.

Special Appeal No. 921 of 2004

Brijpal Sharma ...Appellant
Versus
The State of U.P. & others ...Respondents

Counsel for the Appellant:
Sri S.K. Srivastava
Sri A.K. Srivastava

Counsel for the Respondents:
Sri I.P. Singh
S.C.

Constitution of India- Article 226- Service Law- Transfer order- writ court granted interim order- special appeal-

held- transfer is an exigency of service- Interim order of writ court staying transfer illegal-Special Appeal against interim order held maintainable.

Held-Para 3

In Special Appeal No. 555 of 2004, State of U.P. vs. Smt. Mera Sankhwar decided on 12.7.2004 this court has in great detail discussed which interim orders are appeallable and which are not. The entire case law has been discussed in that decision, and hence we are not referring to the same.

Case law discussed:

Spl. Appeal 555 of 2004, decided on 12.7.2004
Spl. Appeal 860 of 2004, decided on 26.7.2004
Spl. Appeal 855 of 2004, decided on 21.7.2004
Spl. Appeal 911 of 2004, decided on 5.8.2004
AIR 1993 SC 2444
AIR 1991 SC 532
AIR 1991 SC 1605
AIR 1995 SC 813
(Suppl.) 3 SCC 214
(1994) 6 SCC 98
AIR 2001 SC 1748
(2003) 4 SCC 104

(Delivered by Hon'ble M. Katju, A.C.J).

1. Heard Sri A.K. Srivastava, learned counsel for the appellant and Sri I.P. Singh and learned standing counsel for the respondents.

2. This special appeal has been filed against the interim order of the learned Single Judge dated 22.7.2004 staying the transfer order of the writ petitioner and directing that he shall continue to work as Junior Engineer Vikas Khand-Sikandarabad, District Bulandshahar and be paid his salary.

3. In *Special Appeal No. 555 of 2004, State of U.P. vs. Smt. Mera Sankhwar decided on 12.7.2004* this court has in great detail discussed which interim orders are appeallable and which are not. The entire case law has been discussed in that decision, and hence we are not referring to the same.

4. Subsequently in *Special Appeal No. 860 of 2004, Shesh Nath Singh vs. Mukesh Singh and others, decided on 26.7.2004* and in *Special Appeal No. 855 of 2004, Union of India vs. Raghubir Prasad decided on 21.7.2004* and *Special Appeal No. 911 of 2004, Sandeep Kumar Singh vs. State of U.P. Decided on 5.8.2004*, we have held that a special appeal lies against an interim order a learned Single Judge staying the transfer order because transfer is an exigency of service, and hence this Court should not ordinarily interfere with the transfer orders. In this decision also the case has been considered e.g. The decision of the Supreme Court in *Union of India vs. S.I. Abbas, AIR 1993 SC 2444, Shilpi Bose vs. State of Bihar, AIR 1991 SC 532, Union of India vs. N.P. Tomas, AIR 1991 SC 1605, Chief Manager (Tel) NE Telecome Circle vs. Rajendra Ch. Bhattacharjee, AIR 1995 SC 813, State of U.P. vs. Dr. R.N. Prasad (suppl.) 3 SCC 214, N.K. Singh vs. Union of India and others (1994) 6 SCC 98, Abani Kante Ray vs. State Bank of India vs. Anjan Sanyal & others AIR 2001 SCC 1748, and Public Services Tribunal Bar Association vs. State of U.P. and others (2003) 4 SCC 104.*

For the reasons given above this appeal is **allowed**. The impugned order is set aside.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2004

BEFORE
THE HON'BLE M. KATJU, J.

Special Appeal No. 941 of 2004

Committee of Management, and another ...Appellants
Versus
Amar Nath Gupta & others ...Respondents

Counsel for the Appellants:
Miss Anuradha Sundaram

Counsel for the Respondents:
Sri Shailesh Srivastava
Sri M.L. Jain
S.C.

Service Law-House rent allowance-Entitlement to-If both husband and wife are in Service, only one who is getting higher H.R.A., held, entitled to get such benefit.

Held: Para 4

Hence we are of the opinion that if both the husband and wife are in service then both are not entitled to house rent allowance unless it is clearly established that they are divorced or otherwise separated. Only one of them can claim for house rent allowance. If they are getting different amounts of house rent allowance then the spouse, who is getting higher house rent allowance will continue to get the house rent allowance but the other will not get it.

(Delivered by Hon'ble M. Katju, A.C.J.)

1. This Special Appeal has been filed against the impugned judgment of learned Single Judge dated 30.7.2004.

2. We have heard the learned counsel for the parties and have perused the impugned order.

3. The question in this case that both husband and wife are in service whether they both are entitled to get house rent allowances? We are of the firm opinion that they are not. The reason for our opinion is that the house rent allowance is given for compensation for the house rent which an employee has to pay to his landlord.

4. Ordinarily a husband and wife are presumed to live together in the same house and if they are paying say Rs.1000/- to the landlord then obviously both husband as well as wife cannot get house rent allowances of Rs.1,000 each because they will then be getting Rs.2000/- as house rent allowance. Hence we are of the opinion that if both the husband and wife are in service then both are not entitled to house rent allowance unless it is clearly established that they are divorced or otherwise separated. Only one of them can claim for house rent allowance. If they are getting different amounts of house rent allowance then the spouse, who is getting higher house rent allowance will continue to get the house rent allowance but the other will not get it.

5. With these observations, the appeal is allowed and the impugned order is set aside.

Appeal allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2004

BEFORE
THE HON'BLE R.B. MISRA, J.

Civil Misc. Writ Petition No. 6779 of 1983

Tribhuwan Nath Rai ...Petitioner
Versus
State of U.P. through the Collector, Ghazipur and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Misra
Sri Sidheshwari Prasad
Sri R.P. Yadav
Counsel for the Respondents:
Sri Sandeep Mukherji, S.C.
Sri O.P. Singh
Sri Faujdar Rai

Constitution of India-Article 226-Selection of petitioner on Asstt. Teacher by Selection Committee placing of wrong facts about petitioner that he possessed requisite qualification of B.Ed. on relevant date-Selection null and void-set aside by DIOS-Fresh selection conducted-Petitioner, not entitled to appointment and salary.

Held: Para 5 & 6

According to the respondents, the petitioner was never allowed to join as such, no question arose for payment and when the out-come of the selection committee is void abinitio and the selection committee arrived on the conclusion to give quality point marks on the non-existing facts i.e. on the fact that the petitioner was not B.Ed. it is well settled that a candidate has to be in possession of required qualification and eligibility at the relevant date and time as required in the advertisement and acquiring degree or qualification beyond the prescribed date does not entitle to be bonafide candidate for the said selection in view of decision of Supreme Court in (1994) 2 S.C.C. 723 U.P. Public Service Commission Vs. Alpana.

I have learned counsel for the parties. I find that the petitioner was not in possession of the required qualification on the relevant date and has placed wrong facts that he was B.Ed., and got appointment to the post of Assistant Teacher in C.T. grade in the year 1998 which was declared dying cadre and the said selection by which the petitioner was bonafidely declared approved was set aside being null and void by the then D.I.O.S.. The subsequent selection already conducted had approved another person who was allowed to work. In these circumstances, the petitioner has no right to the post and salary and is not entitled to any relief as prayed for.
Case law discussed:
(1994) 2 SCC 723

(Delivered by Hon'ble R.B. Misra, J.)

1. Heard Sri R.P. Yadav learned counsel for and on behalf of the petitioner and Sri Sandeep Mukherji, learned Standing counsel.

2. In this petition prayer has been made for issuance of writ of mandamus commanding the respondents to pay the petitioner his entire salary due from 24.3.1982.

3. It appears that an advertisement was published for selection to the post of Assistant Teacher in C.T. Grade (now a dying cadre) in the year 1980 where the incumbent was required to possess of B.Ed. degree in addition to the required qualification prescribed. The petitioner had appeared in the B.Ed. Examination but his result was not declared and at that relevant time he was not in a possession of degree of B.Ed., however on his wrong disclosure that he possess B.Ed. Degree,

he was allowed to participate in the selection and the Selection Committee bonafidely awarded quality point marks and found into the zone of selection. According to the petitioner in view of such recommendation of Selection Committee, he has joined the service however he is not being paid salary.

4. According to the respondents, the petitioner was never allowed to join as such, no question arose for payment and when the out-come of the selection committee is void abinitio and the selection committee arrived on the conclusion to give quality point marks on the non-existing facts i.e. on the fact that the petitioner was not B.Ed. it is well settled that a candidate has to be in possession of required qualification and eligibility at the relevant date and time as required in the advertisement and acquiring degree or qualification beyond the prescribed date does not entitle to be bonafide candidate for the said selection in view of decision of Supreme Court in *(1994) 2 S.C.C. 723 U.P. Public Service Commission Vs. Alpana.*

5. As indicated on behalf of the respondents, in view of the averments made in the counter affidavit that application on behalf of the petitioner was submitted to the management of Govind Intermediate College, Sadat, Ghazipur for allowing the petitioner to join in the service on the basis of the order dated 5.4.1982 passed by the District Inspector of Schools. The District Inspector of Schools after considering the entire facts and circumstances by his order dated 10.10.1980 cancelled the recommendation of the selection committee being null and void and directed for fresh selection in accordance with Rules. In pursuance of the order dated 10.10.1980 the Committee of Management took the steps for the fresh selection and the fresh advertisement was also published and the duly constituted Selection Committee at the relevant time recommended the selection of Mr. Shashidhar Rai which too was approved by the District Inspector of Schools and consequent upon Sri Shashidhar Rai had joined the service as Assistant Teacher in C.T. grade and was working, however the petitioner submitted an application to the Manager for allowing him to join, since the petitioner was never appointed by the Committee of Management and was never approved by the D.I.O.S., as such he was not allowed to join the post, therefore, the petitioner is not entitled to any relief as prayed for as contended on behalf of the respondents.

6. I have heard learned counsel for the parties. I find that the petitioner was not in possession of the required qualification on the relevant date and has placed wrong facts that he was B.Ed., and got appointment to the post of Assistant Teacher in C.T. grade in the year 1998 which was declared dying cadre and the said selection by which the petitioner was bonafidely declared approved was set aside being null and void by the then D.I.O.S.. The subsequent selection already conducted had approved another person who was allowed to work. In these circumstances, the petitioner has no right to the post and salary and is not entitled to any relief as prayed for.

In view of the above, the writ petition is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.22995 of 2001

Devendra Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.S. Chaudhary
Sri Ansu Chaudhary

Counsel for the Opposite Parties:
S.C.

Dying in Harness Rules, 1974-Claim for appointment by adopted son under Registered adoption deed-Rejection by District Magistrate and State Government-Writ against-Held, an adopted son held entitled for an appointment under Dying in Harness Rules, 1974.

Held: Para 4 & 5

There was no difference between a real son and an adopted son and that an adopted son was entitled to all the benefits which a real son gets and was, therefore, entitled for an appointment under the Dying-in-Harness, Rules, 1974.

In view of the aforesaid decisions, the order dated 14.5.2001, passed by the State Government as well as the order dated 30.5.2001, passed by the District Magistrate are quashed and the writ petition is allowed. A mandamus is issued to the respondent no.2 to consider the claim of the petitioner and, if it is found that he is an adopted son of the deceased, he should be given necessary appointment within four weeks from the date a certified copy of this judgment is produced before me.

Case law discussed:
(1996) 1 UPLBEC 4
1994 (68) FLR 283

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner contends that he is the adopted son of Jai Singh. He was adopted on 10.4.1983 according to hindu customs and traditions and that the adoption deed was duly registered. His father died on 29.5.1992. By an order of the Civil Judge, dated 24.2.1993, a succession certificate was granted in favour of the petitioner. The petitioner contends that upon his father's death, he applied for an appointment under the Dying-in-Harness Rules. The State Government by an order dated 14.5.2001 informed the District Magistrate that an adopted son was not entitled for appointment under the Dying-in-Harness Rules, 1974. On the basis of this order the District Magistrate, respondent no.2, by his order dated 30.5.2001 rejected the petitioner's application for appointment under the Dying-in-Harness Rules. The petitioner has now preferred this writ petition for quashing the orders dated 14.5.2001 and 30.5.2001 (Annexures 6 and 7 to the writ petition).

2. Heard Sri Anshu Chaudhary, the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

3. In **Singhasan Gupta vs. State of U.P. and another,** *(1996) 1UPLBEC 4***,** this Court has held that the claim of an adopted son could not be rejected on the ground that he was an adopted son and directed the authorities to consider his case for appointment if he was found to be valid.

4. In **Sunil Saxena vs. State of U.P.**

and others, *1994(68) FLR 283*, this Court held that there was no difference between a real son and an adopted son and that an adopted son was entitled to all the benefits which a real son gets and was, therefore, entitled for an appointment under the Dying-in-Harness, Rules, 1974.

5. In view of the aforesaid decisions, the order dated 14.5.2001, passed by the State Government as well as the order dated 30.5.2001, passed by the District Magistrate are quashed and the writ petition is allowed. A mandamus is issued to the respondent no.2 to consider the claim of the petitioner and, if it is found that he is an adopted son of the deceased, he should be given necessary appointment within four weeks from the date a certified copy of this judgment is produced before me.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No.36043 of 1998

Anurag Chand ...Petitioner
Versus
Director of Education (Basic)/Chairman, Basic Shiksha Parishad, U.P., Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Singh
Sri G.S. Singh
Sri Dinesh Rai

Counsel for the Respondents:
Sri B.P. Singh
S.C.

U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974-Family-Meaning of-whether step son is covered by definition of family and is entitled to appointment under Rule?-held 'yes'.

Held: Para 5

In my view, a stepson would be covered under the definition of word 'family' and would be entitled for appointment.

Case law discussed:
2001 (3) ESC (All) 1283
2004 (1) ESC (All) 180

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner's step mother, Smt. Geeta Kushwaha died in harness on 28.8.1997. As a step son, the petitioner applied for his appointment under the U.P. Recruitment of Dependent of Government Servant Dying in Harness Rules, 1974. The application of the petitioner was also accompanied by a succession certificate issued by the Tehsildar. Subsequently, the respondents issued an appointment letter dated 4.5.1998 appointing the petitioner on the post of Assistant Teacher in Prathmic Vidyalaya Phulwariya, Kashi Vidyapeeth, Varanasi. On the basis of the aforesaid appointment letter, the petitioner joined the school as an Assistant Teacher and worked till 3.6.98, on which date respondent No.2, namely, District Basic Education Officer, Varanasi cancelled the appointment order dated 2.5.1998 by the impugned order on the ground that the petitioner is not a uterine son of the deceased and was, therefore, not entitled for appointment under the Dying in Harness Rules, 1974.

The impugned order dated 3.6.1998 has been assailed in the present writ petition.

2. Heard Sri Dinesh Rai, the learned

counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

Under the Rules of 1974, family has been defined as under.

"(c) "family" shall include the following relations of the deceased Government servant:
(i) Wife or husband:
(ii) Sons;
(iii) Unmarried and widowed daughters;

3. From a perusal of the aforesaid rules it is clear that son is included in the definition of word "family".

The question that arises for consideration is, whether a uterine son could only be included in the definition clause of "family" or whether a step son could also be included.

4. In my view, the word "family" has to be liberally construed. In **Smt. Kusum Devi Vs. State of U.P. and others, 2001 (3) E.S.C. (All.)** 1283, it was held that a divorced daughter of the deceased would be covered under the definition of family and would be entitled to an appointment under the Dying in Harness Rules 1974. In **Smt. Urmila Devi Vs. U.P. Power Corporation, Lucknow and others, 2004(1)** E.S.C.(All.) 180, it was held that a daughter-in-law of the deceased son would be also covered under the definition of family and would be entitled for appointment.

5. In my view, a stepson would be covered under the definition of word 'family' and would be entitled for appointment.

6. In view of the aforesaid, the writ petition is allowed and the impugned order dated 3.6.98 passed by the respondent No.2 (filed as Annexure No.7) is quashed. The petitioner would be entitled to continue in service as a legal heir of the deceased.
Petition Allowed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.7.2004

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 9993 of 1990

M/s Neera Chemicals P. Ltd. and another ...Applicants
Versus
Union of India ...Respondents

Counsel for the Applicants:
Sri Raghuraj Kishore

Counsel for the Respondent:
Sri Ashok Kumar
Sri Bharat Ji Agarwal
S.C.

Income Tax Act, 1961-Ss. 269-Ss., 276-DE, 278B and 276-DD-Criminal prosecution for violation of S. 269-SS punishable under S. 276 DE read with S. 278B-Held, there can be no prosecution for a breach of S. 269 SS, if prosecussion has been launched after deletion of S. 276 DD even if loan amounts were taken by cash prior to that date i.e. 1.4.1989-Secondly, liability under S. 278 B would only arise provided any offence has been committed-If there is no commission of offence, no question of complaint against Managing Director arises.

Held: Para 2

There can be no prosecution for a breach of Section 269-SS, if the prosecution has been launched after deletion of Section

276 DD, even if, the loans amounts were taken by cash, prior to that date i.e. 1.4.1989. This decision has been followed by a learned Single Judge of this Court in Criminal Misc. Application No. 7508 of 1990, Messrs Sudhir Chandra Sunil Kumar and others vs. State of U.P. and others. Learned counsel for the Income Tax Department fairly concedes that this is the correct legal position. So far as the other charge relating to Section 278 B is concerned, that imposes liability on parties, who are in charge of a company. However, that liability would only arise, provided that an offence has been committed in the first place. If there has been no commission of any offence, then there can be no question of making a complaint against the Managing Director.

Case law discussed:

AIR 2003 SC 3126

(Delivered by Hon'ble Amar Saran, J.)

1. Heard learned counsel for the applicants Sri Raghuraj Kishore and Sri Ashok Kumar, learned counsel for Income Tax Department.

2. The allegations in this case were that the applicants are said to have taken three loans in cash and not by cheques or bank drafts in the assessment year 1986-98 totaling Rs.21,000/-. In this manner they are said to have violated the provisions of Section 269 SS of the Income Tax Act, 1961 punishable under Section 276 DE of the Income Tax Act, 1961 read with Section 278 B. Now this complaint was dated 24/25.5.1989. I find that Section 276DD has been omitted with effect from 1.4.1989. There is a decision of Hon'ble Supreme Court in the case of Messrs. General Finance Co. and another v. Assistant Commissioner of Income Tax, Punjab, AIR 2002 SC, 3126, wherein it has been held that there can be no prosecution for a breach of Section 269-SS, if the prosecution has been launched after deletion of Section 276 DD, even if, the loans amounts were taken by cash, prior to that date i.e. 1.4.1989. This decision has been followed by a learned Single Judge of this Court in Criminal Misc. Application No. 7508 of 1990, Messrs Sudhir Chandra Sunil Kumar and others vs. State of U.P. and others. Learned counsel for the Income Tax Department fairly concedes that this is the correct legal position. So far as the other charge relating to Section 278 B is concerned, that imposes liability on parties, who are in charge of a company. However, that liability would only arise, provided that an offence has been committed in the first place. If there has been no commission of any offence, then there can be no question of making a complaint against the Managing Director.

3. In this view of the matter, the application succeeds and criminal proceedings in case No. 265 of 1989 (Union of India vs. M/s Neera Chemicals Private Limited and another) pending in the Court of C.J.M., Kanpur and others are quashed.

Proceeding quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2004

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.3844 of 1985

M/s U.P. State Sugar Corporation Ltd.
...Petitioner
Versus
The Labour Court, U. P. and another
...Respondents

Counsel for the Petitioner:
Sri Dilip Gupta
Sri R.K. Shukla
Sri R.D. Khare

Counsel for the Respondents:
Sri Shyam Narain
S.C.

Constitution of India-Article 226-Labour Law-Retrenchment Neither nature of work for which workman was employed was temporary nor appointment was due to excess load of work for temporary period-Labour Court on basis of admitted fact held, that while terminating Services of workman provisions of retrenchment were not complied cessation of work of workman amounts to retrenchment-Principle of 'No Work No Pay"

Held: Para 5

The Labour Court rejected the case set up by the employer-petitioner and have found that neither the nature of work for which the workman was appointed was temporary or contingency nor it has been shown that the appointment of the workman was done because of the excess load of work for a temporary period. Therefore the Labour Court has arrived at a conclusion, on the basis of the admitted fact, that while terminating the services of the workman concerned, provisions of retrenchment have not been complied with and held that cessation of work of the workman concerned by the employer amounts to retrenchment.

Case law discussed:
(2002) 6 SCC

(Delivered by Hon'ble Anjani Kumar, J.)

1. The petitioner-employer, aggrieved by an award of the Labour Court dated 24th September 1984 in Adjudication Case No.1 of 1975, has approached this Court by means of this writ petition under Article 226 of the Constitution of India.

2. The following dispute was referred to the Labour Court for adjudication:-

"KYA SEWAYOJAKON DWARA APNE KARMCHARI SHRI MUJIB AHMAD [PUTRA SHRI KHAN MOHAMMAD] KO SEASON 1973-74 KE ARAMBH HONE KI TITHI 7-12-73 KO KARYA PAR NA LIYA JANA UCHIT TATHA/ATHWA VAIDHANIK HAI. YADI NAHIN TO SAMBANDHIT KARMCHARI KYA LABH/KSHATIPURTI PANE KA ADHIKARI HAI TATHA ANYA KIS VIVRAN SAHIT."

3. The Labour Court, on receipt of the aforesaid reference, issued notices to the workman concerned as well as the employer. The parties exchanged pleadings and adduced evidence. In short the workman has set up his case that he has been employed by the employer in crushing season 1971-72 and has worked the whole season of 1971-72 as sheet-writing clerk which is the job of seasonal nature. The crushing of the season 1972-73 started on 28.11.1972 and ended on 15.3.1973. The workman worked in this 1972-73 season also. His work and conduct was unblemished and no complaint whatsoever was either raised or communicated to the workman concerned. The workman has further set up the case that when the bonus to all other employees was paid for the season 1971-72 he was also paid the bonus but he was not paid retaining allowance. The workman has further cited the case of other employees who were appointed with the workman concerned, they were still allowed to work. The cause of action for raising dispute has arisen when all other

employees similarly situated were allowed to join 1972-73 season but the workman concerned was denied. The aforesaid deprivation of employment by the employer to the workman concerned is contrary to law and the workman concerned is entitled to all rights and consequential benefits of a seasonal employee.

4. On the contrary the employers have set up the case that the workman was appointed purely on temporary basis under the standing orders on 12.12.1972. Initially his appointment was for a period of two months and all the terms and conditions were mentioned in the letter of appointment. Since the employment of the workman was of temporary nature his services were terminated in terms of the letter of appointment. He, therefore, as stated by the employer, has no right for reinstatement and any other right. It is also stated by the employer that for the year 1972-73 the workman has not worked for whole of the season. The employers have further stated that for the crushing season 1972-73 which started on 27.11.1972. The workman concerned worked with effect from 13.12.1972 to 7.3.1973 but he was paid the wages for the whole season beyond which the workman is not entitled for anything. In their rejoinder the employers have stated that the workman concerned was not posted on one purchasing center. His appointment was purely temporary for a temporary job and the employers have never terminated the services of the workman concerned but his services came to an automatic end with the end of the job.

5. The Labour Court considered the pleadings of the parties and evidence on the record. The Labour Court rejected the case set up by the employer-petitioner and have found that neither the nature of work for which the workman was appointed was temporary or contingency nor it has been shown that the appointment of the workman was done because of the excess load of work for a temporary period. Therefore the Labour Court has arrived at a conclusion, on the basis of the admitted fact, that while terminating the services of the workman concerned, provisions of retrenchment have not been complied with and held that cessation of work of the workman concerned by the employer amounts to retrenchment.

6. The Labour Court has also recorded a finding that the contention of the employer that on commencement of crushing season 1973-74 the workman has not presented himself for job and it is incorrect to say that he was denied of the job. In the pleadings this statement has since not been controverted, the Labour Court, in my opinion, arrived at a conclusion against it on the basis of findings recorded by the Labour Court, which, in my opinion, cannot be interfered by this Court in exercise of power under Article 226 of the Constitution of India as this Court will not sit in appeal over the findings arrived at by the Labour Court. This writ petition has no force. It deserves to be dismissed and is accordingly dismissed.

7. Lastly, it is submitted by learned counsel for the employer that admittedly the workman has not worked for all these days during the pendency of this writ petition since after the alleged termination of service, therefore, on the principle of 'no work no pay' the order of the Labour Court deserves to be modified as laid down by the Apex Court in the case of ***Hindustan Motors Ltd. Vs. Tapan Kumar Bhattacharya and another, (2002) 6 SCC 41.***

8. In this view of the matter the award is modified to the extent that subject to petitioner's permitting the workman concerned to join his duties with effect from the coming crushing season, the workman shall be entitled for half of the emolument from the date of termination till the date of reinstatement in the coming season.

There shall be no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.24623 of 2000

No.6920275-W Naik M.K. Moorthy
...Petitioner
Versus
The Chief of Army Staff and others
...Respondents

Counsel for the Petitioner:
Sri Colonel Ashok Kumar

Counsel for the Respondents:
Sri Subodh Kumar
S.C.

Constitution of India-Art. 226- Writ order-Maintainability- Order of punishment and served upon petitioner in Banglore-Statutory representation under Section 164 (2) of Army Act made by petitioner from Bangalore-Same was decided at new Delhi and Communicated to petitioner at Tamilnadu-No cause of action or part of it arose in State of U.P.-Hence Allahabad High Court has no Territorial jurisdiction to decide the matter.

Held: Para 7 & 9

From the pleadings in the petition it is clear that the order of punishment was passed and served upon the petitioner in Bangalore and that he made a statutory representation under section 164 [2] of the Army Act from Bangalore itself; therefore, the cause of action arose only at Bangalore. The representation under section 164 [2] of the Act was decided at New Delhi and communicated to the petitioner in Bangalore. Therefore, no cause of action or part of cause of action arose in the State of U.P. and therefore, this Court does not have any territorial jurisdiction to decide the matter. The mere fact that the petitioner was posted at Allahabad does not give him any cause of action to decide the petition at Allahabad.

Words and Pharas-word-'may'-whether directory or mandatory?
In my view, the word 'may' is only directory and is not mandatory nor does it give a right to the petitioner to sue the Chief of the Army Staff anywhere in the country according to his own choice, whims or caprice. The chief of the Army Staff can be sued anywhere in the country, provided the cause of action or a part of the cause of action arose in that State.

Case law discussed:
2001 (2) UPLBEC 1275
AIR 1998 All 47
AIR 1988 All. 36
1997 (1) UPLBEC 236

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner was enrolled in the Indian Army in 1994. The petitioner was posted at Bangalore and pursuant to an incident dated 30.7.1994, he was chargesheeted for using criminal affairs against his superior officers. The Summary Court Martial proceedings were held at Bangalore in July 1999 in which an order dated 21.7.97 was passed imposing minor punishment of reduction in rank and three months rigorous imprisonment. The petitioner thereafter

filed a statutory representation under section 164 [2] of the Army Act 1950 before the G.O.C.-in-Command, Sadan Command Pune. The said representation was rejected by the competent authority on 24.2.1998 and a communication to this effect was sent by the office of the Additional Director General Army Head Quarter, New Delhi vide its letter dated 29.5.1998 to the petitioner address in Tamilnadu. The petitioner has now filed the present writ petition before this Court at Allahabad for quashing of the Summary Court Martial proceedings, the order of penalty as well as the order passed in the petition under section 164[2] of the Army Act.

2. A preliminary objection has been raised by the respondents that this Court does not have the territorial jurisdiction to hear the petition, inasmuch as no cause of action arose in the State of U.P. and therefore, no writ could be issued by this Court. It was contended that the petitioner was posted at Bangalore, the incident occurred at Bangalore and that the Court Martial proceedings were also conducted at Bangalore and that the order of punishment was also passed at Bangalore. Not only this, the representation under section 164 [2] of the Army Act, was also represented by the petitioner from Bangalore and that the order of dismissal of his petition laws communicated to the petitioner in Tamilnadu and therefore, no cause of action wholly or in part arose in the State of U.P.

3. Heard Colonel Ashok Kumar, the learned counsel for the petitioner and Sri Subodh Kumar, the learned counsel for the respondents.

The learned counsel for the petitioner submitted that the Chief of the Army Staff could be sued anywhere in the country as held by the Supreme Court in Dinesh Chandra Gahotri v. Chief of the Army Staff, 2001 [2] UPLBEC 1275. The petitioner was posted in Ordinance Depot at Allahabad in the month of April 1999 and therefore, he was entitled to file a writ petition before the Allahabad High Court.

The submission of the learned counsel for the petitioner is wholly devoid of any merit and is liable to be rejected. The mere fact that the petitioner was posted at Allahabad does not give him any cause of action to file a petition at Allahabad.

4. In **Rakes Dhar Tripathi v. Union of India, AIR 1998 Alld.47** a Division Bench of this Court held that since all the respondents were residing at New Delhi and that the cause of action arose only in New Delhi, the mere fact that the petitioner was residing at Allahabad would not entitle him to file a writ petition at Allahabad. The Court held that it had no territorial jurisdiction.

5. In **Daya Shanker Bhardwaj v. Chief of the Air Staff, New Delhi and others, AIR 1988 Allahabad 36**, a Division Bench of this Court held-

"A right of action arises as soon as there is an invasion of right. But ' cause of action' and ' right of action' are not synonymous or interchangeable. A right of action is the right to enforce a cause of action (American Jurisprudence 2nd Edition vol. I.) A person residing anywhere in the country being aggrieved by an order of government Central or State or authority or person may have a right of action at law but it can be enforced or the jurisdiction under Art. 226 can be invoked of that High Court only within whose territorial limits the cause of

action wholly or in part arises. The cause of action arises by action of the government or authority and not by residence of the person aggrieved."

6. In **Chabi Nath Rai v. Union of India and others, 1997[1] UPLBEC-236** a Division Bench of this Court held-

"The mere fact that he sent a representation from Allahabad and the decision on his representation was communicated at Allahabad did not give any cause of action at Allahabad. In Special Appeal No.300 of 1995, Sipoy Ranchhor Singh v. Union of India and others, it was held that -- "merely because the delinquent served the sentence in district Jail, the cause of action does not arise at the place where he is serving the sentence, but it is the place where the person is tried, sentence and convicted. The Court declined to issue a writ of mandamus to decide the representation by the Chief of Army Staff at New Delhi."

In Lt. Col. [Mrs.] Saroj Mahanta v. Union of India and others, 2003 [3] ACJ 2511 a Division Bench of this Court held "thus in view of the above we are of the considered opinion that in order to determine as to whether the writ Court has a jurisdiction to entertain a petition the pleadings in the petition have to be examined and opinion is to be formed as to whether a cause of action partly or fully has arisen or the respondents reside or have office within the territorial jurisdiction of the Court. In absence thereof if the view is taken that petition is to be entertained on merit without considering as to whether such pre-requisite conditions are there the provisions of clauses [1] and [2] of Article 226 of the Constitution would render nugatory."

7. From the pleadings in the petition it is clear that the order of punishment was passed and served upon the petitioner in Bangalore and that he made a statutory representation under section 164 [2] of the Army Act from Bangalore itself; therefore, the cause of action arose only at Bangalore. The representation under section 164 [2] of the Act was decided at New Delhi and communicated to the petitioner in Bangalore. Therefore, no cause of action or part of cause of action arose in the State of U.P. and therefore, this Court does not have any territorial jurisdiction to decide the matter. The mere fact that the petitioner was posted at Allahabad does not give him any cause of action to decide the petition at Allahabad.

8. The learned counsel for the petitioner contended that the Chief of the Army Staff could be sued anywhere in the country. In this regard, the learned counsel has placed reliance upon the judgment of the Supreme Court in Dinesh Chandra Gahtori [supra].

The aforesaid decision has been considered by a Division Bench of this Court in Lieutenant Colonel [Mrs.] Saroj Mahanta v. Union of India and others [supra] in paragraph 50 of the judgment a Division Bench of this Court held –

"From the above it is evident that the Hon'ble Supreme Court in Dinesh Chandra Gahotri [supra] has not laid down any law of universal application. The observations have been made to meet a particular situation where the case remain pending for about a decade." Thus, the direction issued therein if considered in the light of other judgments referred to above does not seem to have a binding effect."

9. Further, I find that the Supreme

Court in Dinesh Chandra Gahotri judgment [supra] had held " that the Chief of the Army Staff ***may*** be sued anywhere in the country."

In my view, the word 'may' is only directory and is not mandatory nor does it give a right to the petitioner to sue the Chief of the Army Staff anywhere in the country according to his own choice, whims or caprice. The chief of the Army Staff can be sued anywhere in the country, provided the cause of action or a part of the cause of action arose in that State.

10. In view of the aforesaid it is clear that the Court has no territorial jurisdiction to decide the writ petition. There is another aspect of the matter, the writ petition is also liable to be dismissed on the ground of laches. From the averments made in the writ petition it is clear that the order of punishment was passed on 21.7.1997 and the statutory petition of the petitioner under section 164 [2] was rejected on 24.2.98. According to the petitioner he was transferred and posted to Allahabad in April 1999 and thereafter filed the writ petition in May 2000 before this Court. No explanation has been given as to why the petitioner could not file a writ petition between the period 24.2.1998 and April 1999 i.e. from the date of rejection of the petition under section 164[2] of the Army Act and his posting at Allahabad. Further, the explanation given by the petitioner for the period April 1999 to May 2000 is vague and does not inspire any confidence. The explanation given seems to be an afterthought in order to cover up the delay.

11. Accordingly, I find that the petitioner is not entitled to any discretionary relief from this Court. The writ petition is dismissed with cost on the ground of laches as well as on the ground of lack of territorial jurisdiction.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.8.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Writ Petition No. 33645 of 2004

M/s L.M.L. Limited, Kanpur ...Appellants
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh

Counsel for the Respondents:
Sri K.C. Sinha, S.S.C.
Sri Rajesh Tewari
Sri Md. Khursheed Alam

Constitution of India-Art. 226-Premature stage-Writ against order asking Petitioner to produce certain documents-held, premature-Moreover, alternative remedy available under S. 75 of ESI-Act, if any adverse order is passed Petition held not maintainable.

Held: Para 3 & 4

We have perused the impugned orders. These orders have only asked the petitioner to produce certain documents. In our opinion, these notices do not amount to any adverse order against the petitioner. Hence the petition is premature. Moreover, if any adverse order is passed against the petitioner, he has an alternative remedy to approach the E.S.I. Court under Section 75 of the E.S.I. Act. In Special Director and another Vs. Mohd. Ghulam Ghouse and another 2004 A.I.R. S.C.W. 416, the Supreme Court deprecated the practice

of the High Court of entertaining writ petitions against a show cause notice.

The Writ Petition is premature and is dismissed at this stage.

Case law discussed:
2004 AIR SCW 416

(Delivered by Hon'ble M. Katju, J.)

1. Heard learned counsel for the petitioner.

2. The petitioner has challenged the impugned orders dated 30.7.2004 and 9.8.2004 (Annexures 8 and 9 to the Writ Petition).

3. We have perused the impugned orders. These orders have only asked the petitioner to produce certain documents. In our opinion, these notices do not amount to any adverse order against the petitioner. Hence the petition is premature. Moreover, if any adverse order is passed against the petitioner, he has an alternative remedy to approach the E.S.I. Court under Section 75 of the E.S.I. Act. In Special Director and another Vs. Mohd. Ghulam Ghouse and another 2004 A.I.R. S.C.W. 416, the Supreme Court deprecated the practice of the High Court of entertaining writ petitions against a show cause notice.

4. The Writ Petition is premature and is dismissed at this stage.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No.5728 of 1996

Rama Shanker Shukla ...Petitioner
Versus
Nagar Mahapalika Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Vikas Budhwar
Sri R.M. Saggi

Counsel for the Respondents:
Sri Rakesh Dwivedi
Sri S.D. Kautilya
Sri A.K. Shukla

Indian Penal Code, 1890-Ss. 493, 24, 25-Service Law-Termination order-Petitioners a Tax Collector, had clear intention to misappropriate-huge amount collected by him as tax-retention of amount for considerable period and utilization of money for personal gain-Deposit of amount only after suspension, does not absolve petitioner from his guilt misappropriating the amount-No explanation for not depositing amount. Thus intention to misappropriate amount-established charges-No ground for interfere with punishment awarded by disciplinary Authority.

Held: Para 6 and 14

In the present case, the petitioner collected a sum of Rs.1,48,000.00 and odd and did not deposit the money in the Treasury for a long time. The petitioner retained and used this amount for his own personal gain. Subsequently, on the basis of a preliminary enquiry, it was found that the petitioner had retained a large sum of money on the basis of which the petitioner was suspended and

it was only, thereafter, that the petitioner had deposited the amount. If the respondents had not found out about the shortfall, in that event, the petitioner would have retained the amount. The deposit of the amount was made after a considerable period of time and no explanation had been given by the petitioner as to why he could not deposit the money earlier. Therefore, in my view the petitioner was guilty of dishonest misappropriation.

As I have already held, the petitioner had a clear intention to misappropriate the amount, and the petitioner had retained the amount for a considerable period of time and utilized the money for his own gain benefit. The fact that the petitioner deposited the amount only after he was suspended does not absolve the petitioner of his initial guilt of misappropriating the amount. Further, no explanation had been given by the petitioner as to why he could not deposit the money earlier. In the absence of any explanation, it is clear that the intention of the petitioner was to misappropriate the amount. Thus such a person who was posted as a Tax Collector, which is a post of trust, could not retained in service.

Case law discussed:

1997 ALJ 1310
2000 (18) LCD 1040
AIR 1959 SC 1390
2001 (2) UPLBEC 1475
2000 (1) UPLBEC 541

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner was initially appointed as a daily wager in the Nagar Mahapalika, Allahabad in the year 1984. His services were regularized in the year 1992 and on 5.6.1992, the petitioner was appointed as a Tax Collector. It transpires that on the basis of a preliminary enquiry it was found that large sums of money collected by the petitioner was not deposited in the Treasury. Accordingly, the petitioner was placed under suspension vide an order dated 22.2.1994. A charge sheet dated 13.2.1995 was issued in which it was stated that large sums of money collected by the petitioner was not deposited in the Treasury, which he had misappropriated for his own use and therefore, caused a loss to the department. The charge sheet further stated that when this fact was brought to the notice of the petitioner, the said amount was deposited subsequently but there was a short fall of Rs.100.60. The petitioner, vide his reply, admitted that whatever amount was found short was deposited by him and that he was also willing to deposit the short fall of Rs.100.60. The enquiry officer after holding the enquiry, submitted his report holding that the charge No.1 was serious in nature and that the petitioner had collected a sum of Rs.1,48,000.00 and odd and that he deliberately did not deposit this amount in the Treasury and deposited the amount only after he was suspended. The enquiry officer found that the petitioner was guilty of misusing and misappropriating the funds of the Nagar Mahapalika. On the basis of the enquiry report, a show cause notice was issued to the petitioner and subsequently by an order dated 19.1.1996,the services of the petitioner was terminated. Against the order of termination, the petitioner has filed the present writ petition.

2. Heard Sri Vikas Budhwar, the learned counsel for the petitioner and Sri S.D.Kautilya, the learned counsel for the respondents.

3. A preliminary objection was raised by the learned counsel for the respondent Sri S.D.Kautilya that against the order of termination, the petitioner had a right of an appeal before the Commissioner and, therefore, the writ petition was not maintainable and should

be dismissed on the ground of alternative remedy. This writ petition was entertained in the year 1996 and after eight years, I am not inclined to dismiss the writ petition on the ground of alternative remedy and, therefore, I propose to deal with the matter on merits. The preliminary objection raised by the learned counsel for the respondents is accordingly rejected.

4. The learned counsel for the petitioner contended that the charges mentioned in the charge sheet dated 13.2.1995 did not constitute any misconduct and, therefore, the petitioner's services could not be terminated. The learned counsel for the petitioner submitted that once the amount of Rs.1,48,000.00 and odd was deposited, the question of misappropriation does not arise nor does it constitute a misconduct. So far as the second charge is concerned, the learned counsel for the petitioner stated that there could have been a bonafide error in not depositing a sum of Rs. 100.60 and that the petitioner was willing to deposit the short fall. In any case, the petitioner could not be made guilty of misappropriating this small amount of Rs.100.60. The petitioner contended that since a sum of Rs.1,48,000.00 and odd had been deposited, no loss was caused to the respondents. In support of his submission, the learned counsel for the petitioner relied upon the decisions of this court in **Chain Sukh Vs. State of U.P. reported in 1997 A.L.J. Page 1310 and Ram Bharat Tewari Vs. Town Area Committee 2000(18) L.C.D. 1040.**

5. In my view, I am not at all impressed by the submissions made by the learned counsel for the petitioner and the judgment cited are distinguishable. In Chain Sukh case (supra), charges levelled against the incumbent was dereliction of duty and in that light, the court held that since there was no charge of dishonest misappropriation, the mere delay in depositing the money could not constitute dishonest misappropriation. In Ram Bharat Tewari case (supra), the court held that the retention of Rs. 3,000.00 by the incumbent did not amount to misappropriation, inasmuch as the incumbent had stated from the very beginning that he had drawn the amount to purchase National Savings Certificate for the staff members, which certificates were not available in the post office and in that connection he had retained the amount. The court also found that the retention of the amount was also recorded in the cash book, hence the court came to a conclusion that the delay in depositing the money did not constitute misappropriation. In my view, the aforesaid decisions are distinguishable and do not apply to the present facts and circumstances of this case.

6. In the present case, the petitioner collected a sum of Rs.1,48,000.00 and odd and did not deposit the money in the Treasury for a long time. The petitioner retained and used this amount for his own personal gain. Subsequently, on the basis of a preliminary enquiry, it was found that the petitioner had retained a large sum of money on the basis of which the petitioner was suspended and it was only, thereafter, that the petitioner had deposited the amount. If the respondents had not found out about the shortfall, in that event, the petitioner would have retained the amount. The deposit of the amount was made after a considerable period of time and no explanation had been given by the petitioner as to why he could not deposit the money earlier. Therefore, in my view the petitioner was guilty of dishonest misappropriation.

7. Section 403 of the Indian Penal Code defines dishonest misappropriation of the property as under.

"403 Dishonest misappropriation of property:-
Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Explanation 1-A dishonest misappropriation for a time only is a misappropriation within the meaning of this Section."

Section 24 IPC defines "dishonestly" as
"Dishonestly"-Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing " dishonestly".

Section 25 IPC defines fraudulently as
"**Fraudulently**"-. A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

In **Krishan Kumar v/s Union of India, AIR 1959 SC 1390**, the Supreme Court held that "wrongful gain" includes wrongful retention.

8. From the record, it is clear that the misappropriation of the money was for a certain period of time, which constitutes dishonest misappropriation under Section 403 of the Indian Penal Code. The intention of the petitioner was loud and clear that he had a dishonest intention to misappropriate the amount and defraud the respondents. The mere fact that he deposited the entire amount after he was suspended would not absolve him of his dishonest intentions to misappropriate the amount.

9. The Maxim "*Actus non facit reum nisi mens sit rea*" is fully applicable and clearly applies in the present facts and circumstances of the case. The action of the petitioner is irrelevant, and it is the guilty intention which is relevant. From the record, it is clear that the intention of the petitioner was to misappropriate the money. The deposit of the amount at a later stage would not absolve the petitioner of the charge of misappropriation. The charges clearly constituted a misconduct. Thus, the submissions made by the learned counsel for the petitioner are wholly erroneous and the judgment cited by the petitioner are distinguishable.

10. The learned counsel for the petitioner next submitted that the documents were not supplied to him which were referred in the charge sheet and, therefore, the petitioner was prejudiced by the non supply of the relevant documents and on this basis, the enquiry proceedings are vitiated on account of violation of the principles of natural justice. In this regard, the learned counsel for the petitioner invited the attention of the court to the letter dated 28.2.1995 which contemplates demanding of certain documents by the petitioner.

11. In my view, the submission of the learned counsel of the petitioner is totally devoid of any merit. The letter dated 28.2.1995 was a reply of the petitioner to the charge sheet and was not a letter demanding documents from the enquiry officer. The reply of the petitioner no doubt states that the list of witnesses had not yet been supplied to him, but the said statement was only made in a casual manner. In any case, the respondents have

categorically stated in the counter affidavit that whatever documents that was demanded by the petitioner was supplied to him and that he was also permitted to inspect various documents. Thus, no prejudice has been caused to the petitioner.

12. The learned counsel for the petitioner next submitted that no oral enquiry was conducted by the enquiry officer and that an oral enquiry was a must especially when a major punishment is awarded. Since no oral enquiry was conducted, the order of termination was illegal and was liable to be quashed. In support of his contention, the learned counsel has relied upon the decision of a Division Bench of this court in **Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills, 2001(2) U.P.L.B.E.C. 1475**, in which it was held that in cases where a major punishment was proposed to be imposed, an oral enquiry was a must, even though the employee may have requested for it or not. The learned counsel also relied upon another decision in **Subhash Chandra Sharma Vs. Managing Director, 2000 (1), U.P.L.B.E.C. 541**, in which it was held-

"In the present case it appears that no regular enquiry was held at all. All that was done that after receipt of the petitioner's reply to the charge sheet he was given a show- cause notice and thereafter the dismissal order was passed. In our opinion this was not the correct legal procedure and there was violation of the rules of natural justice. Since no date for enquiry was fixed nor any enquiry held in which evidence was led in our opinion the impugned order is clearly violative of natural justice."

13. There is no quarrel with the aforesaid submission, but the judgment cited are not applicable in the present facts and circumstances of the case and are also distinguishable. In the cases cited by the petitioner, the incumbent denied the charges levelled against him and, therefore, it was incumbent for the employers to hold an oral enquiry and examine the witnesses, etc. Since no oral enquiry was conducted, the court held that there was a violation of the principles of natural justice. However, in the present case, the facts are different. The petitioner admitted the charges, and had justified his innocence on the ground that since he had already deposited the money, the charge of misappropriation disappears. Since the charges were admitted by the petitioner, the question of holding any further oral enquiry by the enquiry officer did not arise. The enquiry officer was only required to submit the enquiry report on the basis of the reply given by the petitioner. In my view, there is no infirmity in the enquiry proceedings conducted in the present case nor is the same violative of the principles of natural justice. The petitioner in his letter dated 27.3.1995 clearly admitted the charges given in the charge sheet. Consequently, no oral enquiry was required. The submission made by the learned counsel is devoid of any merit.

14. The last submission made by the learned counsel for the petitioner was that the punishment of dismissal was wholly excessive and disproportionate to the misconduct. The learned counsel submitted that since the amount had already been deposited and no loss was sustained by the respondents, therefore, in the absence of any no intention to defraud or misappropriate the amount, the petitioner should have been given a lesser punishment. As I have already held, the petitioner had a clear intention to misappropriate the amount, and the

petitioner had retained the amount for a considerable period of time and utilized the money for his own gain benefit. The fact that the petitioner deposited the amount only after he was suspended does not absolve the petitioner of his initial guilt of misappropriating the amount. Further, no explanation had been given by the petitioner as to why he could not deposit the money earlier. In the absence of any explanation, it is clear that the intention of the petitioner was to misappropriate the amount. Thus such a person who was posted as a Tax Collector, which is a post of trust, could not retained in service.

15. In my view the punishment awarded commensurated with the gravity of the charges and which was squarely been proved against the petitioner and I see no grounds to interfere with the punishment awarded by the Disciplinary Authority.

16. For the aforesaid reasons, I find no merit in the writ petition and is accordingly dismissed. However, in the circumstances of the case, there shall be no order as to cost.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.08.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 17062 of 1985

Pt. Chet Ram Sharma ...Petitioner
Versus
Ist Addl. District Judge, Meerut and others ...Respondents

Counsel for the Petitioner:
Sri N.C. Rajvanshi
Sri M.C. Rajvanshi
Sri M.C. Mishra
Sri M.K. Rajvanshi

Counsel for the Opposite Parties:
Sri Ravi Kant
Sri Pankaj Mittal
Sri Shubham Agarwal
S.C.

(A) U.P. Act No. 13 of 1972-S.10,22 and 34-Review-Power of Appellant Court-in absence of Specific Provision-appellate court can not exercise the power of Review.

Held: Para 15

Thus, from a perusal of Sections 10, 22, and 34 of the Act, read with Rule 22 of the Rules, coupled with the decisions cited aforesaid it is clear that no specific provision has been provided under the Act to review a judgment given by the appellate court.

(B) Code Civil Procedure- 1908-S.151-Judgment dictated on the points-neither raised in memo of appeal, nor argued-whether can be interfered by the said court, by exercising inherent Power-held- 'yes'-for the omission of court-the litigant should not be put to suffer.

Held: Para 27

Thus, in my view, in the present facts and circumstances of the case the application for recall of the judgment passed by the appellate court could be made under Section 151, C.P.C. and the same was maintainable. In exceptional circumstances and to advance the cause of justice, the appellate court had the inherent power under Section 151, C.P.C. to recall its judgment.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner is a tenant and has filed the writ petition challenging the

order dated 11.10.1985 passed by the appellate court recalling its judgment and restoring the appeal to its original number.

The facts are that respondent no.3 is the landlord and had filed an application under Section 21 (1)(a) of U.P. Act No.13 of 1972 (hereinafter referred to as 'the Act') for the release of the shop in question on the ground of personal need. The petitioner contested the release application. The prescribed authority by its judgment dated 26.9.1978 allowed the application and released the premises in question.

2. Aggrieved, the petitioner preferred an appeal under Section 22 of the Act. The appellate court by judgment and order dated 26.11.1984 allowed the appeal and set aside the judgment of the prescribed authority and remanded the matter back to the prescribed authority to re-decide the matter after hearing the parties.

3. It transpired that the landlord filed an application under Section 151, C.P.C. for the review of the order dated 26.11.1984. The appellate court vide order dated 11.10.1985 recalled its order and directed the appeal to be heard afresh on merits.

4. The tenant has challenged this order dated 11.10.1985 contending that the application for review was not maintainable against a judgment passed under Section 22 of the Act.

5. Heard Sri N.C. Rajvanshi, the learned Senior Counsel assisted by Sri Manik Chandra Mishra and Sri Pankaj Mittal, the learned counsel for the landlord/opposite party, assisted by Sri Shubham Agarwal, Advocate.

6. The learned counsel for the petitioner submitted that the appellate court under the Act had no power to review its earlier judgment and hence the impugned order of the appellate court reviewing its own judgment was wholly illegal and without jurisdiction. On the other hand, the learned counsel for the landlord/opposite party submitted that the appellate court had inherent powers to review its earlier judgment under clause (b) of Rule 22 of the Rules for the ends of justice to prevent the abuse of the process of the authority concerned.

7. In order to appreciate the submissions made by the rival parties, it is essential to place a few provisions of the Act and the Rules framed therein.
Section 22 of the Act reads as under:-

"**Appeal.-** Any person aggrieved by an order under Section 21 or Section 24 may within thirty days from the date of the order prefer an appeal against it to the District Judge, and in other respects, the provisions of Section 10 shall *mutatis mutandis* apply in relation to such appeal."

Section 10 of the Act reads as under:-

"**10. Appeal against order under Sections (8, 9 and 9-A)-** (1) Any person aggrieved by an order of the District Magistrate under Section 8 or Section 9 or Section 9-A may, within thirty days from the date of the order, prefer an appeal against it to the District Judge, and the District Judge may either dispose of it himself or assign it for disposal to any Additional District Judge under his administrative control, and may recall it from any such officer, or transfer it to any other such officer.

(2) The appellate authority may confirm, vary or rescind the order, or

remand the case to the District Magistrate for rehearing, and may also take any additional evidence, and pending its decision, stay the operation of the order under appeal on such terms, if any, as it thinks fit.

(3) No further appeal or revision shall lie against any order passed by the appellate authority under this section, and its order shall be final."

8. From the aforesaid it is clear that the appellate court has power to confirm, vary or rescind the order or remand the matter back to the prescribed authority for rehearing.

9. Section 34 of the Act deals with the powers of various authorities and the procedure to be followed by them. Section 34 of the Act is quoted hereunder:-

"**34. Powers of various authorities and procedure to be followed by them:-** (1) The District Magistrate, the prescribed authority or any appellate or revising authority shall for the purposes of holding any inquiry or hearing any appeal or revision under this Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908), when trying a suit, in respect of the following matters, namely,-

(a) summoning and enforcing the attendance of any person and examining him on oath;
(b) receiving evidence on affidavits;
(c) inspecting a building or its locality, or issuing commissions for the examination of witnesses or documents or local investigation;
(d) requiring the discovery and production of documents;
(e) awarding, subject to any rules made in that behalf, costs or special costs to any party or requiring security for costs from any party;
(f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith;
(g) any other matter which may be prescribed."

Sub section (8) of Section 34 is quoted hereunder:

"(8) For the purposes of any proceedings under this Act and for purposes connected therewith the said authorities shall have such other powers and shall follow such procedure, principles of proof, rules of limitation and guiding principles as may be prescribed.

10. Section 34 (g) of the Act provides that apart from the powers given to the appellate court under clause (a) to (f) of sub-section (1) of Section 34, the State Government may provide other powers as may be prescribed. Section 41 of the Act enables the State Government to make Rules to carry out the purposes of the Act. In exercise of the powers under Section 41 of the Act, the Uttar Pradesh Urban Buildings (Regulation of Letting Rent and Eviction)Rules 1972 were framed (hereinafter referred to as the "Rules").

Rule 22 of the Rules states as under:-

"**22. Powers under the Code of Civil Procedure, 1908 (Section 34 (1)(g)].-** The District Magistrate, the Prescribed Authority or the Appellate Authority shall, for the purposes of holding any inquiry or hearing any appeal or revision under the Act, shall have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 when trying a suit, in respect of the following matters, namely-

(a) the power to dismiss an application,

appeal or revision for default and to restore it for sufficient cause;

(b) the power to proceed *ex parte*, and to set aside, for sufficient cause, an order passed *ex parte*;

(c) the power to award costs and special costs to any successful party against the unsuccessful party;

(d) the power to allow amendment of an application, memorandum of appeal or revision;

(e) the power to consolidate two or more cases of eviction by the same landlord against different tenants;

(f) the power referred to in sections 151 and 152 of the Code of Civil Procedure, 1908 to make any order for ends of justice or to prevent the abuse of process of the authority concerned".

11. In **Shiv Behari Sharma** vs. **Additional District Judge, Kanpur,** 1977 AWC 679, it was held that there was no remedy for a review under U.P.Act No.13 of 1972.

In **Abdul Hameed vs. District Judge, Kanpur**, *1979 ARC 408,* it was held that appellate authority had no power to review its earlier order.

12. In **Kishori Lal alias Kashmiri Lal and others vs. Rent Control & Eviction Officer, Rampur and another**, *1984(2) ARC 623,* it was held that a review application was not maintainable to review an order passed under Section 9-A of the Act.

13. In **Kailash Singh Rajput vs. Ram Prakash,** *AIR 1979 Alld. 110,* it was held that the Court had no power to review its order in exercise of its inherent power and that the power of review could only be conferred by law either specifically or by necessary implication.

14. The learned counsel for the petitioner also invited my attention to a decision of the Supreme Court in **Lily Thomas vs. Union of India and others,** *AIR 2000 SC 1650,* in which it was held that the power of review can only be exercised for correction of a mistake and not to substitute a view and that the power of review could only be exercised within the limits of the statute dealing with the exercise of such power. The review could not be treated as an appeal in question.

15. Thus, from a perusal of Sections 10, 22, and 34 of the Act, read with Rule 22 of the Rules, coupled with the decisions cited aforesaid it is clear that no specific provision has been provided under the Act to review a judgment given by the appellate court.

16. Even though there is no specific provision for review, but could the appellate court exercise such powers by necessary implication under Section 151 C.P.C.? Section 34 (8) of the Act read with Rule 22(f) of the Rules gives powers to the appellate court to exercise the powers of Section 151 C.P.C. to pass such orders for the ends of justice or to prevent the abuse of the process of the authority concerned. In fact, the powers of Section 151 C.P.C. is clearly and expressly engrafted in Rule 22(f) of the Rules.

17. Section 151 C.P.C. does not confer any powers but only indicates that there is a power to make such orders as may be necessary for the ends of justice and to prevent an abuse of the process of the Court. If the circumstances require the court to act "ex *debito justitios*" and to do that real and substantial justice, the Court has the inherent power under Section 151 C.P.C. to make such orders.

18. In **Sri Sheo Kishan Das vs. The**

Prescribed Authority, Pilibhit and others, *1980 ARC 369,* a Division Bench of this Court held that although no specific powers are conferred but restitution can be granted under Section 151, C.P.C. in exercise of powers under Rule 22(g) and Section 34 of the Act and refusal to grant restitution would amount to non-exercise of jurisdiction vested in such authorities by law.

In **S.G. Estates and Properties Ltd. Vs. Tehri Steels Ltd.,** *1997(1) ARC 614, it was held-*

"…Section 151 is the jurisdiction inherent in a Court which can be exercised where there is no remedy available or where though such remedy is available it is just and expedient in the interest of justice that such jurisdiction is to be exercised…"

In **Sheo Nath Gupta vs. Pramod Kumar Misra and others**, *2000(1)ARC 270*, it was held-

"…if the orders do not serve the ends of justice and do not prevent the abuse of the process of the Court then the powers should not be exercised under Section 151 of the Code…"

19. From the aforesaid, it is clear that when there is no remedy available or where though such remedy is available, it is just and expedient in the interest of justice that such power is exercised under Section 151 of the C.P.C. The Courts have power in the absence of any express or implied prohibition to pass an order as may be necessary for the ends of justice or to prevent the abuse of the process of the Court.

20. Applying the aforesaid principles, it has to be seen as to whether the landlord's application for recall comes within the parameters of the power conferred under Section 151, C.P.C.

21. Admittedly, an application under Section 151, C.P.C. was filed for recall of the judgment of the appellate court. The ground for recall was that the appellate court had allowed the appeal on such grounds which were neither raised nor argued by any party and, therefore, the landlord had no opportunity to rebut those grounds. The ground for recall of the judgment has not been disputed by the petitioner. The appellate court after hearing the review application passed an order dated 31.5.1985, which is quoted hereunder:-

22. "The main grievance of the applicant in this Review petition is that a point not argued in appeal was considered by me at the time of the writing of the judgment and the petitioner claims that he has been prejudiced by this reason."

"In this premises and context I place this on record that the points whether the disputed accommodation was an independent structure or was a part of a larger building or structure was never argued in Court and it occurred to me for the first time at the time of writing of judgment when I came across the site plan of the accommodation in question and that changed entire thinking about the appeal. Since I came to hold an opinion that remand was the only answer. I did not consider it necessary to rehear the matter as no decision on merits, in my opinion was being passed.

"…I, however be the last person to let a litigant suffer for any fault or error committed by me even unknowingly. I can only say that Judges like the rest of them are all human and the concept of error is an integral concomitant of us all

mortals."

23. Based on this order, the appellate court subsequently passed the impugned order and recalled its judgment and posted the appeal for rehearing.

24. In my view, the order passed by the appellate court recalling its earlier judgment has been validly passed in the exercise of its powers conferred under Section 151, C.P.C. to meet the ends of justice and to prevent the abuse of the process of the Court. The appellate court clearly held that the judgment was passed on certain grounds which occurred to the judge which dictating the judgment and which points were neither raised nor argued by the parties and therefore, the litigant should not suffer for any fault or error committed by the appellate court. On this basis, the appellate court recalled its judgment.

25. The inherent powers have not been conferred on the Court. It is a power inherent in the Court by virtue of its duty to do justice between the parties. One of the first and main duties of the Court is to ensure that the act of the Court does not cause injustice to any of the suitors. Accordingly, if injustice has been done by the Court, the aggrieved party can invoke the provisions of Section 151, C.P.C.

26. The maxim of law expressed in the Latin phrase "*actus curaie nemini gravabit",* namely that the error of the Court will cause no harm to a litigant, fully applies in the instant case.

27. Thus, in my view, in the present facts and circumstances of the case the application for recall of the judgment passed by the appellate court could be made under Section 151, C.P.C. and the same was maintainable. In exceptional circumstances and to advance the cause of justice, the appellate court had the inherent power under Section 151, C.P.C. to recall its judgment.

28. In the result, the writ petition is devoid of any merit and is dismissed with costs, which is assessed at Rs.10,000/-. The petitioner is directed to deposit the cost before the appellate court within four weeks from today, which the landlord can withdraw. The appellate court is further directed to decide the appeal within three months from the date a certified copy of this order is produced before him.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.8.2004

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal From Order No.199 of 1992

National Insurance Co. Ltd. ...Appellant
Versus
Satya Prakash and others ...Respondents

Counsel for the Appellant:
Sri A.K. Sinha

Counsel for the Respondents:
Sri A.K. Shukla
Sri V.K. Sharma
Sri D.V. Singh
Sri Sudhir Jaiswal

Motor Vehicles Act 1988-Section 173-Principle of Joint tort feasers –explained: Collusion between two trucks-carrying more than 6 passengers-driver of both the trucks found driving the vehicle rashly and negligently-held both are liable to pay the compensation.

Held: Para 12 & 13

Therefore the liability of appellant under

the Insurance Policy to indemnify the owner of the truck for the compensation on account of accidental death of Om Veer Singh is established.

The tribunal has also recorded a finding that there was head on collusion of the trucks and the drivers of the truck were driving the vehicles rashly and negligently. Both the truck drivers have been held to be joint tort feasers.

(Delivered by Hon'ble Prakash Krishna, J.)

1. This appeal is under section 173 of Motor Vehicles Act 1988 by the Insurance Company against the judgment and order dated 25.10.1991 passed by the Motor Accident Claims Tribunal in MACT No.16 of 1991.

2. One Om Veer Singh, a labourer on daily wages at Rs.25/- was engaged by a truck driver having registration no. RNT 559 for loading and unloading purposes and was traveling in the said truck on 3rd of July 1988. On that day while going from Jagner to Sardi the said truck collided with another truck No. DEG 3398. On account of collision of two trucks aforesaid, Shri Om Veer Singh was seriously injured and ultimately died.

3. The claimant-respondents No.1 to 4 who are sons of deceased and wife filed claim petition claiming compensation being M.A.C. No.16 of 1991. In the claim petition the owners of two trucks and their respective Insurance Companies were impleaded as opp.parties.

4. The tribunal by its judgment and order dated 28.10.1991 awarded a sum of Rs.85,000/- as compensation and held that both the Insurance Companies are liable to pay half and half of it as the drivers of two vehicles were joint tort-feasers.

5. The present appeal is on behalf of the Insurance Company who had insured the truck No. RNT 559 in which the deceased was travelling as a labourer on that fateful day. The learned counsel for the appellant has pressed only one point in the appeal. He submitted that the claim against the appellant Insurance Company could not be decreed as the appellant had insured the truck. The truck is meant to carry goods. It is not meant to carry passengers. The insurance was of the truck and the goods and as such the Insurance Company is not liable to indemnify the owner of the truck for the damages awarded against the owner, in respect of a passenger on the truck.

6. Issue no.2 was struck by the tribunal to the effect as to whether the deceased wastravelling in truck No.RNT 559 as unauthorized passenger and the Insurance Company of the truck is not liable to indemnify the owner. A copy of the Insurance Policy has been filed as annexure No.3 alongwith the affidavit. The following terms of the said policy are helpful to resolve the above controversy:-

"The policy does not cover:

(i) Use for organized racing, pace making reliability trial speed testing.
(ii) Use whilst drawing a trailer except towing (other than for reward) of any one disabled mechanically propelled vehicle.
(iii) Use for carrying passengers in the vehicle except employees (other than driver) not exceeding 6 in numbers coming under the purview of W.C. Act 1923."

7. The learned counsel for the appellant, in support of this appeal made a fervent appeal and drawn my attention that a premium of Rs.24/- for two drivers and one cleaner has been paid. He

submitted that the Insurance Company had insured besides truck and the goods two drivers and one cleaner. Elaborating the argument it was submitted that the deceased was traveling in the truck as a passenger and therefore the appellant is not liable to indemnify the owner of truck. He has placed reliance upon two judgments of the Supreme Court, (i) ***Ramashray Singh Vs. New India Assurance Co. Ltd. JT 2003 (6) S.C. 97 and New India Assurance Co. Ltd. Vs. C.M. Jaya and others JT 2002 (1) S.C. 198.***

8. Heard the learned counsel for the parties and perused the record. It is to be placed on record that before the Tribunal no evidence was led by the present appellant. The Claim Petition was filed with the allegation that Om Veer Singh deceased was employed by the driver of the truck for loading and unloading purposes and in that connection he was traveling in the truck. Consequently the deceased was traveling in the truck not as a passenger but in the course of employment. It has come on record and the tribunal has also found that the driver of the truck had the authority to engage labourers for the purposes of loading and unloading goods. In paragraph No.21 of the award the tribunal has found that the deceased was employed by the driver of the truck. The driver of the truck as an agent of the owner of the truck engaged the deceased and as such he was not an unauthorized passenger in the truck. PW/1 Satya Prakash has stated that the deceased was engaged by the driver of the truck at Rs.50/- for loading and unloading purposes. The tribunal has rightly placed reliance upon the statement of PW/1 on this point. The testimony of PW/1 is uncontroverted and unchallenged. There is no evidence on record against the aforesaid finding recorded by the tribunal. Therefore the very basis of the argument of the learned counsel for the appellant that the deceased was unauthorised passenger in the goods vehicle vanishes.

9. In view of these facts liability of the appellant is required to be determined. The relevant terms of the Insurance Policy have been quoted above. The Insurance Policy does not cover the use of vehicle for carrying passengers except employees not exceeding six in number. Meaning thereby in a goods vehicle employees not exceeding six in number are covered under the Insurance Policy. The finding is that the deceased was engaged as a labourer and wastravelling in the truck in that capacity. Therefore there is no doubt that the Insurance Company is liable to indemnify the owner of the truck. The Supreme Court interpreted the aforesaid terms of the Insurance Policy in the case of ***B.V. Nagaraju vs. Oriental Insurance Co. Ltd. JT 1996 (6) S.C. 32.*** In para 5 of the aforesaid judgment the terms of the Insurance Policy have been quoted and in para 7 of the report it has been mentioned as follows:-

10. "It is plain from the terms of the Insurance Policy that the insured vehicle was entitled to carry six workmen, excluding the driver."

11. It is not the case of the appellant that the vehicle in question was carrying on workmen exceeding six in number on the date of occurrence of the accident.

12. Therefore the liability of appellant under the Insurance Policy to indemnify the owner of the truck for the compensation on account of accidental death of Om Veer Singh is established.

13. The tribunal has also recorded a finding that there was head on collusion

of the trucks and the drivers of the truck were driving the vehicles rashly and negligently. Both the truck drivers have been held to be joint tort feasers.

14. The cases relied upon by the learned counsel for the Insurance Company have no application to the facts of the present case. They are distinguishable on two grounds. Firstly, these cases have been decided under New Motor Vehicles Act, 1988. Secondly, in those cases the Supreme Court was not called upon to adjudicate the liability of the Insurance Company in respect of the workman traveling in goods vehicle. Those are the cases of passengers traveling in goods vehicles.

15. Therefore, I do not find any merit in the appeal. The appeal is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2004

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

Income Tax Reference No.15 of 1982

Commissioner of Income Tax, Kanpur
...Applicant
Versus
M/s Kanpur Textiles Limited, Kanpur
...Respondent

Counsel for the Applicant:
Sri A.N. Mahajan

Counsel for the Respondent:
Sri R.S. Agarwal

Income Tax Act, 1961-S.256 (2)-Reference-under-whether interest on late payment of Income Tax is an allowable deduction while computing prints and gains from business or profession. Held; No.

Held: Para 21

We are in respectful agreement with the principles laid down in the aforementioned cases and are of the considered view that interest on late payment of income tax is not an allowable deduction while computing the profits and gains from business or profession. In view of the foregoing discussions, we are of the considered opinion that the interest on late payment of income tax/advance tax or self-assessment tax or any other direct tax cannot be allowed as a deduction.

Case law discussed:
(1973) 88 ITR 234, (1995) 213 ITR 523, (1969) 73 ITR 53 (SC), (1973) 92 ITR 503 (All), (1974) 95 ITR 151 (Del), (1975) 101 ITR 292 (Bom), 1977 U.P.T.C. 31, (1978) 114 ITR 684, (1985) 151 ITR 701, (1985) 156 ITR 585 (SC), (1948) 30 Tax Cases 496, (1976) CTR (Pat) 227, (1987) 167 ITR 354, (1998) 229 ITR 366 (Bom), (1971) 82 ITR 363 (SC), (1965) 57 ITR 521 (SC), (1977) 106 ITR 704 (All), (1997) 224 ITR 591 (SC), (1978) CTR (All) 211, (1978) 112 ITR 276 (Cal), (1979) 118 ITR 976 (Cal), (1987) 163 ITR 429 (A.P.), (1989) 180 ITR 29,31 (Punj), (1989) 180 ITR 114,166 (Punj), (1981) 129 ITR 62 (Cal), (1993) 203 ITR 315 (Cal), (1906) AC 10, 12 (HL), 13 ITR Suppl. 23,26 (HL), 33 TC 259, 274, 282 (HL), 17 TC 59,63, (1957) 31 ITR 153 (Bom), (1960) 39 ITR 751 (Cal), (1961) 42 ITR 774 (Pat), (1965) 58 ITR 84 (Cal), (1973) 90 ITR 373 (P&H), (1977) 108 ITR 531 (Guj), (1977) 110 ITR 577 (Cal), (1978) 13 ITR 252 (Cal), (1978) 114 ITR 654 (Bom), (1981) 132 ITR 342 (P&H), (1983) 144 ITR 936 (Kar), (1987) 166 ITR 176 (SC), (1989) 177 ITR 222 (Bom), (1989) 180 ITR 37 (Kar), (1989) 180 ITR 478 (Gauhati), (1994) 209 ITR 490 (Cal), (1998) 230 ITR 733 (SC).

(Delivered by Hon'ble R.K. Agrawal, J.)

1. The Income Tax Appellate Tribunal, Allahabad has referred the

following questions of law under Section 256(2) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for opinion to this Court:-

"1. Whether on the facts and in the circumstances of the case, the Tribunal was in law justified in holding that the liability of gratuity amounting to Rs.1645092/- relating to past years accrued in the accounting year relevant to the Assessment Year 1972-73 and was, therefore, an allowable deduction for that Assessment Year?
2. Whether on the facts and in the circumstances of the case, when the system of accounting of the assessee was mercantile and when Dr. Sampurnanand Award of 1961 was extended by the U.P. Government year after year, the Tribunal was justified in law in holding that the liability of Rs.1645092/- relating to the past years arose for the first time in the Assessment Year 1972-73?
3. Whether the Tribunal having found that the assessee company had failed to claim the liability for gratuity for the past year was justified in law in holding that it was not debarred from claiming the liability of earlier years in the Assessment Year 1972-73?
4. Whether on the facts and in the circumstances of the case, when the provisions of S.36(1)(v) of the Income Tax Act, 1961, provisions as contained in Part C of Schedule IV of the Income Tax Act, 1961 and the rules relating thereto were not complied with, the Tribunal was in law justified in allowing the claim of gratuity of Rs.1645092/- in the Assessment Year 1972-73?
5. Whether on the facts and in the circumstances of the case, when the provisions of S.36(1)(v) of the Income Tax Act, 1961, provisions as contained in Part C of Schedule IV of the Income Tax Act, 1961 and the rules relating thereto were not complied with, the Tribunal was in law justified in allowing the claim of gratuity of Rs.1245428/- in the Assessment Year 1972-73?
6. Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in holding that the interest paid to the Income Tax Department was an allowable deduction under the Income Tax Act?"

Briefly stated, the facts giving rise to the present reference are as follows:-

2. The reference relates to the Assessment Year 1972-73, the previous year being the financial year. The respondent assessee is a public limited company incorporated under the Companies Act. It is engaged in manufacturing of cotton textile goods. A part of its products are exported to various countries. For the Assessment Year 1972-73, the respondent assessee claimed the following amount of retirement gratuity as deduction while computing its profit and loss:

(i) in respect of the years prior to the accounting year under consideration – Rs.1645092/-;
(ii) in respect of the accounting year under consideration – Rs.1245428/- and
(iii) actually paid and debited to the profit and loss account – Rs.166495/-.

3. The Assessing Officer found that the respondent assessee was making payment of gratuity to its employees on the basis of the Cawnpore Cotton Textiles Industries Workmen's Gratuity Scheme which became effective from 14th August

1961, published by the U.P. Government under 6(3) of the U.P. Industrial Disputes Act, 1947, popularly known as Dr. Sampurnanand Award. He also noticed that the provisions of Dr. Sampurnanand Award, 1961 was substantially the same as those contained in the U.P. Government Notification No.4268, dated 19th November 1971, and the Payment of Gratuity Act, 1972. However, he allowed the claim of the respondent assessee only for Rs.166495/- in respect of gratuity actually paid and debitted to the profit and loss account as in the earlier years. The Assessing Officer had rejected the claim in respect of remaining two amounts on the ground that the liability accrued from year to year in the past and not in the accounting year under consideration under Dr. Sampurnanand Award of 1961. Further, there was no approved gratuity fund created under irrevocable trust as laid down under the Act or the Rules made thereunder and the conditions laid down in Section 36(1)(v), IV Schedule and the Income Tax Rules were not fulfilled. He further held that the assessee had been regularly following the system of claiming deduction on payment basis and no bona fide reason for deviation there from could be established. He was further of the opinion that not only an irrevocable trust was to be created, the fund has also to be invested in the manner provided in the Income Tax Rules.

4. Further, during the Assessment Year in question the respondent assessee has received a sum of Rs.41490/- as interest from the Income Tax Department. It, however, disclosed an amount of Rs.13030/- only. The balance amount of Rs.28460/- was disallowed by the Assessing Officer and was added to its income.

5. The assessee, feeling aggrieved, preferred an appeal before the Appellate Assistant Commissioner. The Appellate Assistant Commissioner upheld the disallowance of Rs.1645092/- which was in respect of the years prior to the previous year under consideration holding that the method of accounting being mercantile, the claim should have been made in the earlier years. However, he held that the claim of Rs.1245428/- in respect of the previous year under consideration was allowable as liability for this amount accrued in the Assessment Year under consideration. He, however, confirmed the disallowance of interest of Rs.28460/-.

6. Both, the Assessee and the Revenue, preferred separate appeal before the Tribunal. The Tribunal relying upon a decision of the Gauhati High Court in the case of **Commissioner of Income Tax v. Nathmal Tola Ram**, (1973) 88 ITR 234, allowed the assessee's claim in respect of Rs.1645092/-. It also allowed the claim of Rs.28460/- towards interest. The Tribunal, however, dismissed the Revenue's appeal regarding the sum of Rs.1245228/-.

7. We have heard Sri A.N. Mahajan, the learned Standing Counsel for the Revenue, and Sri R.S. Agrawal, the learned counsel for the assessee.

8. The learned counsel for the Revenue submitted that as the respondent assessee had not created a fund for the exclusive benefit of its employees under an irrevocable trust and had not paid any amount by way of contribution to such approved gratuity fund, any amount paid towards gratuity cannot be allowed as deduction as the same does not fall within the purview of Section 36 (1)(v) of the Act. He further submitted that under Section 2 (5) of the Act 'approved

gratuity fund' has been defined to mean a gratuity fund which has been and continues to be approved by the Chief Commissioner or the Commissioner in accordance with the Rules contained in Part C of the IV Schedule. According to him, as the provisions of Part C of Schedule IV has not been complied with, the payment of gratuity cannot be allowed as a deduction while computing the profit and gain of the business. Sri Mahajan further submitted that once an item of expenditure falls under Section 36 (1)(v) of the Act, it cannot be allowed under the residuary provision under Section 37 (1) of the Act. On the question of allowability of interest, he submitted that the amount in question represented the interest paid on income tax, which is not an allowable deduction as it has not been laid out for the purposes of carrying on business. He relied upon a decision of Gujarat High Court in the case of **Saurashtra Cement and Chemical Industries Ltd. v. Commissioner of Income Tax**, (1995) 213 ITR 523.

9. The learned counsel for the respondent assessee, however, submitted that no doubt in the earlier years the respondent assessee was claiming deduction on account of gratuity on the basis of actual payment but on account of subsequent development, i.e., the notification dated 19th November 1971 issued by the State Government, the amount of gratuity became a statutory liability which had accrued during the relevant previous year. It was quantified on a scientific basis on the actuarial report and, therefore, it has to be allowed as a deduction. He further submitted that under Section 40 (a)(ii) of the Act any sum paid on account of rate or tax levied on the Profits or Gains of Business, is not allowed as a deduction. The interest paid for not depositing or paying the tax would not come under the aforesaid provisions and has, therefore, been rightly allowed as a deduction by the Tribunal. He relied upon the following decisions:-

(i) **Metal Box Company of India Ltd. v. Their Workmen**, (1969) 73 ITR 53 (SC);
(ii) **Madho Mahesh Sugar Mills (P.) Ltd. v. Commissioner of Income Tax**, (1973) 92 ITR 503 (Alld.);
(iii) **Delhi Flour Mills Co. Ltd. v. Commissioner of Income Tax**, (1974) 95 ITR 151 (Del);
(iv) **Tata Iron & Steel Co. Ltd. v. D.V.Bapat, Income Tax Officer, Companies Circle I (2), Bombay and another**, (1975) 101 ITR 292(Bom);
(v) **Additional Commissioner of Income Tax v. M/s Lakshmi Sugar Mills**, 1977 UPTC 31;
(vi) **Commissioner of Income Tax, Lucknow v. Laxmi Sugar and Oil Mills Ltd.**, (1978) 114 ITR 684;
(vii) **Commissioner of Income Tax, A.P.-I, Hyderabad v. Warner Hindustan Limited**, (1985) 151 ITR 701.

10. Having heard the learned counsel for the parties, we find that the Apex Court in the case of **Metal Box Company of India Ltd.** (supra) had considered the question as to whether it is legitimate in such a scheme of gratuity to estimate the liability on an actuarial valuation and deduct such estimated liability in the profit and loss account while working out its net profits. The Apex Court has held that in the case of an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the

accepted principle of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid. The Apex Court has held that estimated liability for payment of gratuity based on actuarial valuation, was a permissible deduction. It had further held that such a liability was a liability in praesenti though payable in future and it was ascertainable. The Apex Court has further held as follows :-

"But the contention was that though Schedule VI to the Companies Act may permit a provision for contegent liabilities, the Income Tax Act, 1961, does not, for, under section 36 (i)(v), the only deduction from profits and gains permissible is of a sum paid by an assessee as an employer by way of his contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust. This argument is plainly incorrect because section 36 deals with expenditure deductible from out of the taxable income already assessed and not with deductions which are to be made while making the P. & L. account. In our view, an estimated liability under gratuity schemes such as the one before us, even if it amounts to a contingent liability and is not a debt under the Wealth Tax Act, if properly ascertainable and its present value is properly discounted is deductible from the gross receipts while preparing the P. & L. Account."

11. This Court in the case of **Madho Mahesh Sugar Mills (P.) Ltd.** (supra) has held that though no part of the gratuity may have been payable by the assessee in any of the earlier years, the past services of the employees had to be taken into account merely to arrive at a quantum of the liability which became payable after the notification. The liability for payment of gratuity ascertained on actuarial calculation in which all contingencies are taken into consideration, is a liability in praesenti and is capable of ascertainment and, therefore, was a permissible business expenditure in the Assessment Year concerned."

12. In the case of **Delhi Flour Mills Co. Ltd.** (supra), the Delhi High Court has followed the decision of the Apex Court in the case of **Metal Box Company of India Ltd.** (supra) and of this Court in the case of **Madho Mahesh Sugar Mills (P.) Ltd.** (supra) and had held that provision made by the assessee for payment of gratuity was an allowable deduction.

13. Similar view has been taken by the Bombay High Court in the case of **Tata Iron & Steel Co. Ltd.** (supra); this Court in the case of **M/s Lakshmi Sugar Mills** (supra) and **Laxmi Sugar and Oil Mills Ltd.** (supra) and the Andhra Pradesh High Court in the case of **Warner Hindustan Limited** (supra).

14. The Apex Court in the case of **Shree Sajjan Mills Ltd. v. Commissioner of Income Tax**, (1985) 156 ITR 585 (SC), has summarized the position regarding allowability of the amount of gratuity prior to the insertion of Section 40A(7) in the Act by the Finance Act, 1975, with effect from 1st April 1973, as follows:-

"(1)Payments of gratuity actually made to the employee on his retirement or termination of his services were expenditure incurred for the purpose of business in the year in which the payments were made and allowed under section 37 of the Act.

(2) Provision made for payment of gratuity which would become due and payable in the previous year was allowed as an expenditure of the previous year on accrued basis when mercantile system was followed by the assessee.
(3) Provision made by setting aside an advance sum every year to meet the contingent liability and gratuity as and when it accrued by way of provision for gratuity or by way of reserve or fund for gratuity was not allowed as an expenditure of the year in which such sum was wet apart.
(4) Contribution made to an approved gratuity fund in the previous year was allowed as deduction under section 36(1)(v).
(5) Provision made in the profit and loss account for the estimated present value of the contingent liability properly ascertained and discounted on an accrued basis as falling on the assessee in the year of account could be deductible either under section 28 or section 37 of the Act."

15. It is not in dispute that Dr. Sampurnanand Award which was made in the year 1961 was applicable initially for a period of one year. It was extended from year to year by the State Government by a separate notification. However, after 13th September 1971, the Award was not extended and only on 18th September 1971, the State Government had issued a notification extending the Award from 14th September 1971. The amount of gratuity in question is being claimed under the notification dated 19th November 1971. Dr. Sampurnanand Award under which there was the liability for payment of the amount of gratuity, had been in force during all the previous Assessment Years on account of extension by the State Government every year and it came to an end on 13th September 1971 as it was not extended after 13th September 1971. However, vide notification dated 18th September 1971, it was made applicable from 14th September 1971. The scheme of gratuity framed under Dr. Sampurnanand Award was an annual affair as its operation was initially for a period of one year and had been extended every year whereas the gratuity scheme enforced on 19th November 1971, vide Notification No.4268, dated 19th November 1971, was for a period of 3 years. The provisions of the two schemes have been found to be similar. It may be mentioned here that the Payment of Gratuity Act, 1972 came into force on 16.09.1972 and, therefore, was not in existence during the assessment year in question. Thus, the same principle regarding payment of gratuity would be applicable with the exception that liability for payment of gratuity which had accrued during the assessment in question but had not been paid to the employees being a liability in praesenti, is to be allowed as a deduction while computing the profits and gains from business of the respondent. However, the amount of gratuity which relates to the earlier assessment years, had accrued in the earlier years and not in the assessment year in question and, therefore, it cannot be allowed as a deduction in this year.

16. There is a distinction between the actual liability in praesenti and a liability de futuro which for the time being is only contingent. The former is taxable but not the latter as held in **Peter Merchant Ltd. v. Stedeford** (1948) 30 Tax Cas. 496; **Indian Copper Corporation v. Commissioner of Income Tax** (1976) CTR (Pat) 227; **Commissioner of Income Tax v. Instrumentation Ltd.** (1987) 167 ITR 354 (Raj); **Standard Mills Co. Ltd. v. Commissioner of**

Income Tax (1998) 229 ITR 366, (Bom).

It is also settled that an assessee who follows the mercantile system of accounting, is entitled to claim a deduction even though the expenditure is actually not expended. It is enough if the liability for such expenditure accrues. If in law the liability accrued, this accrual will not be defeated or fail by a reason of the assessee not making entries in the books of account as held in the case of **Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income Tax** (1971) 82 ITR 363 (SC). It is also well settled that if a business liability has definitely arisen in the accounting year, a deduction should be allowed although the liability may have to be estimated and discharged at a future date, as held in the case of **Poona Electric Supply Co. Ltd. v. Commissioner of Income Tax**, (1965) 57 ITR 521 (SC); **Kundan Sugar Mills v. Commissioner of Income Tax**, (1977) 106 ITR 704 (All) and **Metal Box Co. of India Ltd. v. Their Workmen**, (1969) 73 ITR 53 (SC). At the same time, if the liability to a particular sum has been incurred during the accounting year and if otherwise the sum is allowable as a revenue expense, then whether the sum has been actually paid or not is immaterial; the liability so incurred has got to be allowed as a revenue expense, as held by the Apex Court in the case of **Haji Lal Mohd. Biri Works v. Commissioner of Income Tax** (1997) 224 ITR 591 (SC). It is also well settled that in the case of a statutory liability, the accrual depends upon the term of the statute. The quantification or ascertainment cannot postpone its accrual to the extent of admitted liability, as held in the case of **Commissioner of Income Tax v. L.H.Sugar Factory and Oil Mills P. Ltd.**, (1978) CTR (All) 211; **Commissioner of Income Tax v. Swadeshi Mining and Mfg. Co. Ltd.**, (1978) 112 ITR 276 (Cal); **Commissioner of Income Tax v. Swadeshi Mining and Mfg. Co. Ltd.,** (1979) 118 ITR 975 (Cal); **Commissioner of Income Tax v. Shri Sarvaraya Sugars Ltd.**, (1987) 163 ITR 429 (AP); **Commissioner of Income Tax v. Aggarwal Rice & General Mills**, (1989) 180 ITR 29, 31 (Punj); **Commissioner of Income Tax v. Ram Chand Kanshi Ram**, (1989) 180 ITR 114, 166 (Punj). Where a statute imposes liability with retrospective effect, such liability, even for past years, accrues in the accounting year wherein the statute first comes into operation, as held by the Calcutta High Court in the case of **Commissioner of Income Tax v. West Ghusick Coal Co. Ltd.**, (1981) 129 ITR 62 (Cal). Further it is not in all cases correct to say that a statutory liability created in a particular year, becomes liability for deduction in that year under the mercantile system of accounting. It depends on the facts and circumstances of the case and on statutory provisions in that regard, as held by the Calcutta High Court in the case of **Commissioner of Income Tax v. Padmavati Raje Cotton Mills Ltd.**, (1993) 203 ITR 375 (Cal). In the aforesaid case an ordinance levying market fees was promulgated on 15th May 1980. The demand for the market fees relating to earlier years was made during the accounting year relevant to the Assessment Year 1983-84. On these facts, it has been held that though the statutory liability was created in the year 1980, the said liability became real and enforceable when the demand was made. Therefore, the assessee was held entitled to deduction in respect of such demand for the Assessment Year 1983-84.

17. Thus, applying the principles laid down by the Apex Court in the

aforementioned cases, the amount of gratuity can be deducted either under Section 28 or Section 37 of the Act. Further, the contribution made to an approved gratuity fund is only allowable under Section 36(1)(v) of the Act. Thus, the Tribunal was justified in allowing the amount of Rs.1245428/-, being the amount of gratuity, as deduction for the Assessment Year in question as the said liability has been ascertained on actuarial calculation and it is a liability in praesenti and was a permissible business expenditure. However, the Tribunal was not justified in allowing the sum of Rs.1645092/- towards gratuity as the said liability did not accrue in the previous year relevant to the Assessment Year in question and related to the earlier years when Dr. Sampurnanand Award was in force.

18. So far the question of allowance of interest of Rs.28460/- is concerned, it may be mentioned here that under Section 37 of the Act an expenditure laid out or expended wholly or exclusively for the purpose of business which is not of the nature described under Sections 33 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee, is allowable while computing the income chargeable under the head Profits and Gains of Business or Profession. Section 40(a)(ii) of the Act, however, provides that any sum paid on account of any rate or tax levied on the profits or gains of any business or profession, shall not be deducted in computing the income chargeable under the Profits and Gains of Business or Profession. Section 40 of the Act opens with a non obstante clause. It specifically refers to notwithstanding anything to the contrary in Sections 33 to 38. Even otherwise, income tax is not deductible as business expenses from the business profit as it is merely a State share of the profits as held in A**shton v. Att-Gen** (1906) AC 10, 12 (HL); **LC v. Ollivant** 13 ITR Suppl 23, 26 (HL); **IR v. Dowdall** 33 TC 259, 274, 282 (HL); **Allen v. Farquharson** 17 TC 59, 63.

19. Interest on account of deficiency in payment of advance tax or on account of delay in payment of tax or in the filing of the return of Income, on the money borrowed for payment of income tax, is neither deductible as business expenses under Section 37 nor as interest on borrowings under Section 36(1)(iii) of the Act, as held in the case of **Aruna Mills Limited v. Commissioner of Income Tax, Ahmedabad** (1957) 31 ITR 153 (Bom); **Balmer Lawrie & Co. Ltd. v. Commissioner of Income Tax, Calcutta** (1960) 39 ITR 751(Cal); **Maharajadhiraj Sir Kameshwar Singh v Commissioner of Income Tax, Patna** (1961) 42 ITR 774 (Pat); **Mannalal Ratanlal v. Commissioner of Income Tax, Calcutta** (1965) 58 ITR 84 (Cal); **Commissioner of Income Tax v. Oriental Carpet Manufacturers (India) P. Ltd.** (1973) 90 ITR 373 (P&H); **Gopaldas Dahyabhai Lavsi v. Commissioner of Income Tax, Gujarat** (1977) 108 ITR 531 (Guj); **Waldies Ltd. v. Commissioner of Income Tax, West Bengal - III** (1977) 110 ITR 577 (Cal); **National Engineering Industries Ltd. V. Commissioner of Income Tax (Central), Calcutta** (1978) 113 ITR 252 (Cal); **Kishinchand Chellaram v. Commissioner of Income Tax**, **Bombay City – III,** (1978) 114 ITR 654 (Bom); **Commissioner of Income Tax, Amritsar - I v. Om Prakash Behl** (1981) 132 ITR 342 (P&H); **Commissioner of Income Tax, Karnataka v. International Instruments (P.) Ltd.** (1983) 144 ITR 936 (Kar); **Panmavati Jaikrishna (Smt.) v. Addl.**

Commissioner of Income Tax, (1987) 166 ITR 176 (SC); **Commissioner of Income Tax v. Ghatkopar Estate and Finance Corporation (P.) Ltd.** (1989) 177 ITR 222 (Bom); **Federal Bank Ltd. v. Commissioner of Income Tax** (1989) 180 ITR 37 (Ker); **Assam Forest Products (P.) Ltd. v. Commissioner of Income Tax** (1989) 180 ITR 478 (Gauhati); **Orient General Industries Limited V. Commissioner of Income Tax** (1994) 209 ITR 490 (Cal) and **Bharat Commerce and Industries Ltd. v. Commissioner of Income Tax** (1998) 230 ITR 733 (SC);

20. In the case of **Saurashtra Cement and Chemical Industries Ltd.** (supra), the Gujarat High Court has held that the interest paid on late payment of income tax is not an allowable deduction. It has held as follows:-

"The argument apparently appears to be facile but foes not stand scrutiny of reason. The mere fact that the interest on the late payment of the tax is compensatory does not make it an expense wholly or exclusively carried out for the purpose of business. The essence of section 37 of the Act is that such expenses are wholly laid out or incurred for the purpose of business, is not allowable as expenses laid out or incurred for the purpose of business, ordinarily the interest paid thereon also canoe be considered as expenses laid out or incurred wholly for the purpose of the business.

However, in the present case, the interest if payable on the personal liability of the assessee of the income tax which is a direct tax and is not a part of the business expenditure. In this connection, it may further be noticed that interest on money borrowed for the payment of the tax was held to be not an allowable expenditure. Reference in this connection be made to the decision of the Supreme Court in the case of **Panmavati Jaikrishna (Smt.) v. Addl. CIT** (1987) 166 ITR 176. The Supreme Court, affirming the decision of this Court in Padmavati Jaikrishna (Smt.) v. CIT (1975) 101 ITR 153 disallowing the claim for deduction of interest on the amounts borrowed to pay taxes and annuity deposits, held as under (at page 179):

"We are inclined to agree with the High Court that so far as meeting the liability of income tax and wealth tax is concerned, it was indeed a personal one and payment thereof cannot at all be said to be expenditure laid out or expended wholly or exclusively for the purpose of earning income."

It may be noted that specific provision was required to be inserted in the form of Section 80V for the purpose of allowing of such interest as expenditure in the computation of profits and gains from business. But for the special provision made, interest on the capital borrowed for the payment of tax is not allowable expenditure. If that be so on the same principle the interest paid for the late payment of tax cannot be held allowable expenditure as the same cannot be held to be expenditure incurred wholly or exclusively for the purpose of the business."

21. We are in respectful agreement with the principles laid down in the aforementioned cases and are of the considered view that interest on late payment of income tax is not an allowable deduction while computing the profits and gains from business or profession. In view of the foregoing discussions, we are of the considered opinion that the interest on late

payment of income tax/advance tax or self-assessment tax or any other direct tax cannot be allowed as a deduction.

22. In view of the foregoing discussions, our answer to the question nos.1 to 3 and 6 are in the negative, i.e., in favour of the Revenue and against the Assessee and our answer to question no.5 is in the affirmative, i.e., in favour of the Assessee and against the Revenue. So far question no.4 is concerned, the amount of Rs.1645092 was not allowable in the assessment year 1972-73. However, there was no bar during the assessment year 1972-73 for claiming the deduction of gratuity under Section 37 of the Act even if the conditions of Section 36(i)(v) of the Act have not been complied with. Thus, our answer to question no.4 is also in the negative, i.e., in favour of the Revenue and against the assessee. In view of the divided success, the parties shall bear their own costs.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2004

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Second Appeal No. 470 of 1981

Ram Kishan and others ...Appellant
Versus
Sri Ganeshi ...Respondent

Counsel for the Applicant:
Sri B. Malik
Sri V.C. Mishra
Smt. S.V. Mishra

Counsel for the Respondents:
Sri H.N. Sharma

Specific Relief Act, 1963-S. 16(C)-Suit for Specific performance of Contract-plaintiff must plead and prove that he has always been ready or willing to perform with part of contract-When plaintiff himself failed to perform his part of contract, not entitled to a decree of Specific performance.

Held: Para 6 & 10

From the aforesaid provision of Section 16 (c), it is quite evident that a plaintiff seeking specific relief of specific performance of contract has to aver and prove that he has performed or has always been ready or willing to perform the essential terms of the contract which are to be performed by him under the agreement. If on a particular date for which notice has been given by the party seeking relief of specific performance of contract, he himself fails to perform his part of the contract i.e. the payment of sale consideration to the proposed vendor before the Sub-Registrar, it cannot be presumed that the plaintiff seeking such relief has always been ready and willing to perform his part of contract. In this context, the legal position is well settled.

In view of the aforesaid facts and circumstances, I find that the plaintiff-respondent, when had failed to perform his part of the contract in terms of Section 16 (c) of the Specific Relief Act, had no right to obtain a decree of specific performance of agreement in question and the appeal of the defendant-appellant should be allowed.

Case law discussed:
AIR 1928 PC 208
AIR 1967 SC 868
AIR 1995 SC 945
AIR 1980 All 52

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. Heard Sri B. Malik, learned counsel for the appellants. None has however, appeared on behalf of the respondent.

2. This Second Appeal arises out of the judgment and decree dated 31.1.1981 passed by the 1st Addl. District Judge, Meerut, whereby he allowed the First Appeal and set aside the judgment and decree dated 6.5.1975 passed by the Trial Court (2nd Addl. Civil Judge).

3. The facts giving rise to this appeal in brief are that the respondent-plaintiff had filed a suit for specific performance of contract of sale, which was hotly contested by the appellants-defendants in the trial court. At the trial stage, it was held that the plaintiff-respondent had failed to establish on record that he was ready to perform the essential terms of the contract, which were to be performed by him and accordingly, the trial court dismissed the suit against which the First Appeal was preferred. The 1st Appellate Court held that though, it is sufficiently established on record and it is clear from the evidence available that on the date fixed i.e. 28.12.1971, both the parties had visited the Office of Sub-Registrar for registration of the sale deed to be executed in pursuance to the agreement in question, but the plaintiff on that date did not possess the required consideration with him as to enable the appellant-defendant to execute the sale deed. As such, the very execution of the sale deed was shelved. Inspite of recording this finding of facts, the 1st Appellate Court has found favour with the plaintiff and set aside the Trial Court's decree on the ground of subsequent notice dated 29.12.1971 given by the plaintiff requesting the appellant-defendant to again visit the Office of Sub-Registrar on 7.1.1972 for execution of the sale deed on which date he did not go for registration and execution of the said transfer. Thus, taking no notice of the aforesaid concluded findings of fact that on 28.12.1971, the plaintiff was not ready with sufficient money to get the sale deed executed in his favour when both the parties were present at the Sub-Registrar's Office and unreasonably giving undue weightage to the subsequent notice the 1st Appellate Court erroneously found it more justifiable in law to decree the suit and granted the relief for specific performance of the agreement in question.

4. Aggrieved with the aforesaid judgment, the present appeal has been preferred.

5. From the aforementioned facts and circumstances, it so appears that the learned 1st Appellant Judge has given scant importance rather no importance to the provisions of Section 16(c) of the Specific Relief Act, 1963 which enjoins upon the plaintiff seeking the relief of specific performance of contract, to perform his part of the contract, in the following words:-

Personal bars to relief.- *Specific performance of a contract cannot be enforced in favour of a person—*
(c) who fails to aver and prove that he has performed or has <u>always</u> been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

6. From the aforesaid provision of Section 16 (c), it is quite evident that a plaintiff seeking specific relief of specific performance of contract has to aver and prove that he has performed or has always been ready or willing to perform the essential terms of the contract which are to be performed by him under the agreement. If on a particular date for which notice has been given by the party seeking relief of specific performance of

contract, he himself fails to perform his part of the contract i.e. the payment of sale consideration to the proposed vendor before the Sub-Registrar, it cannot be presumed that the plaintiff seeking such relief has always been ready and willing to perform his part of contract. In this context, the legal position is well settled.

7. The Privy Council in ***Ardeshir H. Mama Vs. Flora Sassoon, AIR 1928 PC 208,*** has held that in a suit for specific performance the averment of readiness and willingness on plaintiff's part up to the date of the decree is necessary. The Supreme Court in ***Gomathinavagam Pillai Vs. Palaniswami Nadar, AIR 1967 S.C. 868,*** has held as below:-

"*But the respondent has claimed a decree for specific performance and it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract. If he fails to do so, his claim for specific performance must fail".*

8. In ***Jugraj Singh and another Vs. Labh Singh and others, AIR 1995 S.C. 945,*** the Apex Court has propounded the law under Section 16 (c) in the following words:-

"Section 16 (c) of the Specific Relief Act, 1963 provides that the plaintiff must plead and prove that he has always been ready and willing to perform his part of the essential terms of the contract. The continuous readiness and willingness at all stages from the date of the agreement till the date of the hearing of the suit need to be proved. 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."

9. In ***Har Pratap Singh and another Vs. Satya Narain Misra and another, AIR 1980 Allahabad 52***, the readiness and willingness of a party to perform the essential term of a contract has been projected in the following words:-

"*The readiness and willingness of a party to perform the essential term of a contract to be performed by him, and which is required to be averred and proved under clause (c) of Sec. 16 has to be a real readiness and willingness, backed by the capacity to do so. A person who is incapable of performing the essential term of a contract to be performed by him cannot be said to be ready or willing to perform it however much he may say that he is ready and willing to perform it. It is well settled that the provisions of Section 16 are mandatory."*

10. In the aforesaid view of the matter, when it was amply clear even to the Lower Appellate Court that on a given date, the plaintiff was not fully ready to perform his part of contract when both the parties had visited the office of Sub-Registrar for execution of the sale deed, the said Court does not appear to be legally justified to have passed a decree in favour of such plaintiff, who had failed in terms of aforesaid Section 16 (c) of the Specific Relief Act. On the other hand, the trial court appears to be fully justified in not granting relief of specific performance when it found that on 28.12.1971, inspite of the parties visiting the office of the Sub-Registrar for execution of the sale deed, the plaintiff failed to perform his part of contract. The suit was rightly dismissed at the trial stage and there was no legal or otherwise equitable justification for the 1st Appellate Court to have decreed the suit after setting aside the decree passed by the trial court.

In view of the aforesaid facts and circumstances, I find that the plaintiff-respondent, when had failed to perform his part of the contract in terms of Section 16 (c) of the Specific Relief Act, had no right to obtain a decree of specific performance of agreement in question and the appeal of the defendant-appellant should be allowed.

In the result, this appeal is allowed and the judgment and decree dated 31.1.1981 passed by the 1st Appellate Court is hereby set aside. The decree of the trial court dated 6.5.1975 is hereby restored.

Appeal Allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.3.2004

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 32863 of 2004

Smt. Savinay Jain ...Petitioner
Versus
Motor Accident Claim Tribunal, Mainpuri ...Respondent

Counsel for the Petitioner:
Sri Y.K. Srivastava

Counsel for the Respondent:

Motor Vehicles Act, 1988-Award of Compensation-Part of amount directed to be invested for one year in fixed deposit-Application for withdrawal of same on vague grounds rejected-Writ against-Held, Tribunal while disbursing amount has to act in interest of claimant, as per guidelines laid down by apex court-Submission that if no condition is put in award subsequently tribunal cannot while releasing amount direct for investment of amount on take any other safety measures cannot be accepted.

Held: Para 7 & 8

Thus the Tribunal while disbursing the amount has to act in the interest of the claimant in accordance with the guide lines laid down by the Apex Court. The submission that if no condition is put in the award subsequently Tribunal cannot while releasing the amount direct for investment of the amount or take any other safety measures cannot be accepted.

However, according to the guidelines as laid down by the Apex Court itself, it is open for the claimant to make an application and on sufficient reasons, the Tribunal can always release the amount. In the present case, the Tribunal has rejected the amount. In the present case, the Tribunal has rejected the application of the petitioner observing that no details of the business or other important work has been disclosed in the application. Copy of the application has been filed as annexure 3 to the writ petition which clearly shows that there was no details of the purpose for which amount was sought to be withdrawn. No error has been committed by the Tribunal in rejecting such vague application which do not mention any details or purpose for which amount was sought to be withdrawn.

Case law discussed:
1994 ACJ 1 (SC)
(1991) 4 SCC 584
1983 ACJ 57 (Guj)

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard counsel for the petitioner.

By this writ petition, the petitioner has prayed for quashing order dated 31.7.2004 passed by Motor accident Claim Tribunal by which the application of the petitioner for release of the amount deposited with Tribunal has been rejected.

The Motor Accident claims Tribunal vide its award dated 3.10.2001 awarded a compensation of Rs.1,50,000.00 along with 9% interest from the date of filing of claim petition. In pursuance of the award an amount of Rs.2,24,250/- was deposited. The motor accident claims tribunal after receipt of the money passed order dated 15.3.2004 that an amount of Rs.1,24,000/- be invested for one year a fixed deposit. Petitioner on 15.7.2004 moved an application praying that petitioner be paid the entire amount. The petitioner in the application vaguely stated that she required the amount for business and other important works. The Tribunal observed that petitioner has already been given 1,00,000.00 lack in case, and the Tribunal observed that in the application it has not been stated that which business will be done by the petitioner and no other details have been given.

2. The learned counsel for the petitioner challenging the order contended that the Tribunal while giving an award dated 3.10.2001 did not put any condition for the release of the amount, hence the Tribunal had no jurisdiction to reject the application of the petitioner.

3. I have considered the submissions of the parties and perused the record. Petitioner while returning by Vehicle Tata Sumo, the vehicle U.P.084/5552 negligently hit in which the daughter of claimant Kumari Sonali Jain died. It is true that in the award passed by the Motor Accident Claims Tribunal that no condition for release of the amount was mentioned. However, when the petitioner made an application for releasing the amount, the same has been rejected.

4. The contention of the counsel for the petitioner is that when no condition was put in the award, the application for release of the amount cannot be rejected. The guide lines which have been laid down by the Apex Court for release of the amount awarded in compensation has to be kept in mind by the Tribunal while releasing the amount. The Apex Court in 1994 ACJ 1 ***General Manager, Kerala State Road Transport Corporation versus Susamma Thomas and others*** laid down following in paragraph 16 & 17.

"16. Pursuant to the earlier orders of this court a sum of Rs.3,98,000/- had been invested out of which a sum of Rs.3,60,000 is invested in a nationalised Bank. It is appropriate that the appellant shall deposit the balance of the amount together with accrued interest in the Tribunal. The Tribunal will take into account what measures of safety are required to be adopted to protect the interests of the minors. It is also necessary to bear in mind that even in respect of the claimants who are sui juris, their interests, if they are illiterate or semiliterate, must also be protected from possible exploitation.

17. In case of compensation for death it is appropriate that the Tribunals do keep in mind the principles enunciated by this court in Union Carbide Corpn. v. Union of India, 1991 (4) Supreme Court cases 584, in the matter of appropriate investments to safeguard the feed from being frittered away by the neneficiaries owing to ignorance, illiteracy and susceptible to exploitation. In that case approving the judgment of the Gujrat High Court in Muljibhai Ajasrambhai Harijan v. United India Insurance Co. Ltd. 1983 ACJ 57 (Gujrat), this court offered the following guidelines:

(i) The Claims Tribunal should, in the case of minors, invariably order the

amount of compensation awarded to the minor invested in long term fixed deposits at least till the date of the minor attaining majority. The expenses incurred by the guardian or next friend may, however, be allowed to be withdrawn,

(ii) In the case of illiterate claimants also the Claims Tribunal should follow the procedure set out in (i) above, but if lump sum payment is required for effecting purchases of any movable or immovable property, such as, agricultural implements, rickshaw, etc. to earn a living, the Tribunal may consider such a request after making sure that the amount is actually spent for the purpose and the demand is not a rogue to withdraw money.

(iii) In the case of semiliterate persons the Tribunal should ordinarily resort to the procedure set out in (I) above unless it is satisfied, for reasons to be stated in writing, that the whole or part of the amount is required for expanding as mentioned in (ii) above for earning his livelihood in which case the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid.

(iv) In the case of literate persons also the Tribunal may resort to the procedure indicated in (i) above, subject to the relaxation set out in (ii) and (iii) above, if having regard to the age, fiscal background and strata of society to which the claimant belongs and such other considerations, the Tribunal in the larger interest of the claimant and with a view to ensuring the safety of the compensation awarded to him thinks it necessary to so order :

(v) In the case of widows the claims Tribunal should invariably follow the procedure set out (i) above,

(vi) In personal injury cases if further treatment is necessary, the Claims Tribunal on being satisfied about the same, which shall be recorded in writing, permit withdrawal of such amount as is necessary for incurring the expenses for such treatment.

(vii) In all cases in which investment in long term fixed deposit is made it should be on condition that the bank will not permit any loan or advance on the fixed deposit and interest on the amount invested is paid monthly directly to the claimant or his guardian, as the case may be.

(viii) In all cases Tribunal should grant to the claimants liberty to apply for withdrawal in case of an emergency. To meet with such a contingency, if the amount awarded is substantial, the Claims Tribunal may invest it in more than one fixed deposit so that if need be one such FDR. can be Liquidated.

5. These guidelines should be borne in mind by the Tribunals in the cases of compensation in accident cases.

6. The observation of the Apex Court in paragraph 16 is that the Tribunal will take into account as to what measures of safety are required to be adopted to protect the interests of the minors.

7. Thus the Tribunal while disbursing the amount has to act in the interest of the claimant in accordance with the guide lines laid down by the Apex Court. The submission that if no condition is put in the award subsequently Tribunal cannot while releasing the amount direct for investment of the amount or take any other safety measures cannot be accepted.

8. However, according to the guidelines as laid down by the Apex Court itself, it is open for the claimant to make an application and on sufficient reasons, the Tribunal can always release the amount. In the present case, the Tribunal has rejected the amount. In the present case, the Tribunal has rejected the application of the petitioner observing that no details of the business or other important work has been disclosed in the application. Copy of the application has been filed as annexure 3 to the writ petition which clearly shows that there was no details of the purpose for which amount was sought to be withdrawn. No error has been committed by the Tribunal in rejecting such vague application which do not mention any details or purpose for which amount was sought to be withdrawn.

9. In view of the aforesaid, it is held that no error has been committed by the Tribunal in rejecting the application. However, in case petitioner makes an application giving details of purpose for which amount is sought to be withdrawn, the Tribunal will consider the same and pass appropriate order in accordance with law.

10. With the aforesaid observations, the writ petition is disposed of.
Petition disposed off.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.8.2004

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 817 of 2004

Provincial Medical Services Association, U.P. and others ...Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Ravi Kant
Sri Sishir Kumar

Counsel for the Respondents:
Sri S.M.A. Kazmi
S.C.

Contempt of Court Act-Section 12 Jurisdiction of Contempt Court-Power of punishment inherent power of every Court of record-Court while exercising power can not go beyond order passed earlier-alleged to be not complied with-But in exceptional circumstances, where facts so warrant, Court can also pass orders if necessary in facts and circumstances of case.

Held: Para 16

Thus, in view of the above, the law on the issue can be summarised that the power of punishing a contemner, is inherent in every Court of record. It is essential and necessary for the purpose of smooth working of the Court. The Court while exercising the power of contempt generally does not go beyond the order passed earlier which has not been complied with, but in exceptional circumstances, where the facts so warrant the Court can also pass the orders which are necessary in the facts and circumstances of the case.

Case law discussed:
Spl. Appeal 320 of 2004, decided on 27.4.04
(1994) Supp. 2 SCC 303
AIR 2002 SC 2215
(2000) 10 SCC 251
AIR 2003 SC 3044
AIR 1959 All. 675
AIR 1991 Mad 323 (FB)
AIR 1954 SC 186

(Delivered by Hon'ble Dr. B.S. Chauhan, J.)

1. This special appeal has been preferred against the orders dated 17.5.2004 and 30.4.2004, passed by the learned Single Judge while dealing with the Contempt Petition No. 820 of 2002 Rajesh Kumar Srivastava Vs. A.P. Verma & ors., by which earlier order dated 28.1.2004, passed in the same contempt petition is being enforced directing the State Government to frame the transfer policy and implement the same for the Doctors.

2. The facts and circumstances giving rise to this case are that the Hon'ble Apex Court decided the public interest litigation D.K. Joshi Vs. State of U.P. & ors., (2000) 5 SCC 80, issuing certain directions to the State Government to restrain the unqualified/unregistered Doctors to indulge in any kind of medical practice. Subsequently, a Contempt Petition No. 292 of 2002, Rajesh Kumar Srivastava Vs. A.P. Verma, Chief Secretary, U.P. was filed before the Hon'ble Apex Court raising the grievance that the directions issued by their Lordships in the said judgment were not being complied with at all and the State Government was not taking any steps to ensure the compliance of the same. The Hon'ble Supreme Court vide its order dated 8.10.2001 did not entertain the petition, rather gave liberty to the petitioner therein to file the petition before this Court and in pursuance of the same, the said contempt petition has been filed herein and entertained by this Court. In order to prevent the quacks to spoil the life of the members of the society, a large number of directions have been issued from time to time by this Court. In order to check the menace of private practice and running their own Nursing Homes or working in other Nursing Homes by the Government Doctors at the cost of public, in the said case, on 28.1.2004, amongst others, the following directions were also issued.

"The Principal Secretary, Medical Health and Family Welfare, it is directed, to ensure **that no medical officer in the Government Service is posted beyond three years in any District**, and that all para medical staff serving in the Primary Health Centre/Community Health Centre/District Hospitals and other hospitals run by Government of U.P. for more than five years shall be transferred from that centre/hospital. Any Doctor in employment of State Government offering their services to the unauthorised medical practitioners shall face immediate disciplinary action by the State Government, and shall be prosecuted for aiding and abetting such unauthorised practice."

3. Being aggrieved, a large number of special appeals have been preferred against the same contending that a Court while entertaining a contempt petition, cannot issue this kind of direction. More so, the petition is limited only to prevent the unqualified and unregistered persons to indulge in medical practice and issuing such a direction is beyond the competence of the contempt court. In a special appeal, a Division Bench of this Court stayed the operation of the above said direction. However, in the Special Appeal No. 320 of 2004 Dr. Ravindra Kumar Goel & ors.

Vs. State of U.P. & ors. decided on 27th April, 2004, another Division Bench of this Court held that the transfer is a condition of service. It is a matter between employer and employee and the Court generally does not interfere in such matters unless the transfer of employee is found to be in violation of the statutory provision or held to have been made mala fide. But, while dealing with the issue of competence of the Contempt Court to issue such a direction, the Court held as under:-

"In our opinion it is correct to say that the principles of transfer are policy matters, and they should ordinarily be decided by the State Government and not by this Court. Hence we modify direction no. 8 contained in the judgment of the learned Single Judge, and we hold that **this directive shall be treated as a recommendation rather than a binding directive** on the State Government."

4. Subsequently, the State Government has framed the transfer policy and implemented the same, hence this special appeal has been preferred challenging the consequential orders.

5. The issues involved herein are as to whether a Court while dealing with the Contempt Petition can issue a direction beyond the scope of contempt proceedings and a matter not related to the issue involved in the contempt petition.

6. A coordinate Bench does not have a right to examine the correctness of a Division Bench judgment unless it is held to be per incuriam or based on evidence not on record, being perverse, and even for that purpose, the matter is to be referred to a larger Bench. The judicial discipline does not warrant sitting in appeal against the judgment of the coordinate Bench.

7. In Noorali Babul Thanewala Vs. Sh. K.M.M. Shetty & ors., AIR 1990 SC 464 the Hon'ble Supreme Court while dealing with a similar issue, held that a Court dealing with the contempt matter has a right not only to pass an order to purge the contempt by directing the contemnor to implement the order passed by it but also has competence to issue necessary further consequential directions for the enforcement of the said order.

8. In Major Gen. (Old Capt.) Virender Kumar Vs. Chief of the Army Staff & ors., (1994) Supp 2 SCC 303, the Hon'ble Supreme Court held that contempt proceedings are meant for implementation of the orders passed by the Court, but it does not have the power to decide an issue which had not been involved earlier while passing the main order. Similar view had been reiterated in Satyabrata Biswas & ors. Vs. Kalyan Kumar Kisku & ors., AIR 1994 SC 1837.

9. Similar view has been reiterated by the Hon'ble Apex Court in Director, Elementary Education & ors. Vs. Pratap Kumar Nayak, (1997) 9 SCC 107 observing that a Court or Tribunal cannot issue a direction in contravention of the direction issued in the main order, and it does not have the power to act beyond the main order and issue fresh directions.

10. In Jhareswar Prasad Paul & anr. Vs. Tarak Nath Gangoli & ors., AIR 2002 SC 2215 while dealing with a similar issue the Apex Court observed as under:-

"The contempt jurisdiction should be confined to the question whether there has been any deliberate disobedience of the

order of the Court and if the conduct of the party who is alleged to have committed such disobedience is contumacious. **The Court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant**. The Court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. At the cost of repetition be it stated here that the Court exercising contempt jurisdiction is primarily concerned with the question of contumacious conduct of the party, which alleged to have committed deliberate default in complying with the directions in the judgment or order. If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the Court which disposed of the matter for clarification of the order instead of the Court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the Court passing the judgment or order. If this limitation is borne in mind then criticisms which are sometimes levelled against the Courts exercising contempt of Court jurisdiction 'that it has exceeded its powers in granting substantive relief and issuing a direction regarding the same without proper adjudication of the dispute' in its entirety can be avoided. This will also avoid multiplicity of proceedings because the party which is prejudicially affected by the judgment or order passed in the contempt proceeding and granting relief and issuing fresh directions is likely to challenge that order and that may give rise to another round of litigation arising from a proceeding which is intended to maintain the majesty and image of Courts."

11. In Baldeobhai Gopalbhai Patel Vs. K.M.V. Cooperative Housing Society Limited & ors., (2000) 10 SCC 251, the Hon'ble Supreme Court dealt with an issue where the High Court issued the direction to demolish the construction raised in violation of the order of the Court in addition to sending the contemnor to jail for imposing the punishment holding him guilty of contempt of Court. The Apex Court held that as the matter was yet to be decided finally, the High Court ought not to have passed the order of demolition of the construction raised in the breach of the Court's order.

12. In Special Leave Petition (Criminal) No. 585 of 2004 Smt Shail Vs. Shri Manoj Kumar & ors., decided on 29th March, 2004 the Hon'ble Apex Court dealt with an issue wherein the petitioner therein had filed an application for maintenance before the Family Court, and as it was not decided, she approached this Court, wherein this Court passed the order directing the Family Court to decide her application within stipulated period. As the same was not decided, she filed the contempt petition and proceedings were initiated against the Presiding Officer of the Family Court. The matter went to the Hon'ble Supreme Court and the petitioner therein urged that whatever may be the legal and factual position as it was difficult for her to survive, this Court ought to have awarded her the maintenance in order to save her from destitution. The Hon'ble Supreme Court placing reliance upon its earlier judgment Surya Dev Rai Vs. Ram Chander Rai & ors., AIR 2003 SC 3044, held that the High Court while exercising the supervisory powers, which are required to

be exercised sparingly with care and caution, ought to have granted the maintenance itself and the direction issued to the petitioner to appear before this Court on the next date of hearing in the said contempt petition and seek the relief of maintenance from the High Court.

13. In Smt Abida Begam Vs. R.C.E.O., AIR 1959 All 675 a Division Bench of this Court held:

"It may not be possible for us to grant a decree in the suit, but, in spite of that fact, we think that this Court has jurisdiction under Article 226 of the Constitution to grant the relief as against the defendant no. 1, even though this matter had not come in its writ jurisdiction on an application under Article 226."

14. It may be mentioned that in the said case, the Division Bench was deciding a special appeal against the judgment of a learned Single Judge who had decided a second appeal under Section 100 C.P.C. Thus, the Court was not exercising writ jurisdiction but the jurisdiction of second appeal. However, it was observed that even in such a jurisdiction in certain exceptional cases the Court can issue writs. Thus the decision in Abida Begam's case (Supra) is an authority for the proposition that in exceptional cases a Judge sitting in a particular jurisdiction can issue a directive relating to another jurisdiction also so as to do justice.

15. A similar view has been reiterated by the Full Bench of Madras High Court in Vidya Charan Shukla Vs. Tamil Nadu Olympic Association & anr., AIR 1991 Mad 323, where the Court held that every court of record has an inherent jurisdiction to punish the contemnor and even in contempt proceedings the contempt of court is not limited only to enforce the order passed earlier, and to punish the contemnor but also to pass an appropriate order as required in the facts and circumstances of the case. While deciding the said case, the reliance had been placed upon a large number of earlier judgments of various Courts, including the judgment of the Hon'ble Supreme Court in Sukhdev Singh Vs. Hon'ble C.J. S. Teja Singh & Hon'ble Judges of the Pepsu High Court at Patiala, AIR 1954 SC 186.

16. Thus, in view of the above, the law on the issue can be summarised that the power of punishing a contemner, is inherent in every Court of record. It is essential and necessary for the purpose of smooth working of the Court. The Court while exercising the power of contempt generally does not go beyond the order passed earlier which has not been complied with, but in exceptional circumstances, where the facts so warrant the Court can also pass the orders which are necessary in the facts and circumstances of the case.

17. There is another aspect of the matter which also requires to be examined. The petitioner-appellants in this case had approached earlier the Hon'ble Supreme Court raising their grievance that the order passed by the Hon'ble Supreme Court is not being complied with. The Hon'ble Supreme Court did not consider it proper to entertain the contempt petition and it was disposed of vide order dated 8.10.2001 observing as under:-

"It is appropriate for the petitioner to move the High Court for the relief sought for. The contempt petition is dismissed accordingly."

18. There can be no dispute to the settled legal proposition that the Court of record is competent to initiate the contempt proceedings in respect of a matter seized by it and also in respect of the contempt of the Court subordinate to it, but it is beyond imagination that the High Court can entertain the contempt petition for non-compliance of the order passed by the Hon'ble Supreme Court. The Hon'ble Apex Court did not ask the petitioner therein to file the Contempt Petition rather directed to approach this Court for seeking appropriate relief. Though petitioner therein approached this Court by filing contempt petition, but in strict legal sense, considering the scope of contempt jurisdiction, it cannot be held that it is a contempt petition, but directions issued by their Lordships cannot be ignored. It is misnomer and in such circumstances, there cannot be any bar in passing the orders which are incidental and necessary in such a case. The submission made by the learned counsel for the petitioner-appellants that an order without jurisdiction is void, is acceptable, but such an issue is neither involved herein nor it is required to be examined at all.

19. The Coordinate Bench of this Court already held that the order passed by the learned Single Judge issuing a direction for transfer and framing the transfer policy is merely a recommendation. Therefore, appellants herein cannot have any grievance whatsoever as the issues raised by the appellants herein have already been dealt with by the coordinate Bench in Ravinder Kumar Goel and others (Supra).

20. Secondly, the Government frames the transfer policy in respect of its employees from time to time. Doctors cannot claim to be of a separate class, nor it is their case that they are not to be governed by the said policy. The transfer policies framed by the State always provide a guideline to transfer an employee after serving three years generally at a particular place. The said transfer policy or any other guidelines issued by the State Government from time to time in respect of transfer of the Medical Officers, separately had not been implemented strictly in their cases. State Government considering the directions issued by this Court which have been held to be recommendatory only, framed the transfer policy of transferring the Doctors who have served at a particular place for ten years. A government servant does not have a right to serve at a place of his choice. It is for the employer to consider as to where and for how long the services of a particular employee are required. How the appellants could have a grievance for implementing the transfer policy which the State is required to enforce even without direction of any Court. It is not something which this Court has directed to do, which was not permissible in law or not known to the State Authorities. It was only a recommendation to wake up the so called administration from its deep slumber as under what circumstances the Authorities were discriminating the other government employees from the medical officers by not transferring them from a particular place for the decades altogether; and as to why the other officers are being transferred generally after serving at one place for three years. It cannot be a legal issue for examination by any Court when appellants who are government servants and know very well that transfer is an incidence of service. Be that as it may, it is for the State to adopt the policy and the Court has to keep its hands off unless the policy is found to be unreasonable and arbitrary. Framing the policy of transfer

after 10 years' stay at one particular place may be a premium for the Doctors for flourishing their Nursing Homes at the place of their service or serving in the Private Nursing Homes to the dis-advantage of the society as a whole. The transfer policy framed by the State Government may be counter-productive of its desired aims. It is strange that the appellants have a grievance against a discriminatory policy framed by the State Government, which is totally to their advantage and discriminatory against all other employees and against the public interest. Thus, seeing the present state of affairs in the Medical Service, we have no hesitation to say that 10 years' stay policy may be counter-productive.

21. As the Division Bench of this Court has already held that the said directions are only recommendatory, we see no reason to take a view contrary to the same. Appeal is devoid of any merit. The facts of the appeal do not warrant any interference. It is accordingly dismissed.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2004

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 33529 of 2004

Natha Ram Pathak ...Petitioner
Versus
Director, Prashikshan Evam Sevayojan, U.P. Lucknow and others ...Respondents

Constitution of India-Art. 226-Order directing representation to be filed within two weeks and decide same within three weeks. Not mandatory-High Court's order, held, cannot be read as prescribing limitation for filing representation- Nor is it open to Director to reject the representation on ground that same has been filed beyond two weeks.

Held: Para 5

However, in the opinion of the Court, the order dated 17.11.2003, passed by this Court, cannot be read as limitation prescribing limitation for filing the representation nor it is open to Director to reject the representation on the ground that the same has not been filed beyond two weeks.

(Delivered by Hon'ble Arun Tandon, J.)

1. Heard Sri Pankaj Agrawal Advocate on behalf of the petitioner and Learned Standing Counsel on behalf of the respondents 1 and 3.

2. It is not necessary to issue notice to Respondent Nos. 2 and 4 in view of the order proposed to be passed by this Court today.

3. The petitioner has filed present writ petition against the order of the Director, Prashikshan Evam Sevayojan, U.P. Lucknow dated 15th July, 2004, whereby the objections filed by the petitioner in pursuance of the order of this Court dated 17.11.2003, passed in Civil Misc. Writ Petition No. 7830 of 2003 have been rejected only on the ground that the same has not been filed within two weeks as was directed under order of this Court dated 17.11.2003, which has been enclosed as Annexure-10 to the writ petition.

4. From the order passed by this Court, it is apparently clear that the direction to file the representation within two weeks was issued in view of the further direction that the representation

shall be decided within three weeks from the date it is filed by the respondent. Thus, if the representation has not been filed by the petitioner within two weeks as was required under order of this Court dated 17.11.2003, the further direction for deciding the representation within three weeks seized to mandatory and it is open to authority concerned to decide the representation without there being any time limit for the same.

5. However, in the opinion of the Court, the order dated 17.11.2003, passed by this Court, cannot be read as limitation prescribing limitation for filing the representation nor it is open to Director to reject the representation on the ground that the same has not been filed beyond two weeks.

6. In the facts and circumstances of the case, the order passed by the Director, Prashikshan Evam Sevayojan, U.P. Lucknow dated 15th July, 2004 is hereby set aside and the matter is remanded to the Director, Prashikshan Evam Sevayojan, U.P. Lucknow to decide the representation afresh strictly in accordance with law at the earliest possible.

7. It is needless to point out that the Director shall afford opportunity of hearing to the parties concerned before taking a decision and shall pass a reasoned order.

With the above observations, writ petition stands disposed of.

Petition Disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2004

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 2501 of 1994

Shoeb Alam and others ...Petitioners
Versus
The Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioners:
Sri R.N. Sharma

Counsel for the Respondents:
Sri A.K. Singh
Sri S.N. Singh
Sri K.B. Garg
S.C.

Consolidation of Holdings Act-S.9-Writ Jurisdiction-Exercise of-Petitioners made persistent attempts to continue their illegal possession over gaon sabha property-present petition again is desperate attempt to encroach upon court's precious time by vexations plea which did not find favour with this Court-Hence costs of Rs.10,000/- imposed on petitioners-held liable to pay mesne profits.

Held: Para 6

Before parting, I feel constrained to notice that in the instant case, there is enough indication that the petitioners have made persistent attempts to continue their illegal possession over the Gaon Sabha Property despite repeated failures upto the Apex Court. The present petition is again a desperate attempt to encroach upon Court's precious time by vexatious plea which did not find favour with this Court. In my considered view, it is a pre-eminently fit case in which the petitioners should be visited with costs which I quantify at Rs.10,000/-. The

petitioners are directed to handover possession of the property of Gaon Sabha forthwith and till actual possession is handed over to the Gaon Sabha, the petitioners would be liable to pay compensation for their illegal possession for the entire period the land in question remained in illegal possession of the petitioners. It may be clarified that in case any such application is filed by the Gaon Sabha for determining the question of actual amount of mesne profits before the District Magistrate, the same shall be decided in accordance with law within a period not exceeding six months from the date of filing of such application by the Gaon Sabha.

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Impugned herein is the order-dated 28.5.1993 passed by Deputy Director Consolidation by which compromise order dated 17.2.1975 in case no. 1129 under section 9 of the U.P. Consolidation of Holdings Act passed by Asstt. Consolidation officer was set aside and plot Nos. 5622 and 5393 was directed to be recorded as Gaon Sabha property while relegating the matter to the Consolidation officer for disposal afresh.

2. Heard learned counsel for the parties and perused the record. I have also been taken through the impugned order.

3. The learned counsel for the petitioner assailed the impugned order on the ground that it was passed exparte and the finding that the compromise was a forged one and both father of the petitioners and then Pradhan of the village made a collusive combination cannot be sustained. The learned counsel for the petitioner canvassed that earlier there was limitation operating in relation to right to claim property but subsequently, amendment was made by which limitation came to be obliterated**. Per contra,** Sri A.K. Singh learned counsel for the Opp. Parties contended that the property in question vested in Gaon Sabha and as a matter of fact, father of the petitioners 1 and 2 had preferred a writ petition impugning order dated 11.2.1993 which culminated in being dismissed by means of order of the Court dated 17.1.2000. Special leave to appeal preferred by the father of petitioners 1 and 2 also ended up in dismissal. It has been lastly submitted by the learned counsel that writ petition is a crude attempt on the part of the petitioners to grab the Gaon Sabha property.

4. From a perusal of record, it would transpire that it has not been gainsaid that plots in question were Gaon Sabha property. Initially, objections were filed by the father of petitioners. Subsequently, it is claimed that the father of the petitioners and the then Gram Pradhan entered into compromise and on the basis of the said compromise, the Asstt. Consolidation officer passed the order dated 17.2.1975. It is this compromise, which was set aside by means of impugned order. Since it is admitted position on record that property belonged to Gaon Sabha, it has not been established by any logic or reasons by the learned counsel for the petitioner that the petitioners or their father could acquire Gaon Sabha land on the basis of any right or that by any reckoning, they had acquired any Bhumidhari rights over the property in question. The plea of adverse possession in view of admitted position that property belonged to Gaon Sabha, does not hold water. Besides, it may be noticed that Section 11 C of the U.P. Consolidation of Holdings Act casts a duty upon the Consolidation authorities to protect the interest of Gaon Sabha. In the light of the above provisions, the question

of compromise or consequent order of the Asstt. Consolidation Officer was considered and jettisoned by this Court in its decision 17.1.2000 and it cannot be re-agitated by resort to the point of limitation which in my considered view is a metricious submission to prop up a second inning in this Court. It is crystal clear from the provisions of the U.P.Z.A. & L.R. Act that question of limitation cannot be called in aid in relation to property which is admittedly Gaon Sabha property. The learned counsel has not been able to bear out that any limitation has been fixed for acquiring any right on the Gaon Sabha property on the basis of adverse possession. The law is too settled to be ignored on this count and I do not propose to make an idle parade of learning by dwelling upon this aspect at prolix length also considering that the matter journeyed upto Apex Court but with no success.

5. In the above conspectus, I am of the considered opinion that in view of duties cast on the Consolidation Authorities in Section 11-C of the U.P.C.H. Act, the Deputy Director Consolidation rightly passed the impugned order and it cannot be questioned or assailed as no material irregularity or illegality has been pointed out. Petition fails and is dismissed accordingly.

6. Before parting, I feel constrained to notice that in the instant case, there is enough indication that the petitioners have made persistent attempts to continue their illegal possession over the Gaon Sabha Property despite repeated failures upto the Apex Court. The present petition is again a desperate attempt to encroach upon Court's precious time by vexatious plea which did not find favour with this Court. In my considered view, it is a pre-eminently fit case in which the petitioners should be visited with costs which I quantify at Rs.10,000/-. The petitioners are directed to handover possession of the property of Gaon Sabha forthwith and till actual possession is handed over to the Gaon Sabha, the petitioners would be liable to pay compensation for their illegal possession for the entire period the land in question remained in illegal possession of the petitioners. It may be clarified that in case any such application is filed by the Gaon Sabha for determining the question of actual amount of mesne profits before the District Magistrate, the same shall be decided in accordance with law within a period not exceeding six months from the date of filing of such application by the Gaon Sabha.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2004

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal From Order No. 912 of 1991

Pappu Singh and another ...Appellants
Versus
Ravindra Nath Dubey and another ...Respondents

Counsel for the Appellants:
Sri R.B. Sahai

Counsel for the Respondents:
Sri P.K. Tripathi
Sri Saral Srivastava
Sri A.K. Banerji
Sri S.K. Srivastava

Motor Vehicles Act, 1988-S. 149-Liability of Insurance Company-Breach of Policy-No evidence, to show that owner of tractor handed over tractor to 'P' for

driving-Thus insured did not commit any breach of Policy-Insurer failed to discharge burden- In absence of any finding by Tribunal that owner of Tractor committed willful breach of terms of Policy, insurer, held liable to indemnify owner and pay compensation to victim.

Held: Para 14, 15 & 16

Admittedly, the owner of the tractor had employed a duly licensed driver, namely, Mahipal Singh. The Insurance Company has not led any evidence to show that the insured person, namely, the owner of the tractor handed over the tractor to Pappu Singh to drive the tractor on 28.8.1988. Therefore, it can not be said that the insured person committed breach of the terms of the policy. The Insurance Company should have established by leading evidence that there was breach of condition of contract of the Insurance Company. The Insurance Company has failed to discharge the burden in the present case. Assuming that the tractor was being driven by Pappu Singh on 28.8.1988, it is not sufficient to hold that the insured person has committed breach of the terms of the Insurance Company in the absence of wilful violation of the terms of the policy by the insured person.

I am of the opinion that the law as laid down by Supreme Court in the case of Swarn Singh and others (supra) is fully applicable to the facts of the present case. In the absence of any finding by the Tribunal that the owner of the tractor committed wilful breach of the terms of the Insurance Company, the Insurance Company is liable to indemnify the owner of the tractor and to pay the compensation to the victim.

There is no dispute that Mahipal Singh was having a valid driving licence on 28th August, 1988 and the tractor was duly insured with Oriental Insurance Company Ltd.

Case law discussed:
JT 2004 (1) SC 109
AIR 1978 SC 1184

(Delivered by Hon'ble Prakash Krishna, J.)

1. This appeal is against the judgment and order of Motor Accident Claims Tribunal, Fatehpur, dated 16th August, 1991, passed in MACP No. 19 of 1989.

2. Respondent no. 1 filed a claim petition against the present appellants and Insurance Company, namely, Oriental Insurance Company Limited claiming a sum of Rs. two lacs as compensation in an accident caused by tractor no. UPW 4804 on 28th August, 1988 at about 8.00 p.m. near Mission Hospital Fatehpur. The Tribunal by its impugned order has awarded a sum of Rs.45000/- as compensation along with the interest at the rate of 12% per annum from the date of the petition till the date of payment. The said award has been passed against the present appellants only. It was dismissed against the Insurance Company, opposite party no. 3 in the claim petition. The present appeal is at the instance of the owner of the vehicle and it is alleged driver, driving the vehicle on the fateful day when the accident took place.

3. The challenge in the appeal is a limited one. The case of the appellant is that the vehicle being insured with the Insurance Company, the respondent no. 2 in the appeal, the Claims Tribunal committed illegality in not passing the award against the Insurance Company. The Tribunal exonerated the Insurance Company on the short ground that on 28th August, 1988 at the time of the accident the vehicle was being driven by Pappu Singh, appellant no.1, who happens to be

the son of appellant no.2 had no driving licence to drive the tractor. Therefore, in the present appeal the controversy involved is as to whether Pappu Singh was driving the vehicle on the date of the accident and whether the finding of the Tribunal exonerating the Insurance Company is legally justified.

4. Heard learned counsel for the appellant and Sri Saral Srivastava, learned counsel for the Insurance Company. None appeared for the claimant/respondent no.1 to oppose the appeal.

5. The Tribunal decided issues no. 1, 4 and 5 together and have come to the conclusion that Pappu Singh was driving the vehicle on the date of the accident. Therefore, in paragraph 17 of the judgment it is concluded that only opposite parties 1 and 2 are liable to pay the compensation amount and in terms of the policy the Insurance Company, respondent no. 2 is not liable for the same.

6. It is to be noted that the Insurance Company has not laid any evidence in support of its plea that the tractor in question was not being driven by a duly licensed driver at the time of the accident. The claimant who received the injuries in the accident on 28.8.1988 came out with a case that the tractor was being driven by Pappu Singh who was caught on the spot by one Kailash Dwivedi, examined as PW 2. In contra; the case of the owner of the tractor was that he had employed Mahipal Singh as a driver on the tractor and he had a valid driving licence and was driving the tractor at the time of the occurrence of accident.

7. The Tribunal has taken into consideration the statement of claimant and of Mahipal Singh (PW2) to arrive at the aforesaid finding. From the judgment it appears that the Tribunal was very much influenced by the fact that the driver of the tractor was arrested by Sri Kailash Dwivedi immediately after the accident on 28.8.1988. It has come on record that the accident took place on 28th August, 1988 and the first information report was lodged on 29th August, 1988. Kailash Dwivedi has further stated that the tractor was driven to the police station and handed over to the police immediately after the accident. He also stated that he apprehended Pappu Singh and was handed to the police on 28th August, 1988. In the above background the evidence of the parties are required to be scrutinized. It is admitted case that the FIR was lodged on 29th August, 1988. The case of the appellant is that when Pappu Singh went to the police station on 29th August, 1988, he was arrested there by the police. Admittedly, there is nothing on record to show that Pappu Singh was apprehended on 28th August, 1988 and was handed over to the police on the same day except the statement of Kailash Dwivedi (PW2). The attention of the Tribunal was invited to the fact that the F.I.R. itself was lodged on 29.8.1988 and there is nothing on record to show that Pappu Singh was apprehended on 28th August, 1988 and was handed over to the police on that date. The Tribunal met these points with following observations:-

8. “But every body knows the working of the police. Till 29.8.88 there was no FIR. Even if Pappu and tractor were present without a F.I.R. the police will naturally detain the tractor and will ask the driver to go away. The tractor is already in the hand of the police. The owner and driver will naturally appear to take their four lacs tractor and if necessary they will be arrested and such

happened in this case. The tractor was detained there. The F.I.R. was lodged the next day. The other day when the driver appeared at the police station to take the tractor or otherwise he was arrested."

9. Thus it is clear that Pappu Singh was arrested only on 29th August, 1988 when he went to the police station for release of the tractor involved in the accident. The Tribunal in my view has not correctly appreciated the evidence on record. This part of the order is based on surmises, and it has wrongly preferred to place reliance upon the statement of PW2 on this point. It has also come on record that the claimant became unconscious immediately after the accident. He has not deposed that the tractor was being driven at the time of the accident by Pappu Singh. Kailash Dwivedi was produced as a witness to establish that the tractor in question was involved in the accident. In the circumstances of the case and in the light of the evidence of the respective parties, it is not safe to rely upon the statement of PW2 to hold that the tractor was being driven by Pappu Singh. Further Mahipal Singh the driver of the tractor was examined on behalf of the appellants and he accepted that he was driving the tractor on the date of the accident and ran away immediately after the accident. Undisputedly Mahipal Singh is duly licensed driver of the tractor and was employed by the owner of the tractor as a driver. On this point there is no issue in between the parties. The Tribunal was very much influenced by the fact that Pappu Singh was arrested and challenged by the police and the claimant has got no interest that it was being driven by Pappu Singh of if it was being driven by Mahipal Singh. These two circumstances are wholly irrelevant to come to the conclusion that the tractor was being driven by Pappu Singh at the time of the accident. Therefore, I am of the view that the finding of the Tribunal that the tractor was being driven by Pappu Singh and not by Mahipal Singh can not be sustained. I am of the view that the tractor was being driven by Mahipal Singh who was having a valid driving licence to drive the tractor.

10. In this connection it is also relevant to examine the plea raised by the Insurance Company disputing its liability to pay the amount of compensation to the victim. This matter is not res–integra. Very recently the Supreme Court has examined this matter in depth in the case of **National Insurance Company Limited Vs.. Swarun Singh and others, JT 2004 (1) SC 109.** On this judgment the learned counsel for both the parties have placed reliance on Sub Section 1(1) if Section 149 of the Motor Vehicles Act casts a liability upon the insurer to pay to the person entitled to the benefit of the decree as if he were the judgment debtor. Al though the said liability is subject to the provisions of Section 1 prefaces with a non obstinate class that the insurer may be entitled to avoid or cancel or may have avoided and cancelled the policy. Interpreting Section 149 (2) (a) and (b) it has been held in the aforesaid case that the Insurance Company with a view to avoid its liability is not only required to show that the conditions laid down in the aforesaid section are satisfied but is further required to establish that there has been breach on the part of the insured. The relevant portion of paragraph 46 of the aforesaid judgment is quoted below:-

"Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down under section 149 (2) (a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured."

11. In the aforesaid case the Supreme Court has placed reliance upon its earlier judgment given in the case of ***Scandia Insurance Company Limited Vs.. Kokilaben Chandrabandan and other A.I.R. 1978 SC 1184.*** In this case the Supreme Court laid emphasis on the expression 'breach' and used in Section 96 (1) (2) (b) (ii) of the Motor Vehicles Act 1939. It has been held that the insurer will have to establish that the insured is guilty of an infringement or violation of the promise that a person who is duly licensed will have to be in charge of the vehicle. The relevant paragraph is quoted below :-

"*If the insured is not at all at fault and has not done any thing he should not have done or is not amiss in any respect, how can it be conscientiously posited that he has committed a breach? It is only when the insured himself places the vehicle in charge of a person who does not hold a driving licence, that it can be said that he is guilty of the breach of the promise that the vehicle will be driven by a licensed driver. It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise. Not when some mishap occurs by some mischance. When the insured has done everything within his power inasmuch as he has engaged a licensed driver and has placed the vehicle in charge of a licensed driver, with the express or implied mandate to drive himself it cannot be said that the insurer is guilty of any breach. And it is only in case of a breach or a violation of the promise on the part of the insured that the insured can hide under the umbrella of the exclusion clause. In a way the question is as to whether the promise made by the insured is an absolute promise or whether he is exculpated on the basis of some legal doctrine. The discussion made in paragraph 239 of Breach of Contract by Carter (1984 Edition) under the head Proof of Breach, gives an inkling of this dimension of the matter. In the present case even if the promise were to be treated as an absolute promise the grounds for exculpation can be found from S.84 of the Act which reads thus :-*

" 84. Stationary vehicles – No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake of brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver."

In view of this provision apart from the implied mandate to the licensed driver not to place a non licensed person in charge of the vehicle, there is also a statutory obligation on the said person not to leave the vehicle unattended and not to place it in charge of an unlicensed driver. What is prohibited by law must be treated as a mandate to the employee and should be considered sufficient in the eye of law for excusing non compliance with the conditions. It cannot therefore in any case be considered as a breach on the part of the insured. To construe the provision differently would be to re write the provision by engrafting a rider to the effect that in the even of the motor vehicle happening to be driven by an unlicensed

person regardless of the circumstances in which such a contingency occurs, the insured will not be liable under the contract of insurance,. It needs to be emphasized that it is not the contract."

12. The Supreme Court after discussing the various cases on the point has recorded its conclusion in para 64 of the judgment which reads as follows :-

*"*A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception."

"The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability."

13. The ratio of the judgment of the Supreme Court is to be applied in the facts of the present case. Admittedly, the owner of the tractor had employed a duly licensed driver, namely, Mahipal Singh. The Insurance Company has not led any evidence to show that the insured person, namely, the owner of the tractor handed over the tractor to Pappu Singh to drive the tractor on 28.8.1988. Therefore, it can not be said that the insured person committed breach of the terms of the policy. The Insurance Company should have established by leading evidence that there was breach of condition of contract of the Insurance Company. The Insurance Company has failed to discharge the burden in the present case. Assuming that the tractor was being driven by Pappu Singh on 28.8.1988, it is not sufficient to hold that the insured person has committed breach of the terms of the Insurance Company in the absence of wilful violation of the terms of the policy by the insured person.

14. I am of the opinion that the law as laid down by Supreme Court in the case of Swarn Singh and others (supra) is fully applicable to the facts of the present case. In the absence of any finding by the Tribunal that the owner of the tractor committed wilful breach of the terms of the Insurance Company, the Insurance Company is liable to indemnify the owner of the tractor and to pay the compensation to the victim.

15. There is no dispute that Mahipal Singh was having a valid driving licence on 28th August, 1988 and the tractor was duly insured with Oriental Insurance Company Ltd.

16. In the result the appeal is allowed. The judgment and order of the Tribunal is modified to the extent that the claim petition is allowed against the Insurance Company also with costs and, therefore, the claimant/applicant is entitled to recover the amount of compensation from the Insurance Company also. The Insurance Company will indemnify the owner of the tractor. No order as to costs.

Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 682 of 2002

The Union of India and another
...Appellants
Versus
Bhikham Singh ...Respondent

Counsel for the Applicants:
Sri Subodh Kumar
Sri M.I. Khan
Sri B.N. Singh, S.S.C.

Counsel for the Respondents:
Sri I.P. Yadav
Sri Krishnaji Khare

Constitution of India-Art. 226-C.R.P.F. Rules, 1975-Service law-Misconduct-Dismissal-concealment of material facti regarding involvement in Criminal case-about arrest and subsequent release on bail-Discretionary enquiry-Order of dismissal-Writ against-Single Judge held that misconduct stood washed off on acquittal of petitioner and that punishment of dismissal was disproportionate to misconduct-Special Appeal-For proving or disproving guilt of concealment of material facts, final acquittal of petitioner by Trial Court is immaterial-Held, petitioner was not entitled for relief of quashing punishment order which stood merged with appellate order-Since petitioner had not asked for relief of quashing of appellate order-Further, writ court strived in vain to question proportionality of quantum of punishment, where there was no justification to exhonate petitioner of charges of concealment of substantive facts about his arrest etc. in connection with a criminal case-Hence appeal allowed.

Held: Para 10,16 17

Copy of the statement of Ishwar Singh-Company Commander filed as Annexure-2 to the memorandum of appeal, reveals that it was recorded in the presence of the petitioner and the proceedings were not taken up behind his back. The aforesaid facts are fully established on the record and the petitioner was rightly found guilty for concealment of important facts, which he was bound to divulge before his authorities and thus he had grossly misconduct himself. In view of the aforesaid, we find that for proving or disproving this guilt, the circumstance that the petitioner was finally acquitted in the rape and Marpeet case by the trial court is hardly of any consequence, though it definitely finds great emphasis in the judgment of the learned Single Judge.

Thus, while summing up the entire facts and circumstances in the light of the above observations recorded by us in the judgment, we hold that the petitioner was not entitled for the relief of quashing the punishment order dated 30.1.1991 which had stood merged with the appellate order as he had not sought for the relief to quash the appellate order dated 12.12.1993. We also find that the learned Single Judge has strived in vain to question the proportionality of the quantum of punishment when there was hardly any justification to exonerate the petitioner of the charges of deliberate concealment of important and sensitive facts about his arrest etc in connection with a criminal case.

On the facts and circumstances, we find that the petition of the delinquent employee does not have any force at all and instead of granting relief in his favour the petition itself should have dismissed. We thus find that there is sufficient merit in the appeal, which deserves to be allowed.

Case law discussed:
(2003) 4 SCC 364
(1997) 3 SCC 371
(1995) 6 SCC 749
(1997) 7 SCC 463
(1994) 2 SCC 537
1997 (76) FLR 775
AIR 1987 SC 2386

(Delivered by Hon'ble Umeshwar Pandey, J.)

1. By this intra court appeal, the appellant-Union of India has challenged the judgment and order dated 10.9.2002 passed by the learned Single Judge granting relief of quashing the dismissal order of the petitioner-respondent and directing the authorities to reinstate him in service with all consequential benefits etc.

2. The brief facts are that the petitioner while on earned leave for some time, was involved in a criminal case under Section 376, 452 and 323 of I.P.C. at his home police station of district Agra. He was said to have entered the house of Smt. Roopam Devi, the prosecutrix of a criminal case and committed rape against her and also assaulted her family members. After his return from leave, the petitioner did not inform his immediate authorities about registration of the criminal case against him and then had proceeded for 40 days earned leave. In that criminal case the petitioner was taken into police custody during the investigation proceedings and was later on released on bail. The petitioner also did not give information of his arrest in the case and subsequent release on bail to his immediate superior officer. It was the aforesaid Smt. Roopam Devi who gave this information to the Company Commander of the petitioner. On receipt of this information, details of the criminal case were obtained by the department from the police station concerned. Since the conduct of the petitioner was gravely prejudicial to the required standard of discipline of the force to which he belonged, disciplinary proceedings were started against him under the relevant rule of C.R.P.F. Rules, 1975. The Inquiry Officer, after conclusion of the proceedings, found that the charges of mis-conduct about the concealment of facts regarding his arrest in the aforesaid criminal case and subsequent release on bail, had been fully established against him. Accordingly, the disciplinary authority concurring with the report of the inquiry and on considering the reply submitted by the petitioner found that even if the police case registered against the petitioner was fabricated, he, in all propriety, as a member of a disciplined force should have reported the full facts to his Company Commander on coming back from the leave but he deliberately did not do so. Accordingly not finding the petitioner a fit person to be retained in service as a member of the force, he passed the impugned order of dismissal from service.

3. It was contended on behalf of the petitioner that in the course of time he faced trial in the criminal case and was acquitted for the offences with which he was charged. As such, that incident should not be construed as a mis-conduct on his part and he cannot be held guilty which could entail the award of extreme punishment of dismissal. It is further contended that the petitioner on return from his earned leave had come to the office and had detailed the entire fact about his arrest and release etc. to his Company Commander-Ishwar Singh. Thus, he could not be accused of having concealed this fact from his superiors in the force.

4. The learned Single Judge after having considered the entire aspect of the

matter found that the charge of alleged concealment of fact by the petitioner about his involvement and arrest in the criminal case and later on his release on bail, could not stand to judicial scrutiny and the alleged mis-conduct of involvement in a criminal case of rape etc. also stood completely washed off on petitioner's ultimate acquittal in the criminal case. The learned Single Judge also found that the award of punishment of dismissal from service was highly disproportionate to the charges levelled against the petitioner and he accordingly allowed the petition and passed the impugned order.

5. We have heard Sri Subodh Kumar, learned counsel appearing for the appellants and Sri Krishnaji Khare representing the respondent-petitioner and have gone through the entire record.

6. The learned counsel for the appellant has tried to emphasise that the learned Single Judge while granting relief in the present writ petition has given undue weightage to petitioner's acquittal in the criminal case of rape etc., whereas this aspect should not be of much relevance in a departmental proceeding started against a delinquent in connection with the charges relating to that criminal incident and his subsequent conduct in respect thereto. Sri Subodh Kumar, learned counsel for the appellant in this context has relied upon the decision in ***Chairman & Managing Director, United Commercial Bank Vs. P.C. Kakkar*** reported in ***(2003) 4 S.C.C. 364*** and has contended that acquittal in a criminal case could not be determinative of the commission of mis-conduct and it is open to the authorities to proceed with the disciplinary proceedings notwithstanding such acquittal in the criminal case. The employee is not entitled to claim immunity from such proceeding on that basis. That may be a circumstance to be considered while awarding punishment and it would depend upon the facts of each case. There cannot be any universal application of such circumstance. Learned counsel for the appellants has also contended that the proportionality of the punishment awarded as judged by the learned Single Judge in his impugned order, is also not legally justifiable. It is further submitted that the petitioner has only challenged the order of dismissal dated 30.1.1991 from service whereas he had preferred a departmental appeal which was dismissed vide order dated 12.12.1993. The dismissal order dated 30.1.1991 passed by the disciplinary authority thus, stood merged with the order of the appellate authority dated 12.12.1993 and in case the appellate order has not been challenged in the petition, the relief of quashing the order of dismissal from service could not be legally granted by the learned Single Judge.

7. From a perusal of the impugned judgment of the learned Single Judge, it is apparent that the appeal preferred by the petitioner before the appellate authority against the order of dismissal dated 30.1.1991 had been dismissed vide appellate order dated 12.12.1993. A copy of the appellate order is filed as Annexure-4 to the affidavit filed along with memo of appeal. If the petitioner's appeal against his dismissal order had been rejected by the authority, it is quite obvious that the said dismissal order challenged in the petition stood merged with the appellate order but by the time the petition was argued before the learned Single Judge and till its disposal by the impugned judgment, the appellate order was not challenged by the petitioner. If such appellate order survives, there is

absolutely no meaning of quashing the order of dismissal by the Court under Article 226 of the Constitution of India. The said order of dismissal remains alive in the form of the appellate order which continues to be operative. Thus, the relief claimed in the petition actually becomes redundant so long as the petitioner does not claim the relief to quash the appellate order. In this view of the matter, the present petition being silent about the appellate order and not challenging the same would be deemed to be not maintainable and on this score itself the petition deserves to be dismissed. This aspect of the matter has not been considered by the learned Single Judge even though the fact that the appeal of the petitioner had been dismissed by the authority was very much in the notice of the learned Single Judge. While referring to the contentions of the counter affidavit, this allegation of the appellant-Union of India finds reference in the last paragraph of the impugned judgment at page 15 of the paper book of this appeal. On this ground itself that the petition was liable for dismissal we find that the impugned judgment thus cannot be sustained in the eye of law.

8. We also fully agree with the submissions of the learned counsel for the appellants that undue weightage has been given in the judgment of the learned Single Judge to the fact that the petitioner-respondent in the trial in the case of rape and Marpeet had not been found guilty and was acquitted for those offences.

9. In the aforesaid case of Chairman & Managing Director (UCO Bank) (supra), the Apex Court has in quite categorical terms held that acquittal in the criminal case is not determinative of commission of mis-conduct and it is open to the authorities to proceed with the disciplinary proceeding notwithstanding acquittal in the case. Such acquittal order of the criminal court does not entitle an employee to claim immunity from disciplinary proceedings and at the most it may be a circumstance to be considered while awarding punishment. That too would depend upon the facts of each case and that cannot be a circumstance available for universal application.

10. A perusal of the inquiry report (Annexure-2 to the memo of appeal) and the impugned order of dismissal dated 30.1.1991 (Annexure-3 to the memorandum of appeal) shows that the petitioner has not been found guilty and punished for the charges of committing the offence of rape and Marpeet but in fact he was found guilty for the charges of deliberate concealment of the fact that he was involved in the case, as a result of which he was arrested by the police, kept in the lock up for some days and thereafter released on bail. It is not disputed that in such a criminal case as aforesaid, the petitioner was involved and that he was arrested by the police during the investigation, kept in judicial lock up and was later on released. The fact of the petitioner's involvement in a rape case and the happenings subsequent to the registration of the case were actually not communicated to his immediate superior, the Company Commander-Ishwar Singh, who was examined as a witness during the inquiry proceedings in presence of the petitioner. The petitioner was on leave from 20.7.1990 to 28.8.1990 during which period he had been arrested in the criminal case and later on released on bail. He as a personnel belonging to the disciplined force of C.R.P.F. was bound to intimate his immediate authorities about all these incidents of his arrest etc. But as per his Company Commander-

Ishwar Singh, he did not inform him about all these facts, thereby committing a serious mis-conduct making himself liable for disciplinary action. The report submitted by the Inquiry Officer and relied upon by the disciplinary authority (Annexure 2 and 3) clearly discloses this fact that the petitioner was found guilty of making deliberate concealment of those incidents which had happened with him during the period of his earned leave from 20.7.1990 to 28.8.1990. The Inquiry Officer has relied upon the statement of Ishwar Singh-Company Commander regarding the aforesaid finding against the petitioner. We, while exercising our jurisdiction under Article 226 of the Constitution of India, cannot reverse the finding of fact so recorded by the Inquiry Officer or the disciplinary authority. Copy of the statement of Ishwar Singh-Company Commander filed as Annexure-2 to the memorandum of appeal, reveals that it was recorded in the presence of the petitioner and the proceedings were not taken up behind his back. The aforesaid facts are fully established on the record and the petitioner was rightly found guilty for concealment of important facts, which he was bound to divulge before his authorities and thus he had grossly misconducted himself. In view of the aforesaid, we find that for proving or disproving this guilt, the circumstance that the petitioner was finally acquitted in the rape and Marpeet case by the trial court is hardly of any consequence, though it definitely finds great emphasis in the judgment of the learned Single Judge.

11. As regard the quantum of punishment awarded to the petitioner, there is a catena of case law in which the propriety of the courts interfering with the quantum of punishment awarded to the delinquent have been questioned. The Apex Court in several cases has in very clear words made this scope of courts interference as extremely limited. In case the findings recorded by the disciplinary authority are not found questionable and worth interference in the judicial review, the courts are not supposed to interfere with the punishment awarded to the delinquent. Even if a lesser punishment has been awarded, the courts are not supposed to interfere with such administrative orders also vide Balbir Chauhan Vs. Food Corporation of India Ltd. and others, (1997) 3 S.C.C. 371 para-6.

12. In ***B.C. Chaturvedi Vs. Union of India & others, (1995) 6 S.C.C. 749,*** the Apex Court in para-18 of the judgment has observed as below:-

……the disciplinary authority, and on appeal the appellate authority, being fact finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

In ***Union of India and another Vs. G. Ganayutham, (1997) 7 S.C.C. 463***, the

Supreme Court has summarized the scope of judicial review against a punishment order in the following words:-

"In such a situation, unless the court/tribunal opines in its secondary role, that the administrator was, on the material before him, irrational according to Wednesbury or CCSU norms, the punishment cannot be quashed. Even then, the matter has to be remitted back to the appropriate authority for reconsideration. It is only in very rare cases as pointed out in B.C. Chaturvedi case that the Court might –-to shorten litigation--think of substituting its own view as to the quantum of punishment in the place of the punishment awarded by the competent authority."

13. The Supreme Court in another case of ***State Bank of India Vs. Samrendra Kishore Endow, (1994) 2 S.C.C 537*** while considering the order of the Tribunal which quashed the charges as based on no evidence, went in detail into the question as to whether the Tribunal had power to appreciate the evidence while exercising power of judicial review and held that a Tribunal could not reappreciate the evidence and substitute its own conclusion for that of the disciplinary authority. It would, therefore, be clear that the Tribunal (or Court) cannot embark upon the appreciation of evidence to substitute its own findings of fact for that of a disciplinary/appellate authority, and it cannot ordinarily interfere with the quantum of punishment.

14. The Court will not apply proportionality as a primary reviewing court. It is, thus, established that the disciplinary authority or the appellate authority, as the case may be, being fact finding authorities have exclusive power to consider the evidence recorded in disciplinary proceedings with a view to maintain discipline. They are also invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the mis-conduct. The Courts while exercising power of judicial review cannot substitute its own conclusion on penalty and impose some other penalty. In the aforesaid B.C. Chaturvedi's case (supra), the Supreme Court has gone to the extent of laying down a principle that the High Court or Tribunal in very exceptional circumstances can appropriately mould the relief either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

15. The High Court or Tribunal is not supposed to go into the correctness of the choice made by the disciplinary authority amongst the various alternatives open to him. Nor could the Court substitute its decision for that of the disciplinary authority. While coming to the present case, we find that the petitioner-respondent was a C.R.P.F. personnel and was thus a member of a disciplined force. The authorities had received information through some complaint that he was arrested in a criminal case of rape and marpeet. He was kept under the lockup for a few days and thereafter released on bail. Obviously, these are such important facts, which had to be brought to the notice to his immediate superiors at the earliest opportunity by the petitioner himself. As per the findings recorded by the Inquiry Officer, these facts were not brought to the notice of the Company Commander by the petitioner, instead such information was sent to him through a letter of the

lady who was alleged to have been raped by the petitioner. This was definitely a mis-conduct of serious nature committed by the petitioner, who was a member of a disciplined force. If one belongs to a force of the type, he is supposed to maintain that discipline everywhere whether on duty or off duty. Such grave mis-conduct having been found to have been committed by the petitioner, there was hardly any occasion for the learned Single Judge to hold that the decision for the award of punishment of dismissal from service taken by the disciplinary authority was so unreasonable or irrational as can be termed shockingly disproportionate. The learned Single Judge has referred to the decisions in ***Ram Awadh Vs. The Dy. Inspector General, Eastern Region, C.I.S.F., Patna & others, 1997 (76) FLR 775*** and ***Ranjeet Thakur Vs. Union of India, A.I.R. 1987 S.C. 2386.*** The aforesaid cases are distinguishable on the facts and principles from the present case, especially in the background of the principles of law laid down by the Apex Court in the cases referred to above.

16. Thus, while summing up the entire facts and circumstances in the light of the above observations recorded by us in the judgement, we hold that the petitioner was not entitled for the relief of quashing the punishment order dated 30.1.1991 which had stood merged with the appellate order as he had not sought for the relief to quash the appellate order dated 12.12.1993. We also find that the learned Single Judge has strived in vain to question the proportionality of the quantum of punishment when there was hardly any justification to exonerate the petitioner of the charges of deliberate concealment of important and sensitive facts about his arrest etc in connection with a criminal case.

17. On the facts and circumstances, we find that the petition of the delinquent employee does not have any force at all and instead of granting relief in his favour the petition itself should have dismissed. We thus find that there is sufficient merit in the appeal, which deserves to be allowed.

18. This intra court appeal is allowed with no order as to costs and the judgment and order dated 10.9.2002 passed by the learned Single Judge is hereby set aside. Respondent's petition is hereby dismissed.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No. 9774 of 2002

Krishna Kumar ...Petitioner
Versus
Assistant General Manager, State Bank of India Kanpur & others ...Respondents

Counsel for the Petitioner:
Sri R.S. Chaudhary

Counsel for the Respondents:
Sri Vipin Sinha
Sri Ashish Srivastava
S.C.

Dying in Harness Rules-S.B.I. Scheme for appointment on Compassionate grounds-Object-Income of married brothers not staying with the family not to be included in income of family-Further, income received from family pension and interest from terminal benefits, held, not to be included in income of family-Hence respondents directed to reconsider petitioner's application for appointment

on Compassionate ground.

Held: Para 7

In my opinion, the income of the brothers who are married and who are not staying with the family as alleged by the petitioner in the rejoinder affidavit, could not be included while calculating the financial income of the family. So far as the income of the widow is concerned, the income received from the family pension and interest from terminal benefits cannot be included. Thus, if these amounts are removed from the total income shown, nothing would remain nor can anyone come to the conclusion that the financial position of the family members was sound.

Case law discussed:

W.P.No. 34547 of 2000, decided on 9.8.2000
Spl. Appeal No. 447 of 1999, decided on 27.7.1999

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner's father was working as a Messenger in State Bank of India and died in harness on 28.3.2000. An application was moved for appointment of the petitioner bank on compassionate ground which was declined by the competent authority vide its order dated 8.1.2002. This order has been challenged in the present writ petition and the petitioner has prayed not only for quashing of this order but also for a direction commanding the respondents to appoint the petitioner under the Dying-in-Harness Rules.

Heard learned counsel for the parties.

2. The application for appointment of the petitioner on compassionate ground has been rejected on the ground that the financial condition of the family could not be termed as penurious in view of the terminal benefits, investments, savings, family pension and monthly relief from Staff Mutual Welfare Scheme.

3. The respondents have filed the scheme for appointment on compassionate ground. The object of the scheme is quoted hereunder:-

"The object of granting compassionate appointment is to enable the family to tide over the sudden crisis due to the death of the bread-winner. The mere death of an employee in harness does not entitle his family to such a livelihood. The object is to offer compassionate appointment only when the Bank is satisfied that the financial condition of the family is such that, but for the provision of employment the family will not be able to meet the crisis."

Clauses 3 (l) and (m) of the Scheme are quoted herein:-

"**1) Financial condition of the family**

Appointments in the public services are made strictly on the basis of open invitation of applications and merit. However, exceptions are made in favour of dependents of employees dying in harness and leaving their family in penury and without any means of livelihood. Determining the financial condition of the family is, therefore, an important criterion for deciding the proposals for compassionate appointment. The following factors should be taken into account of determining the financial condition of the family:

i) family pension
ii) gratuity amount received
iii) employee's/employer's contribution to Provident Fund
iv) any compensation paid by the Bank or its Welfare fund
v) proceeds of LIC Policies and other investments of the deceased

employee.

vi) income of family from other sources

vii) income of other family members from employment, or otherwise

viii) size of the family and liabilities, if any.

m) Deviations

i) Deviations from the provisions of the scheme may be considered by the Managing Director and Group executive or by prior approval of the Government.

4. From a perusal of the aforesaid it is clear that the object for appointing dependants on compassionate ground is to tide over the sudden crisis due to death of the bread winner. The bank is required to give appointment on compassionate ground only, if it is satisfied that the financial condition of the family is such that, but for the provision of employment, the family could not be able to meet the crisis. The criteria for determining the financial conditions have been given in Clause (l) of the Scheme.

5. The learned counsel for the respondents submitted that on the basis of the information supplied by the petitioner, as disclosed in Annexure 5 to the counter affidavit, the monthly income of the family members was Rs.9656/- which was adequate and, therefore, the financial condition of the family was not penurious and the petitioner was, therefore, not entitled for appointment.

6. The learned counsel for the respondents submitted that the widow of the deceased received 3.73 lacs toward terminal benefits by way of provident fund, gratuity and leave encashment etc. and that she was also receiving a family pension of Rs.2,559/- and that the other income of the remaining family members, who were employed came to Rs.4100/- plus interest from terminal benefits would amount to sufficient income and, therefore, there was no requirement to appointment the petitioner on compassionate ground. In support of his case, the respondent has relied upon a decision in **Jadawati Devi vs. State Bank of India and others,** decided on 27.7.1999, in Special Appeal No.447 of 1999, in which it was held that the financial condition of the family was not in such a distress condition to give employment to a member of the family of the deceased under the Dying in Harness Rules. The conclusion drawn was on the basis of the amount received from the provident fund, gratuity and pension etc. In **Pushpendra Arora vs. State Bank of India and others,** decided on 9.8.2000, in Writ Petition No.34547 of 2000, this Court dismissed the writ petition on the ground that the financial position of the family of the deceased employee was sound and that no ground was made out for appointment on compassionate ground.

7. The claim of the petitioner has been denied on the basis of the income disclosed by him in his application for appointment, which has been annexed as Annexure 5 to the counter affidavit. From a perusal of the said application it is clear that the total income shown includes the income of three brothers which comes to Rs.4100/-. The application shows that the three brothers are working as labourers. In my opinion, the income of the brothers who are married and who are not staying with the family as alleged by the petitioner in the rejoinder affidavit, could not be included while calculating the financial income of the family. So far as the income of the widow is concerned, the income received from the family pension

and interest from terminal benefits cannot be included. Thus, if these amounts are removed from the total income shown, nothing would remain nor can anyone come to the conclusion that the financial position of the family members was sound. In **State Bank of India and others vs. Ram Piyarey,** *2001(2) ESC(Alld.)876,* a Division Bench of this Court held:-

"In our opinion, the learned single Judge was correct in holding that the receipt of family pension by the widow and a sum of Rs.1.42 lacs paid to widow after deducting the loan cannot be taken to be a good ground for rejecting the case for appointment on compassionate ground. It is common knowledge that the widow is entitled to family pension and other benefits in the event her husband died in harness. If the plea of the Bank is accepted then no appointment can be made on compassionate ground and the scheme of the Bank shall have no meaning. We are of the view that the learned single judge was quite justified in allowing the writ petition."

8. The judgment in *Ram* **Piyarey** case (supra), was decided on 17.4.2001 whereas the judgment passed in **Jadawati** case was decided on 27.7.1991. Since **Ram Piyarey** judgment is the latest judgment, the same is binding upon me.

9. In view of the aforesaid, the writ petition is allowed and the order dated 8.1.2002 is set aside. The respondents are directed to reconsider the petitioner's application for appointment on compassionate ground in the light of the observations made above and after considering the financial hardship, the authority concerned shall pass appropriate order in accordance with law within two months from the date of the communication of this order.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.8.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 968 of 2004

State Urban Development Agency (SUDA) ...Appellant
Versus
Dinesh Chandra Saxena and others ...Respondents

Counsel for the Appellant:
Sri Neeraj Tiwari

Counsel for the Opposite Parties:
Sri S.N. Singh
Sri R.D. Khare, C.S.C.

U.P. Industrial Dispute Act-Industry-whether U.P. State Handloom Corporation is within meaning of Industry?-held- 'yes'.

Constitution of India Article 226-alternative remedy-employee working with Handloom Corporation is workman-termination order challenged under writ jurisdiction-held- Petitioner has statutory remedy-writ held not maintainable.

Held: Para 10

U.P. State Handloom Corporation as well as State Urban Development Agency and District Development Agency are industries. Hence if the writ petitioners wanted to challenge their retrenchment they should have raised an industrial dispute and requested the Government to make a reference to the Labour Court/Industrial Tribunal. The High Court should not ordinarily interfere when there is an alternative remedy

before the Labaour Court/Tribunal.

Practice of Procedure-Grant of interim relief-termination order stayed by interim order-amounts to grant if final relief-in the garb of interim order final order should not be passed.

Held: Para 6 & 7

In State of Haryana v. Suman Dutta (2000) 10 SCC 311 the Supreme Court held that a termination order should not be stayed by the High Court by means of an interim order. The Supreme Court in that decision observed:

"We are clearly of the opinion that the High Court erred in law in staying the order of termination as interim measure in the pending writ petition. By such interim order if an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same."

The ratio of the aforesaid decision squarely applies to the facts of the present case.

Case law discussed:
2000 (10) SCC-311

(Delivered by Hon'ble M. Katju, J.)

Heard learned counsel for the parties.

1. This special appeal has been filed against the impugned interim order of the learned single Judge dated 16.7.2004 in writ petition no. 26317 of 2004.

2. It appears that the respondents were employees of the U.P. State Handloom Corporation and they had been sent on deputation to the State Urban Development Agency. They were retrenched from their parent department, that is U.P. State Handloom Corporation. As a consequence, their services were also terminated in the State Urban

3. Development Agency where they had been sent on deputation.
By the impugned interim order the order dated 21.5.2004 passed by the State Urban Development Agency terminating the services on deputation of these employees have been stayed and the learned single Judge has further directed the authorities to allow the petitioners to continue in service in state Urban Development Agency and District Urban Development Agency.

4. After hearing learned counsel for the parties in detail we are of the opinion that the impugned order cannot be sustained. Firstly by the said interim order final relief has been granted which cannot be done as held by this Court in **State of U.P. and others v. Smt. Meera Sankhwar and others, Special Appeal No. 555 of 2004 decided on 12.7.2004**. The entire case law on the point has been considered in the aforesaid division bench decision and hence we are not repeating the same.

5. The consequence of the interim order dated 16.7.2004 would be that the writ petitioners would continue in the service of State Urban Development Agency and the District Urban Development Agency. In our opinion this amounts to giving final relief.

6. In **State of Haryana v. Suman Dutta (2000) 10 SCC 311** the Supreme Court held that a termination order should not be stayed by the High Court by means of an interim order. The Supreme Court in that decision observed:

"We are clearly of the opinion that the High Court erred in law in staying the

order of termination as interim measure in the pending writ petition. By such interim order if an employee is allowed to continue in service and then ultimately the writ petition is dismissed, then it would tantamount to usurpation of public office without any right to the same."

7. The ratio of the aforesaid decision squarely applies to the facts of the present case.

8. Apart from the above we may also mention that the parent department of the writ petitioners was the U.P. State Handloom Agency and the District Urban Development agency. When their services in the parent department was terminated (whether by way retrenchment, dismissal or otherwise) their services in the deputationist department automatically comes to an end. This is because a person has his lien only in the parent department and not in the deputationist department. If his service in the parent department is terminated then he loses his lien in the parent department and since he has no lien in the deputationist department obviously he cannot continue in the latter department.

9. Moreover, the writ petitioners had an alternative remedy of challenging the retrenchment under the Industrial Disputes Act/U.P. Industrial Disputes Act and hence in our opinion the writ petition itself should not have been entertained vide **U.P. State Bridge Corporation Ltd. v. U.P. Rajya Setu Nigam Karmchari Sangh, (2004) 4 SCC 268**.

10. The definition of industry in the Industrial Disputes Act has been very widely interpreted by the Supreme Court in the case of **Banglore Water Supply and Sewerage Board v. Rajappa, AIR 1978 SC 969** and in our opinion on the U.P. State Handloom Corporation as well as State Urban Development Agency and District Development Agency are industries. Hence if the writ petitioners wanted to challenge their retrenchment they should have raised an industrial dispute and requested the Government to make a reference to the Labour Court/Industrial Tribunal. The High Court should not ordinarily interfere when there is an alternative remedy before the Labaour Court/Tribunal.

11. For the reasons given above this appeal is **allowed**. The impugned order is set aside.

12. With the consent of both the learned counsel for the parties in this appeal we are also disposing off the writ petition no. 26317 of 2004 in terms of the above order.

Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2004

BEFORE
THE HON'BLE M. KATJU, A.C.J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 950 of 2004

Om Prakash ...Petitioner/Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri A.M. Zaidi
Sri M.H. Khan

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Writ Petition-Alternative remedy-Maintainability- U.P. Public Service

Tribunal Act 1976 (as amended in 2002)-Dismissal of Writ on ground of alternative remedy-As per amendment there must be some order against which petitioner can go to Tribunal-Hence impugned judgment set aside.

Held: Para 2

It may be mentioned that the U.P. Public Service Tribunal Act, 1976 was amended in the year 2000. According to the amendment there must be some order against which the petitioner can go to the Tribunal. If there is no order, party cannot go to the Tribunal. This view was also taken by the Supreme Court in Public Service Tribunal Bar Association Vs. State of U.P. & another (2003) 1 UPLBEC 780.

Case law discussed:
(2003) 1 UPLBEC 80

(Delivered by Hon'ble M. Katju, A.C.J.)

1. Heard Sri A.M. Zaidi, learned counsel for the appellant and learned Standing Counsel.

This Special Appeal has been filed against the impugned order of learned Single Judge dated 10.5.2004. By that judgment, the learned Single Judge dismissed the writ petition on the ground of alternative remedy before the U.P. Public Service Tribunal.

2. It may be mentioned that the U.P. Public Service Tribunal Act, 1976 was amended in the year 2000. According to the amendment there must be some order against which the petitioner can go to the Tribunal. If there is no order, party cannot go to the Tribunal. This view was also taken by the Supreme Court in Public Service Tribunal Bar Association Vs. State of U.P. & another (2003) 1 UPLBEC 780.

3. Following the said decision, this appeal is allowed and the impugned order dated 10.5.2004 is set aside. We remand the case to the learned Single Judge for passing a fresh decision on merits in accordance with law expeditiously.

Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.8.2004

BEFORE
THE HON'BLE TARUN CHATTERJEE, C.J.
THE HON'BLE VINEET SARAN, J.

Special Appeal No. 61 of 2003

State of U.P. through Collector Allahabad and others ...Appellants
Versus
Ram Badan Dubey ...Respondents

Counsel for the Appellants:
Sri R.V. Singh
S.C.

Counsel for the Respondent:
Sri Ram Badan Dubey (In Person)

Constitution of India-Art. 226-Non-payment of services dues by State Government to its employees for years together until decree is put in execution and attachment orders are passed-State Government expected to act fairly-Unfair attitude of State Government entitles petitioner for interested which was rightly awarded by Writ court-However rate of interest reduced from 12% to 9% p.a. simple.

Held: Para 8 & 9

A retired Government employee is not expected to litigate with the State Government for payment of his legitimate dues and even after litigation and the decree having become final, it is not expected of the State Government to

withhold the payment of its retired employee for years together until the decree is put in execution and attachment orders are passed. The State Government is expected to act fairly with its employees and such unfair attitude having been adopted by the State Government does entitle the writ-petitioner for payment of interest, which has rightly been awarded.

However, the rate of interest awarded at 12% per annum appears to be slightly on the higher side. Considering the then prevailing market rate of interest and also the current market rate of interest, in our view, simple interest at the rate of 9% per annum for the entire period ought to have been awarded. The finding of the writ court that the writ-petitioner would be entitled to interest after December, 1997 is also justified. In our view, the rate of interest for such period should also be 9% per annum.

(Delivered by Hon'ble Tarun Chatterjee, C.J.)

1. This Special Appeal has been filed by the State of U.P. and two others against the Judgment and Order dated 3.9.2002 passed by a learned Judge in Civil Misc. Writ Petition No. 55579 of 2000.

2. The brief facts relevant for the decision of this appeal are that the writ-petitioner Ram Badan Dubey (respondent in this appeal) was an assistant teacher in a recognized educational institution, namely, Agrasen Inter College, Allahabad. He was given notice dated 11.2.1985 that on attaining the age of 60 years he would superannuate on 30.6.1985. The writ-petitioner, however, challenged the said notice and contended that he was entitled to continue in service upto 30.6.1986. The writ-petitioner filed civil suit no. 331 of 1985 praying for a declaration that he was entitled to continue in service till 30.6.1986. By Judgment and Decree dated 25.2.1988 the trial court decreed the suit with costs alongwith a direction to pay all privileges and arrears etc. A time-barred appeal was filed challenging the said judgment of the trial court. The application for condonation of delay was rejected by the appellate court vide its order dated 27.1.1990. The judgment and order of the trial court thus became final. The writ-petitioner thereafter ran from pillar to post for getting his arrears of salary, balance amount of pension and group insurance along with interest. Thereafter ultimately he was constrained to put the decree in execution and only after the attachment order was passed and the jeep of the District Inspector of Schools was attached, the Judgment-Debtors (appellants in this Special Appeal) paid the dues of the writ-petitioner on 13.12.1997 which was after 11 ½ years of the retirement of the writ-petitioner on 30.6.1986. The writ-petitioner thereafter filed the writ petition claiming that he was entitled to interest for 11 ½ years at the rate of 18% per annum and thus claimed a sum of Rs.4,14,300/- towards interest for the delay in payment.

3. After hearing the parties the learned Judge allowed the writ petition and directed the appellants herein (Respondents in the writ petition) to jointly and severally ensure payment of a sum of Rs.2,16,341/- towards interest amount plus Rs.3000/- as cost i.e. a total amount of Rs.2,19,341/- to the petitioner by means of an account payee bank draft within a period of three months. The said order is impugned in this special appeal.

4. It may be noted that this appeal had also been filed after delay of more than three months. However, on hearing the parties and considering the averments

made in the affidavits, the delay has already been condoned.

5. We have heard Sri Ran Vijai Singh, learned Standing counsel appearing for the appellants and the Respondent, who appeared in person and have perused the record.

6. It is not disputed that the writ-petitioner was entitled to certain dues of service which were paid to him only on 31.12.1997. After considering the facts and circumstances of this case the learned Judge, while deciding the writ petition, observed as follows:-

"It appears no action was taken by the departmental authorities hence the petitioner was constrained to file the present writ petition. Pleadings contained in the writ petition show that the petitioner got his money on 13.12.1997 when decree in favour of the petitioner was put in execution and attachment proceedings were also initiated by the Civil Court. This goes to show that the department did not honour the Civil Court decree compelling the petitioner to put the same for execution and coercive measures taken when jeep belonging to the office of the District Inspector of Schools was attached."

7. In the said judgment a categorical finding has been recorded that there was deliberate delay in payment of the arrears of salary, pension, group insurance etc. to the writ-petitioner. It has also been observed that the appellants (respondents in the writ petition) chose not to file a detailed counter affidavit rebutting the specific averments of the writ-petitioner regarding harassment at the behest of the State authorities but merely filed short counter affidavit and supplementary counter affidavits. However, it was brought on record that the writ-petitioner was paid an amount of Rs.2,56,693/- only on 13.12.1997. The writ court thus found that the writ-petitioner was entitled for payment of simple interest at 12% per annum. Since there was discrepancy in the calculation of the interest amount by the writ-petitioner and the appellants, the learned Single Judge took assistance of the Section Officer of the Accounts Section in the Registry of the High Court, who was asked to calculate the amount of simple interest at the rate of 12% per annum for 11 years, instead of 11 ½ years, which came to Rs.1,44,227/-. The said amount of interest was calculated upto December, 1997. The writ court thereafter granted 10% simple interest for a period of five years from 1997 to 2002, treating the sum of Rs.1,44,227/- to be the principal amount, which came to Rs.72,114/- and thus held that the petitioner was entitled to payment of an amount of Rs.2,16,341/- and also awarded cost of Rs.3000/-.

8. Having heard the parties and considering the facts and circumstances of this case, we are of the view that the finding of the writ court that the writ-petitioner (Respondent in this appeal) was entitled for payment of interest for the delay in payment of the legitimate dues of the writ-petitioner appears to be justified. A specific finding has been recorded by the writ court that there was no fault on the part of the writ-petitioner which could be attributed to him for the delay in making the payment. Considering the fact that despite the decree having been granted by the trial court in favour of the writ-petitioner and the appeal filed against the same having already been dismissed in the year 1990, we see no reason why the amount was not paid immediately thereafter. A retired Government employee is not expected to litigate with

the State Government for payment of his legitimate dues and even after litigation and the decree having become final, it is not expected of the State Government to withhold the payment of its retired employee for years together until the decree is put in execution and attachment orders are passed. The State Government is expected to act fairly with its employees and such unfair attitude having been adopted by the State Government does entitle the writ-petitioner for payment of interest, which has rightly been awarded.

9. However, the rate of interest awarded at 12% per annum appears to be slightly on the higher side. Considering the then prevailing market rate of interest and also the current market rate of interest, in our view, simple interest at the rate of 9% per annum for the entire period ought to have been awarded. The finding of the writ court that the writ-petitioner would be entitled to interest after December, 1997 is also justified. In our view, the rate of interest for such period should also be 9% per annum.

10. Since we find that the rate of interest awarded was slightly on the higher side, in our view, after calculating the same at 9% simple interest per annum, a quantified amount of Rs.1,75,000/- ought to be paid to the writ-petitioner towards interest for the delay in payment of his legitimate dues after his retirement, which would meet the ends of justice. It is further provided that the writ-petitioner shall also be entitled to cost of litigation, which is assessed at Rs.5,000/- for writ court as well as in this appeal. Thus the writ-petitioner would be entitled to payment of Rs.1,80,000/-.

11. This special appeal, accordingly, stands partly allowed. It is thus directed that the appellants shall jointly and severally ensure payment of an amount of Rs.1,80,000/- to the writ-petitioner by means of an account payee bank draft within a period of three months from today. It is further provided that in case the said amount is not paid within three months, the writ-petitioner shall further be entitled to payment of interest at the rate of 9% on the said amount of Rs.1,80,000/- from today till the date of actual payment for delay of this payment. In case the amount of Rs.1,80,000/- is paid to the writ-petitioner within the stipulated period of three months, no further interest shall be payable by the appellants.

Appeal Partly Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.7.2004

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE UMESHWAR PANDEY, J.

Special Appeal No. 848 of 2004

Vice Chancellor, Aligarh Muslim University, Aligarh & others ...Appellants
Versus
Ram Prakash Shukla ...Respondent

Counsel for the Appellants:

Counsel for the Respondents:

Constitution of India, Article 226- Temporary Appointment-Petitioner holding post of Security Asstt. purely on Temporary basis-circular dated 20.5.03 provided such appointee either as teaching on non teaching staff to continue upto 30.6.03-initial appointment on fixed period-Subsequently extended till regular selection is made-in view of circular issued by the university-petitioner has no right to hold the post-thereafter.

Admittedly the respondent Ram Prakash Shukla was a purely temporary appointee and hence he had no right to the post. No proposal was sent for extension of his service and therefore his service came to an end on 30.6.2003, in view of the order of the competent authority dated 20.5.2003. Para 5

Case law discussed:

1991 (1) ACC-691
1994 (5) SCC 177
AIR 1992 SC 496
(1995) 1 SCC 638
J.T. 2002 (1) SC-431
1996 (8) SC-46

(Delivered by Hon'ble M. Katju, J.)

1. Heard Sri Shashi Nandan and Smt. Suneeta Agarwal for the appellant and Sri Hemant Kumar for the respondent.

2. This special appeal has been filed against the impugned judgment of the learned Single Judge, dated 13.5.2004. We have carefully perused the impugned judgment and we are of the opinion that the same cannot be sustained.

3. Admittedly the respondent was a purely temporary appointee who was appointed temporarily as Security Assistant in the Proctor's office for a period of six months or till some arrangement/regular appointment is made or until further orders whichever is earlier. He joined duties on 23.3.2001. His term was extended from 23.11.2001 for a period of one year and again he was allowed on 20.12.2001 to continue till further orders or till the regular selection is made whichever is earlier.

4. It appears that a circular dated 20.5.2003 was issued by the competent authority of the Aligarh Muslim University (Vice Chancellor) copy of which is Annexure 4 to the stay application filed with this appeal. By this order dated 20.5.2003 the competent authority directed that the appointments of temporary employees sanctioned on various non-teaching/technical cadre posts & group D employee till further orders be now treated to have been made only upto 30.6.2003. By the same order it was also directed that the proposal for further extension of temporary appointments beyond 30.6.2003 alongwith, detailed justification may be sent to the Registrar on the prescribed format.

5. Admittedly the respondent Ram Prakash Shukla was a purely temporary appointee and hence he had no right to the post. No proposal was sent for extension of his service and therefore his service came to an end on 30.6.2003, in view of the order of the competent authority dated 20.5.2003.

6. The Learned Single Judge allowed the writ petition on the ground that the petitioner was discriminated against the writ petition as the services of some other persons were extended. Regarding the persons Sri Shashi Nandan, learned counsel for the appellant submitted that proposals were sent for extending their service as they were needed in the respective departments, whereas there was no proposal in respect of the writ petitioner as he was not needed. It is not for this Court to decide whether a person is needed or not needed. The Court must exercise judicial restraint in such matters and should not interfere in such matters which lie within the domain of the University or competent authority. Some attitude should be given to the executive and it is not proper for this Court to interfere on the lightest pretext.

7. The respondent in this appeal (writ petitioner) was purely temporary appointee and hence had no right to the post, as held by the Supreme Court in Kaushal Kishore vs. State of U.P., (1991) SCC 691, Commissioner, Food and Civil Supllies vs. Prakash Chandra Saxena, (1994) 5 SCC 177, Triveni Shanker Saxena vs. State of U.P., AIR 1992 SC 496, Madhya Pradesh Hasta Shilpa Vikas Nigam Ltd. vs. Devendra Kumar Jain, (1995) 1 SCC 638, Dr. Chanchal Goyal vs. State of Rajasthan (2003) 3 SCC 485, Shailaja Shivajirao Patil vs. President, JT 2002 (1) SC 431, Secretary, Ministry of Works and Housing Government of India vs. Mohinder Singh Jagdev, JT 1996 (8) SC 46, etc. These decisions have been followed by a Division Bench of this Court in Mathura Vrindavan Development Authority, Mathura vs. State Public Services Tribunal and others, Civil Misc. Writ Petition No. 4002 decided on 25.11.2003.

8. For the reasons given above we are of the opinion that this appeal deserves to be allowed. The impugned judgment of the learned Single Judge dated 13.5.2004 is set aside and the writ petition stands dismissed.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2004

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 2948 of 2004

Radha Krishna and others ...Petitioners
Versus
Sri Brij Kishore & others ...Respondents

Counsel for the Petitioners:
Sri Ajit Kumar
Sri Mohit Kumar

Counsel for the Respondents:
Sri Tripathi B.G. Bhai
C.S.C.

U.P. Consolidation of Holding Act 1953- Section 5 (3) Abetment of Suit-suit for permanent injunction-During pendancy of suit the village in question brought under Consolidation Proceeding-only relief for Injunction-No declaration of title on right claimed-held not liable to abate.

The findings recorded by revisional court that suit filed by the plaintiff was only for relief of injunction and did not involve any declaration of the rights and title and hence not liable to be abated, does not suffer from any infirmity and are hereby affirmed. Para 18

Case law discussed:
1984 ACJ 490
1999 (1) AWC 152
AIR 1966 SC 1718
1990 RE 466

(Delivered by Hon'ble Krishna Murari, J.)

1. The short question which arises for consideration, in this case, is whether, a suit where only a relief for permanent injunction has been claimed is liable to be abated by reason of Section-5 (2) of U.P. Consolidation of Holdings Act 1953 (hereinafter referred to as the Act).

2. The facts relevant for the purpose of the case are that the plaintiff/respondent filed original suit no. 342/90 in the Court of Civil Judge, Mathura, seeking a relief for permanent injunction to restrain the defendant/petitioner from interfering in his possession or from taking possession forcibly and raising any construction over the land in dispute. During the pendency of the proceedings an application no. 24-

ka was moved by defendant/petitioner no. 1 with a prayer that suit is liable to be abated under Section 5 (2) of the Act as the village where the land in dispute is situate has been notified for consolidation operations.

3. The trial court, vide order dated 21.4.1993, allowed the application and abated the suit. The plaintiff/respondents filed a revision challenging the said order. The revisional court allowed the revision and set aside the order passed by the trial court which is under challenge in the present petition.

4. I have heard Sri Mohit Kumar holding brief of Sri Ajit Kumar, learned counsel for the petitioner and Sri Tripathi B.G. Bhai, appearing for the contesting respondent.

5. Sri Mohit Kumar, learned counsel for the petitioner has submitted that since a relief for injunction is based on title and for the purpose of granting such a relief the court has necessarily to go into the question o title and interest of the plaintiff in the land in dispute, as such the suit is liable to be abated under the provision of Section 5 (2) of the Act. In support of the contention, he placed reliance on the following Single Judge decisions of this court. Smt. Barsatia Vs. District Judge, Ghazipur and others, 1984 ALJ 490, Narendra Pratap Saini Vs. Indra Mishra and others 1989 Revenue Decisions 406 and Bachchu Lal Vs. Ram Sajivan 1993 ACJ 863.

6. Learned counsel for the contesting respondent, on the order hand, contended that in any suit for injunction, simplicitor, where no relief, with regard to declaration of title has been sought, any finding, with regard to right, title or interest in the land is only incidental for the purpose of granting injunction. On the basis of allegations in the plaint and relief claim therein, it has been vehemently urged by the learned counsel for the respondent that no relief with regard to declaration of title or interest in the suit property has been claimed, as such the provision of Section 5 (2) of the Act are not attracted in any manner. In support of his arguments, learned counsel for the respondent has placed reliance on the following decisions. Banwari Lal Vs. Tulsiram 1979 Revenue Decisions 136, Smt. Krishna Kumari Vs. Shiv Kumar 1987 Revenue Decisions, 399 and Kanchan Kumari Chawdhary Vs. District Judge Mau 1999 (1) AWC 152.

7. Relying on the aforesaid decisions, it has further, been urged by the learned counsel for the respondents that even if, the question of title in the suit property comes up for consideration before the Civil Court, it is only incidental for the purpose of granting injunction to the plaintiff and does not involve any adjudication of the title of the plaintiff. The moment, it becomes essential to adjudicate the right or title of the plaintiff on the basis of defence set up by the defendant, the suit would fail for want of relief of declaration. It has further, been argued that since, in the present case, the plaintiff has not claimed any adjudication or relief regarding his title over the land in dispute and as such the order passed by the revisional court, dismissing the application for abatement of the suit under Section 5 (2) of the Act is perfectly justified.

Section 5 (2) of the Act relevant for the purpose reads as under.

2) "Upon the said publication the notification under sub Section (2) of Section-4, the following further consequences shall ensue in the area to

which the notification relates, namely-

a) every proceeding for the correction of record and every suit and proceeding in respect of declaration or rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the court or authority before whom such suit or proceeding is pending stand abated:"

Provided…..
Provided….

8. This provision of the Act provides that upon publication of notification under section 4 (2) of the Act certain type of suits or proceedings pending before any court or authority shall abate.

9. Thus, it excludes the jurisdiction of the court or authority which are otherwise, empowered to decide the said suit or proceedings. It is well settled that a statute ousting the jurisdiction of a court must be strictly construed as observed by the Apex Court, in the case of Abdul Wahid Khan Vs. Bhawani and others reported in AIR 1966 SC 1718.

A bare reading of Section 5 (2) of the Act indicates that kinds of cases liable to be abated upon publication of notification under Section 4 (2) of the Act are clearly specified viz.

I) Proceedings for correction of records.

II) Suits or proceedings in respect of declaration of rights or interest in any land.

III) Suits or proceedings for declaration or adjudication of any other right in regard to which proceeding can or ought to be taken under this Act.

10. The Section being exhaustive will only apply to suits or proceedings specified therein, and no other. It can not be stretched to bring within its ambit the suit or proceedings which the legislature did not intend to abate on the on set of Consolidation operations. Thus, unless the suit or proceedings fall within three above mentioned categories the jurisdiction of the court or authority, otherwise, empowered to decide the same cannot be excluded or ousted.

11. In the back ground of the above, a careful examination of the allegations and relief claimed in the plaint (filed as annexure-3 to the petition) makes it clear that only relief claimed is that of a permanent injunction to restrain the defendants from interfering in the peaceful possession of the plaintiff over the suit property and or to take forcible possession of the plaintiff over the suit property and or to take forcible possession and raise any construction thereon.

12. Thus, suit as it stands, neither seeks any correction of record nor any declaration of rights or interest in the land, has been claimed. Suit for declaration of rights and interest in any land necessarily implies relief by way of declaration of the said rights in the land and unless a relief is claimed, the suit cannot be said to be one for declaration of rights or interest in the land. No such relief having been claimed in the suit it cannot be termed to be a suit in respect of declaration of rights or interest in the land. Further, under the scheme of the Act, since the authorities are not vested with any power to grant injunction, the

suit cannot be termed as one for declaration or adjudication of any such rights in regard to which proceedings can or ought to be taken under this Act.

13. In the present case, the plaint as it stands, does not fit in any of the three classes of suits or proceedings specified under Section 5 (2) of the Act which the legislature intended to abate on the on set of Consolidation operation. Any finding with regard to title or interest of the plaintiff in the property in such a suit for injunction will only be incidental for the purpose of granting injunction without any declaration of such rights of plaintiff in the land, and hence not liable to be abated.

14. The Apex Court, in the case of Heera Lal and another Vs. Garjan Singh and others reported in 1990 (1) CRC 466 while considering the question of jurisdiction of civil court and revenue court has held that in a suit for permanent injunction the question of title arises only incidentally, and it is the civil court which has exclusive jurisdiction to try such suits.

15. Now coming to the various decisions cited at the bare by counsel for the both the parties in support of their contentions, reference may be made to the Division Bench Judgment of this court in the case of Banwari Lal (Supra) wherein it was held that in a suit where plaintiff does not desire adjudication of his rights and the only relief claimed is that of injunction, and the suit is not of a kind which necessitates adjudication of rights before relief could be granted. Such a suit is not liable to abate. In the present case, also, no adjudication of right or title in the land has been claimed. The only relief claimed is that of a permanent injunction. Further, the case of Narendra Pratap Saini (Supra) relied upon by the learned counsel for the petitioners is clearly distinguishable on facts as in the said case along with injunction a declaration was also sought with regard to mortgage deed of certain bhumidhari plots as void and not binding. The suit being one for declaration was covered under the provision of Section 5 (2) of the Act.

16. The case of Smt. Barsatia (Supra), Narendra Pratap Saini (Supra) and Bachchu Lal (Supra) relied upon by the learned counsel for the petitioner has failed to consider the earlier Division Bench Judgment in the case of Banwari Lal which was rendered in 1979. In any view of the matter, the ratio of the Division Bench Judgment is binding on Single Judge. In an identical controversy same view has been taken by another Single Judge, in the case of Kanchan Kumar Chaudhary Vs. District Judge, Mau, reported in 1990 (1) AWC 152.

17. From the foregoing discussions, it is clear that a suit for permanent injunction filed by plaintiff/respondents is not covered under any of the three classes specified by Section 5 (2) and hence, is not liable to be abated.

18. The findings recorded by revisional court that suit filed by the plaintiff was only for relief of injunction and did not involve any declaration of the rights and title and hence not liable to be abated, does not suffer from any infirmity and are hereby affirmed.

In the result, the writ petition fails and is dismissed.

However, in the facts and circumstances of the case, there shall be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2004

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 26885 of 2000

Vegraj ...Petitioner
Versus
The Deputy Director of Consolidation/ Additional Collector, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai

Counsel for the Respondents:
Sri V.C. Katiyar
Sri A.K. Sachan
S.C.

U.P. Consolidation of Holdings Act-S-9-A-Objection under S. 9-A by widow claiming one half share-opposed on ground of remarriage-Rejection by C.O. and S.O.C.-D.D.C. revered findings-Writ against-Held, judgments of C.O. and S.O.C. based on inadmissible documentary evidence-D.D.C. fully competent to interfere with such findings-Writ dismissed.

The judgments of Consolidation Officer and Settlement Officer, Consolidation were also based on some irrelevant and inadmissible documentary evidence, filed by petitioner, pertaining to the period during pendency of the litigation. Deputy Director of Consolidation is fully competent to interfere with the findings arrived at by subordinate consolidation authorities relying upon such evidence. Para 9

(Delivered by Hon'ble S.N. Srivastava, J.)

1. This writ petition is directed against the judgment passed by Deputy Director of Consolidation dated 10th May, 2000 allowing the revision filed by Opp. Party no.2.

2. The dispute relates to one half share of Kunwar Sen who died leaving his widow Mst. Tarawati-Opp. Party no.2. On publication of records in village an objection under Section-9-A of U.P. Consolidation of Holdings Act was filed by Mst. Tarawati claiming one half share in the land in dispute. Said objection of Mst. Tarawati was opposed by petitioner on the ground that Mst. Tarawati remarried with one Siya Ram and whatever rights she inherited being widow of Kunwar Sen came to an end.

3. Consolidation Officer and Settlement Officer, Consolidation rejected objection of Opp. Party no.2, but Deputy Director of Consolidation allowed revision and reversed findings and order of authorities below. Deputy Director of Consolidation recorded a clear cut finding that remarriage has not taken place and Mst. Tarawati is still continuing as widow of Kunwar Sen.

4. Heard learned counsel for the parties.

5. Learned counsel for petitioner urged that finding of Consolidation Officer and Settlement Officer, Consolidation on the question of remarriage was not considered by the Deputy Director of Consolidation while reversing the orders. It was further urged that Deputy Director of Consolidation cannot interfere with the findings of fact recorded by Consolidation Officer and Settlement Officer, Consolidation and as such order passed by Deputy Director of Consolidation is liable to be quashed.

6. I considered arguments of learned

counsel for the parties and perused the record.

7. While reversing the judgments of subordinate Consolidation authorities, Deputy Director of Consolidation considered the judgments in totality and recorded his finding about illegalities committed by them. I do not agree with the argument of learned counsel for petitioner that Deputy Director of Consolidation did not consider the judgments of subordinate Consolidation authorities at the time of passing the final orders by which he reversed judgments of subordinate Consolidation authorities.

8. Deputy Director of Consolidation has rightly appreciated admissible oral and documentary evidence and rightly recorded a finding of fact that no remarriage has taken place. Kunwar Sen husband of Opp. Party no.2 died on 236.1980. Litigation between petitioner-Vegraj and Tarawati-Opp. Party no.2 started in 1981 in Civil, Revenue and Criminal Courts. Kutumb Register of 1988, Voter list of year 1988 and other documents are of subsequent to beginning of litigation between the parties and were rightly not relied upon by Deputy Director of Consolidation. For this purpose he has also recorded reasons that those documents were wrongly and illegally considered by subordinate consolidation authorities to arrive at a conclusion of remarriage. I asked from learned counsel for petitioner the date of remarriage of Mst. Tarawati, but he could not show the date of remarriage in the pleadings of petitioner.

9. The judgments of Consolidation Officer and Settlement Officer, Consolidation were also based on some irrelevant and inadmissible documentary evidence, filed by petitioner, pertaining to the period during pendency of the litigation. Deputy Director of Consolidation is fully competent to interfere with the findings arrived at by subordinate consolidation authorities relying upon such evidence.

10. Learned counsel for petitioner could not show any perversity in any of the findings recorded by the Deputy Director of Consolidation.

11. Writ petition lacks merits and is accordingly dismissed.

There shall be no order as to cost.

Dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 5.7.2004

BEFORE
THE HON'BLE S.N. SRIVASTAVA, J.

Civil Misc. Writ Petition No. 43189 Of 1993

Shiv Narain Singh ...Petitioner
Versus
Board of Revenue U.P. Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri M.N. Singh

Counsel for the Respondents:
Sri W.H. Khan
Sri A.P. Srivastava
Sri Shyam Lal
Sri A.K. Srivastava
Sri V.K. Singh
S.C.

Limitation Act, 1963- S.5-Second Appeal-Abatement- Death of Respondent no. 5 during appeal- Delay in filing

substitution application-Impugned order abating Second Appeal by Board of Revenue- Writ against-Held, delay was not deliberate-No delatory tactics-sufficience cause shown-application to be construed liberally-Delay due to ignorance of death– Impugned order set aside- Delay condoned.

As stated supra, the petitioner had entered the arena after the death of his father, and it would not be too presumptuous to say that quite often than not, there is noticeable gap of communication between father and son in a traditional family or often fathers are averse to involve any family member and the net result remains that it takes time for a son to pick the thread and there is bound to occur some lapse before he matures into doing things adroitly with the passage of time. In the circumstances, if delay has happened, it was due to ignorance simplicitor and cannot be ascribed to any overt or covert or as a part of strategy to protract final outcome in the matter. Para 6

In the entire perspective, it does not appear that delay was deliberate or petitioner or his father had at all resorted to temporizing procedure or dilatory tactics. Rather it would appear that it was occasioned by ignorance simplicitor. In the circumstances, it would be too harsh for the petitioner in case, door of justice is shut against him and it would foreclose all options for him to put forth his cause. Para 7

Case law discussed:
AIR 1969 SC 575
AIR 1972 SC 749
(1998) 7 SCC 123
(1982) 1 SCC 476

(Delivered by Hon'ble S.N. Srivastava, J.)

1. Dismissal of second Appeal as having abated for not filing substitution application seeking substitution of respondents 7 and 1 in the array of parties within the statutory period, has been the causative factor leading to filing of the present petition challenging the judgment dated 2.11.1993 passed by Board of Revenue.

2. In the suit instituted by respondents 4 and 5 under section 229 B/176 of the U.P.Z.A. & L.R. Act relief sought was for declaring themselves to be co-bhumidhars with defendant no.1 of Schedule A and co-sirdars of Schedule B and further claiming that their 2/5th share be separated. The decision rendered by Asstt. Collector, Ist Class Varanasi held Bhonu, father of the petitioner to be sole sirdar of plot no. 31/1 and Lurkhur to be the sole Sirdar of plot no. 28/2 and for the rest of the land suit was decreed. The appeal preferred against the said decision ended up in dismissal and consequently, a second appeal was filed by Bhonu, father of the petitioner before Board of Revenue. During the pendency of appeal, one Sonu Ram respondentno.1 in the second appeal died on 5.7.1989. Bhonu also died during the pendency of appeal on 3.10.1991 and substitution application was moved by the petitioner on 27.11.991. It is claimed in the writ petition that Triloki arrayed as respondent no. 7 had died during pendency of appeal but no substitution application was moved. Subsequently Lurkhur respondent no.4 in the appeal sought abatement of appeal by means of application-dated 30.11.1992 on the ground of want of steps in the matter of substitution pursuant to the death of Triloki as a consequence of which, Board of Revenue passed the impugned order in the second appeal thereby abating the second appeal.

3. I have heard the learned counsel for the parties and also perused the record and the impugned order.

4. Learned counsel appearing for the

petitioner canvassed that neither Bhonu nor the petitioner gained knowledge of the death of Triloki and further copy of the application made by Lurkhur before the Board of Revenue on 30.11.1992 was never served either to the petitioner or his counsel and the petitioner became aware of the death on 2.11.1993 on which date the impugned order was passed. It was further canvassed by the learned counsel that Triloki who was arrayed as respondent no. 7 was only a pro-forma party and his substitution in the array of parties was dispensable further submitting that he never filed written statement nor did he contest the case. It was further submitted that the substitution application was attended with an affidavit which remained uncontroverted and cause shown was sufficient but the Board of Revenue overlooked the causes shown and proceeded to pass the impugned order which it is further submitted, is liable to be quashed. Per contra, Sri A.P. Srivastava, appearing for the respondent tried to justify impugned order arguing that there was unconscionable delay which was not satisfactorily explained and the application for Condonation of delay was rightly rejected and second appeal was rightly dismissed as having abated.

5. Before proceeding further, I would first scan the impugned order passed by the Board of Revenue. The line of reasoning adopted in the impugned order is that no substitution application was filed to bring on record the heirs of the deceased respondent no.7 Triloki who had died on 17.5.1986 and again respondent no.1 Sonhu had died on 5.7.1989 while substitution application was preferred on 19.12.1989 in which the causative factor of delay was the own inadvertence of the appellant. It bears no repudiation that the Rules of Limitation are not meant to destroy the rights of the parties but are intended that the other parties do not resort to temporizing tactics and hence the remedy may be hedged in with some time-limit within which a suitor had to seek his legal remedy. In **Shakuntala Devi Jain v. Kuntal Kumari**[1] **and State of W.B. v. Administrator, Howrah Municipality**[2] the Apex Court quintessentially held that the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. In a recent decision in **N.Balakrishnan v. M. Krishnamurthy**[3]**,** the Apex Court observed with approval that length of delay is no matter; acceptability of the explanation is the only criterion. It was further observed by the Apex Court that sometimes, delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. It was further expounded by the Supreme Court that there can be some lapse on the part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him unless the explanation smacks of malafides if it has been put forth as part of a dilatory strategy.

6. Reverting to the facts of the present case, it would appear that Bhonu the father of the petitioner was slugging out the matter and the petitioner stepped into the shoes of his father in the wake of his death. It has been argued on behalf of the learned counsel for the petitioner that in so far as respondent no. 7 was concerned, Bhonu and also the petitioner

[1] AIR 1969 SC 575
[2] AIR 1972 SC 749
[3] (1998) 7 SCC 123

were quite unaware of his death and he (petitioner) came to know of the death of respondent no. 7 only on 2.11.1993 on which the impugned order was pronounced. It was further submitted that copy of application containing prayer for abating the appeal dated 30.11.1992 was never served to the petitioner or his counsel and in the circumstances, ignorance was unvarnished and untarnished and delay cannot be put forth to any deliberate motive. In so far as respondent no.4 Triloki is concerned, learned counsel again pleaded ignorance stating that as soon as the petitioner came to know of his death, he lost no time in preferring substitution application. As stated supra, the petitioner had entered the arena after the death of his father, and it would not be too presumptuous to say that quite often than not, there is noticeable gap of communication between father and son in a traditional family or often fathers are averse to involve any family member and the net result remains that it takes time for a son to pick the thread and there is bound to occur some lapse before he matures into doing things adroitly with the passage of time. In the circumstances, if delay has happened, it was due to ignorance simplicitor and cannot be ascribed to any overt or covert or as a part of strategy to protract final outcome in the matter.

7. Coming to the impugned order, the Board of Revenue has passed a cryptic order without delving into the substantiality of the grounds urged in support of condonation of delay. What appears to have weighed with the Board of Revenue is the massive delay. There is nothing in the order that the Board of Revenue tried to split the causes of delay or that it dealt with the explanation offered in the affidavits accompanying the application under section 5 of Limitation Act. There also appears to be nothing on the record manifesting that the petitioner had behaved as irresponsible litigant or he acted leisurely or perfunctorily in not preferring substitution application within the statutory period. In **N. Balakrishnan** (supra), the Apex Court rightly observed that a court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause and the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. In the entire perspective, it does not appear that delay was deliberate or petitioner or his father had at all resorted to temporizing procedure or dilatory tactics. Rather it would appear that it was occasioned by ignorance simplicitor. In the circumstances, it would be too harsh for the petitioner in case, door of justice is shut against him and it would foreclose all options for him to put forth his cause.

8. In yet another case **namely Sital Prasad Saxena (dead) v. Union of India and others**[4]**,** the Supreme Court was observed as under:

"Once an appeal is pending in the High Court, the heirs are not expected to keep a constant watch on the continued existence of parties to the appeal before the High Court which has a seat for away from where parties in rural areas maybe residing. And in a traditional rural family the father may not have informed his son abut the litigation in which he was involved and was a party. Let it be recalled what has been said umpteen times that rules of procedure are designed to advance justice and should be so interpreted and not to make them penal statues for punishing erring parties."

[4] (1982) 1 SCC 476

9. The Board of Revenue is the Apex authority under the U.P.Z.A. & L.R. Act and in the facts and circumstances as discussed above, I feel called to observe that the Board of Revenue has only skimmed the surface and has not delved deeper into the substantiality of causes and seemed to be beguiled into dismissing the matter swayed by huge delay. Thus non-application of mind to the relevant factors whether the conduct of the petitioner smacked of malafides or he was indulging in any dilatory tactics to protract final outcome or that the explanation offered was quite unsatisfactory. As stated supra, the impugned order is a cryptic order passed without delving into the factors leading to the conclusions while deciding the condonation application in the instant case. The order therefore lacks legitimacy on pivotal aspects and cannot be sustained in the eye of law.

10. Accordingly, the petition succeeds and is allowed and the impugned order dated 2.11.1993 is quashed. While relegating the matter to the Board of Revenue for decision afresh, it is directed that the Board of Revenue shall hear the appeal on merit and decide the same within two months from the date of production of a certified copy of this order.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 6.7.2004

BEFORE
THE HON'B LE TARUN AGARWALA, J.

Civil Revision No.716 of 1988

Kailash Nath and another ...Revisionists
Versus
Rajiv Ratan ...Respondent

Counsel for the Revisionists:
Sri Vijai Bahadur

Counsel for the Respondent:
Sri Wasim Alam

Code of Civil Procedure, 1908-0.IX Rr. 6 and 7- Application under- Maintainability- Non appearance of defendant on date of hearing-Ex parte order- Before passing of exparte order and before delivery of judgment on same date and moved an application under 0.9 R. 7, C.P.C. for setting aside order of proceed case ex parte- Application, held, maintainable.

In the present case, the court passed an order to proceed exparte against the defendant, but before the judgment could be delivered, the defendant appeared and moved an application, which was maintainable and was rightly allowed by the court below. Para 9

In Arjun Singh case, the court proceeded exparte against the defendant and fixed a date for delivery of judgment. Subsequently, the defendant moved an application for recall of the exparte order. The Supreme Court held that the provision of Order 9 Rule 7 CPC was not attracted to a date fixed for delivery of judgment and it was not a case of adjourned hearing. In the present case no date was fixed for delivery of judgment. In fact after passing of the exparte order and before delivery of judgment, the defendant appeared on the same date and moved an application. Such application was clearly maintainable even under order 9 Rule 7 CPC. Para 10

Case law discussed:
AIR 1964 SC 993
AIR 1955 SC 425

(Delivered by Hon'ble Tarun Agarwala, J.)

1. This revision has been filed by the plaintiff challenging the correctness of the

order passed by the Judge Small Cause Court allowing the defendant's application for setting aside the exparte order.

2. In order to appreciate the controversy involved in the present case, it is necessary to narrate the brief facts of this case. It transpires that 21.5.1987 was fixed for evidence, on which date the defendant did not appear and the plaintiff was present. Accordingly, the court passed an order to proceed exparte against the defendant. It further transpires that the court proceeded to hear the case and in support of his case, the plaintiff filed his affidavit as evidence. Before the judgment could be delivered, the defendant appeared and moved an application along with an affidavit praying that the order directing the case to proceed exparte be recalled in the interest of justice. An objection on this application was filed by the plaintiff and the matter was adjourned to 4th July 1988 for disposal of the defendant's application. On 4.7.1988, the defendant's application was allowed and the order dated 21.5.1987 directing the case to proceed exparte against the defendant was set aside.

3. The correctness of this order has been challenged by the plaintiff in this revision.

4. Heard Sri Vijay Bahadur, the learned counsel for the plaintiff. No one appeared on behalf of defendant.

5. The learned counsel for the plaintiff submitted that once the order had been passed to proceed exparte and only the judgment was to be delivered, the application of the defendant to set aside the exparte order was premature and was also not maintainable inasmuch as only an application to set aside the decree, if any, could be made under Order 9 Rule 13 CPC after the decree was passed. In support of his submission the learned counsel placed reliance on a decision of the Supreme Court in **Arjun Singh Vs. Mahendra Kumar, AIR 1964 SC 993.**

6. In my view, the contention of the learned counsel for the plaintiff, though attractive, is not applicable in the present facts and circumstances of the case.

7. On 21.5.1987, the court ordered to proceed exparte due to the absence of the defendant. This order had been passed under Order 9 Rule 6 CPC, which reads as under.

"**6. Procedure when only plaintiff appears.**- (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then-
(a) **When summons duly served-** if it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;"

Order 9 Rule 7 reads as under.

"**7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance**-Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non- appearance, he may, upon, such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

In **Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425**, the provision of Order 9 Rule 6 and Rule 7 were explained and analyzed by the Supreme Court as under:

"When the defendant has been served and has been afforded an

opportunity of appearing, then, if he does not appear, the Court may proceed in his absence. But, be it noted, the Court is not directed to make an 'ex parte' order.
Of course the fact that it is proceeding 'exparte' will be recorded in the minutes of its proceedings but that is merely a statement of the fact and is not an order made against the defendant in the sense of an 'ex parte decree or other 'ex parte' order which the Court is authorised to make. All that R.6 (1)(a) does is to remove a bar and no more. It merely authorises the Court to do that which it could not have done without this authority, namely to proceed in the absence of one of the parties."

The Supreme Court further held as what the court could do after proceeding under Order 9 Rule 6 and held,

"On the other hand, if it is for final hearing, an 'ex parte' decree can be passed, and if it is passed, then O.9 R.13 comes into play and before the decree is set aside the Court is required to make an order to set it aside'. Contrast this with R.7 which does not require the setting aside of what is commonly, though erroneously, known as " the 'ex parte' order".

No order is contemplated by the Code and therefore no order to set aside the order is contemplated either. But a decree is a command or order of the Court and so can only be set aside by another order made and recorded with due formality.

Then comes R.7 which provides that if at ' an adjourned hearing' the defendant appears and shows good cause for his "previous non-appearance", he can be heard in answer to the suit:

"as if he had appeared on the day fixed for his appearance."

This cannot be read to mean, as it has been by some learned Judges, that he cannot be allowed to appear at all if he does not show good cause. All it means is that he cannot be relegated to the position he would have occupied if he had appeared."

8. From the aforesaid, it is clear that on the date fixed, if the defendant does not appear, the court may proceed in his absence, but it does not stop the defendant from not appearing subsequently. If the defendant appears subsequently after passing of the ex parte order and shows sufficient cause for his previous non-appearance, the court can hear the defendant and permit him to appear.

9. In the present case, the court passed an order to proceed exparte against the defendant, but before the judgment could be delivered, the defendant appeared and moved an application, which was maintainable and was rightly allowed by the court below.

10. The contention of the learned counsel for the plaintiff that the application was not maintainable and the application could only be moved under Order 9 Rule 13 CPC after the decree was passed is incorrect. In the event, the court after proceeding ex parte against the defendant had delivered the judgment or fixed a date for delivery of judgment, in that case, and in that eventuality, the provision of Order 9 Rule 13 CPC would come into play and the provision of Order 9 Rule 7 CPC would not be attracted. The decision cited by the learned counsel in Arjun Singh case (supra) is not attracted to the present facts. In Arjun Singh case, the court proceeded exparte against the defendant and fixed a date for delivery of judgment. Subsequently, the defendant moved an application for recall of the

exparte order. The Supreme Court held that the provision of Order 9 Rule 7 CPC was not attracted to a date fixed for delivery of judgment and it was not a case of adjourned hearing. In the present case no date was fixed for delivery of judgment. In fact after passing of the exparte order and before delivery of judgment, the defendant appeared on the same date and moved an application. Such application was clearly maintainable even under order 9 Rule 7 CPC.

11. In view of the aforesaid, the revision fails and is dismissed. However, there shall be no order as to cost.

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REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2004

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Revision No.338 of 1989

Ashok Kumar and another ...Applicant
Versus
Din Dayal Badal ...Opposite Party

Counsel for the Applicants:
Sri B.N. Agarwala

Counsel for the Opposite Party:
Sri Virendra Kumar

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972-Sections 30 (2) and 20 (4)-Deposit made under S. 30 (2) by tenant- validity-Death of original land lord- Tenant did not know to whom rent payable-Thus deposit under S. 30 (2), held to be a valid deposit-No arrears of rent due on date of notice of demand- Tenant not in arrears of rent of more than four months under S. 20 (4)-suit for eviction by heris, held, not maintainable.

In the present case, the deposit which has been made by the tenant was made under section 30 (2) of the Act and not under section 30 (1) of the Act. The tenant had categorically stated in his application that the landlord had died and that he did not know as to whom the rent should now be paid. Thus, the deposit of rent under section 30(2) of the Act, was a valid deposit. The contention of the learned counsel for the applicant that the deposit was made under section 30 (1) is wholly incorrect. Consequently, the judgment cited by the learned counsel are distinguishable and are not applicable to the present case. Since a valid deposit had been made by the tenant, there were no arrears of rent on the date when the notice of demand was served. Consequently, the tenant was not in arrears of rent of more than four months under section 20(4) of the Act and could not be evicted from the premises in question. Para 5

Case law discussed:
1995(2) ARC 360
1984 (2) ARC 324
1981 ARC 506

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The original landlord died on 11.11.1987. The tenant remitted the rent by money-order, which was returned with the remark that the original landlord had died. Accordingly, the tenant filed an application under section 30 of the U.P. Act No.13 of 1972, stating therein that the original landlord had died and that it was not known as to whom the rent should be sent. Notice on this application was sent to the heirs of the landlord, who refused to accept the summons and, accordingly, the Munsif permitted the tenant to deposit the rent under section 30 of the Act. Thereafter, the heirs of the original landlord sent a notice dated 9.8.1988 to the tenant demanding arrears of rent and further terminated the tenancy. This notice was duly served upon the

defendant on 16.8.1988. The defendant submitted a reply dated 30.8.1988 intimating the heirs that he had deposited the rent under section 30 of the Act in the Court of Munsif and that the heirs may withdraw the rent from the court. The tenant also intimated that he was not in arrears of rent. Inspite of this reply, the heirs filed a suit for arrears of rent and for eviction. The Judge Small Cause Court dismissed the suit holding that the tenant was not in arrears of rent and that he had made a valid deposit of rent under section 30(2) of the Act. The Court below while dismissing the suit, however directed the landlord to withdraw the rent deposited by the defendant.

2. Aggrieved by the decision of the Judge Small Cause Court, the landlord has now filed the present revision under section 25 of the Provincial Small Cause Courts Act 1887.

3. The learned counsel for the landlord submitted that there was no valid deposit of rent under section 30 (1) of the Act and therefore, no benefit could be given to the tenant with regard to the said deposit. The learned counsel submitted that the money order sent by the tenant was returned with the remark that the landlord had died and therefore, it could not be said that there had been a refusal which would justify the tenant to deposit the rent under section 30 (1) of the Act. In support of his submission, the learned counsel had relied upon 1995(2) ARC 360,Jagat Prasad v. District Judge, Kanpur and others, 1984 (2) ARC 324, Satish Chandra Nigam v. The District Judge, Kanpur and others and 1981 ARC 506, Jawahar Lal Chaurasiya v. Addl. District and Sessions Judge, Saharanpur and others.

4. The submission of the learned counsel, though attractive is however not applicable in the instant case. The deposit of rent in the present case is not under section 30 (1) of the Act, but under section 30 (2) of the Act. Section 30 (1) and (2) of the Act reads as under:

"30. Deposit of rent in Court in certain circumstances—(1) If any person claiming to be a tenant of a building tenders any amount as rent in respect of the building to its alleged landlord and the alleged landlord refuses to accept the same then the former may deposit such amount in the prescribed manner and continue to deposit any rent which he alleges to be due for any subsequent period in respect of such building until the landlord in the meantime signifies by notice in writing to the tenant his willingness to accept it.

(2) Where any bonafide doubt or dispute has arisen as to the person who is entitled to receive any rent in respect of any building, the tenant may likewise deposit the rent stating the circumstances under which such deposit is made and may, until such doubt has been removed or such dispute has been settled by the decision of any competent Court or by settlement between the parties, continue to deposit the rent that may subsequently become due in respect of such building."

From a perusal of the aforesaid provisions it is clear that when the landlord refuses to accept the rent from the tenant, in that case the tenant is entitled and justified to deposit the rent in the Court under section 30 (1) of the Act. However, in a case where a bonafide doubt or dispute arises as to who would be entitled to receive the rent in respect of the building, in such cases the tenant may deposit the rent in Court under section 30 (2) of the Act.

5. In the present case, the deposit which has been made by the tenant was made under section 30 (2) of the Act and not under section 30 (1) of the Act. The tenant had categorically stated in his application that the landlord had died and that he did not know as to whom the rent should now be paid. Thus, the deposit of rent under section 30 (2) of the Act, was a valid deposit. The contention of the learned counsel for the applicant that the deposit was made under section 30 (1) is wholly incorrect. Consequently, the judgment cited by the learned counsel are distinguishable and are not applicable to the present case. Since a valid deposit had been made by the tenant, there were no arrears of rent on the date when the notice of demand was served. Consequently, the tenant was not in arrears of rent of more than four months under section 20(4) of the Act and could not be evicted from the premises in question.

6. In view of the aforesaid, I find no reason to interfere in the judgment passed by the Court below. There is no merit in the present revision and is dismissed. In the circumstances of the case there shall be no order as to cost.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 9.7.2004

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Trade Tax Revision No. 858 of 1994

M/s Bharat Oil Company ...Applicant
Versus
Commissioner of Trade Tax, U.P., Lucknow ...Respondent

Counsel for the Applicant:
Sri R.R. Agrawal

Counsel for the Respondent:
S.C.

U.P. Trade Tax Act-S. 15(1) (c)-Levy of Penalty-Legality-No difference between tax returned and tax assessment-As account books of dealer stood accepted-reassessment order set aside.

In the present case there is no difference in between the tax, tax as returned and the tax as assessed, as the account books of the dealer stand accepted and the reassessment order stands set aside.

In the result I am of the view that no case for levy of penalty under section 15-A (1) (C) of the Act has been made out.
Para 6

Case law discussed:
1988 UPTC 1104
(1968) 21 STC 104
1986 UPTC 1301
2004 UPTC 217

(Delivered by Hon'ble Prakash Krishna, J.)

1. The present revision arises out of penalty proceedings under section 15-A (1) (C) of the U.P. Trade Tax Act for the assessment year 1968-1969. The applicant, a partnership firm, disclosed its total sales of imported kerosene oil at Rs.1,67,155-50. The account book, during the assessment proceeding was accepted by the assessing authority. After the completion of assessment order some information was received by the Department to the effect that the applicant has imported kerosene oil amounting to Rs.7,06,921/- from Indian Oil Corporation in the aforesaid assessment year. The department initiated reassessment proceeding, in order to assess the escaped turnover, under section 21 of U.P. Sales Tax Act. The reassessment proceeding was contested by the applicant. However, reassessment order creating additional demand was

passed by the Assessing Authority. The reassessment order was successfully challenged before the Appellate Authority. The Appellate Authority set aside the reassessment order on a short ground that the reassessment notice was not validly served on the dealer and as such very initirction of reassessment proceeding was without jurisdiction. The reassessment notice was served on one Krishna Bhagwan, who was the agent of the assessee firm. But the firm stood dissolved w.e.f. 7th of November 1971 and the notice was served on Shri Krishna Bhagwan on 29th March 1973 i.e. after the dissolution of the firm. This was held to be invalid service and consequently the proceeding under section 21 was dropped by the First Appellate Authority. This order was confirmed by the tribunal as well as by the High Court in Sales Tax Revision No.309 of 1987. The judgment of the High Court is dated 21st of July 1988 and is also reported in ***1988 U.P.T.C. 1104, C.S.T. vs. S/S. Bharat Oil Company.*** Undaunted by the failure in the reassessment proceeding, the department thereafter in the month of April 1989 levied penalty under section 15 (A)(I)(C) of the Act by the order dated 19th April 1989, to the tune of Rs.94,500/-. The assessing Officer rejected the contention of the dealer that no penalty could be levied as the reassessment order passed under Section 21 of the Act has been finally set aside. He concluded that on the basis of the information it is established that the dealer has imported Kerosene worth Rs.7,06,921/-. This order was confirmed by the Appellate Authority. The tribunal has substantially confirmed the penalty order except that it has reduced the quantum of penalty to Rs.76,900/-.

2. Challenging the aforesaid penalty order the present revision has been filed.

3. Heard the leaned counsel for the parties and perused the record. The learned counsel for the applicant has submitted that the department has accepted the account books of the dealer applicant in the assessment proceeding and that the reassessment order has been set aside, resultantly only the assessment order accepting the account books of the applicant is in operation. Therefore, the levy of penalty on the ground that the dealer has concealed the particulars of his turn over or has deliberately furnished inaccurate particulars of such turn over does not arise. In contra, the learned standing counsel has submitted that notwithstanding the fall of reassessment order framed under section 21, the fact remains that the dealer has imported kerosene oil worth Rs.7,06,921/- and therefore the department has rightly levied the penalty.

4. Section 15-A of the U.P. Sales Tax Act provides the levy of penalties in certain cases. Indisputably the penalty proceeding was initiated by the Department after setting aside of the reassessment order. Before the tribunal a controversy was raised by the applicant that under unamended clause C of Section 15-A (1) no penalty could be imposed for concealment of the turnover or deliberate furnishing of inaccurate particulars of such turn over. However, no such argument was raised before me. The learned counsel for the applicant proceeded with the assumption that the amended clause (C) of Section 15-A would be attracted if at all there is concealment of particulars of the turn over or deliberate furnishing of inaccurate particulars of such turn over.

5. Clause (C) of Section 15-A makes a provision for levy of penalty in the case of deliberate furnishing of inaccurate

particulars of turn over or of concealment of turn over. The burden to establish necessary ingredients of concealment and deliberate furnishing of inaccurate particulars is on the department. The Supreme court in the case of ***Narain Das Suraj Bhan vs. C.S.T. (1968) 21 S.T.C. 104*** has held that the concealment of furnishing inaccurate particulars must be in the return furnished under section 7 of the Act. In that case the Supreme Court was examining a question as to whether a penalty for inaccurate particulars of such turn over (under unamended clause (B), which is now equivalent to amended clause (C) will refer to return filed under section 7 or section 21 of the Act. It was held that even if in response to a notice issued under section 21 (1), the assessee files a fresh statement of its turnover it is still liable to be penalized under section 15-A for concealment or deliberate furnishing of inaccurate particulars of turn over in return filed under section 7. In the present case the fact remains that the disclosed turnover has been accepted by the Department in the assessment proceedings. The said assessment order accepting the account books of the dealer is still intact and the reassessment order has been set aside. Before any penalty can be levied the turn over has to be assessed as concealed turnover in the assessment order of an assessee. Therefore, in penalty proceedings, the Assessing authority has to probe into and decide whether there has been any concealment of turn over. The said finding could be recorded in the assessment proceedings only which includes reassessment also. But it does not include the penalty proceeding itself. The turnover has to be assessed in the assessment order otherwise the passing of the assessment order would become meaningless. If for one reason or the other the disclosed turn over has been accepted in the assessment proceeding including reassessment, I am of the opinion that there is no question of concealment of turnover or of furnishing inaccurate particulars of such turn over. The veracity of the return filed by the dealer having been accepted by the Department in assessment proceeding, the department cannot turn around and say in the penalty proceeding that the return filed by the dealer under section 7 of the Act is inaccurate as it has concealed the turnover or deliberately furnished inaccurate particulars of such turn over. Section 7 (2) of the U.P. Sales Tax Act says that the Assessing Authority, after such inquiry as he considers necessary, if he is satisfied with any returns submitted under sub section (1) are correct and complete, he shall assess the tax on the basis thereof. It follows that the returns filed by the dealer applicant under sub section (1) were accepted as correct and complete, as its account books were accepted. The word "assessment" is comprehensive word and can denote the entirety of proceedings which are taken with regard to it. The assessment proceedings are quasi judicial proceedings in nature and a quasi judicial order can be set aside or modified in accordance with the prescribed procedure. The Assessing authority, in penalty proceedings can not discard the assessment order and come to the conclusion that the return submitted by the dealer was either incorrect or incomplete. To put it differently, in penalty proceedings the authority concerned is bound to give due regard to the assessment order, accepting the account books.

6. There is another aspect of the matter. Section 15-A (1) (C) is the substantive provision and it defines various omissions and commissions for the purposes of levy of penalty, under

clause (a) to (r). Thereafter, sub clause (II) of clause (r) has made a provision for determination of quantum of penalty in case referred to any clauses (C), ……. It provides that the quantum of penalty would be, a sum not less than 50% but not exceeding 200% of the ***amount of the amount of tax which would thereby have been avoided.*** This Court in the case of ***Satya Pal Singh Brick Field Vs. Commissioner of Sales Tax 1986 U.P.T.C. 1301***, in para 17 has held that in cases of concealment of turn over the liability to pay the tax on a dealer would be the difference between the tax, tax as returned and the tax as assessed. In the present case there is no difference in between the tax, tax as returned and the tax as assessed, as the account books of the dealer stand accepted and the reassessment order stands set aside.

7. In the result I am of the view that no case for levy of penalty under section 15-A (1) (C) of the Act has been made out. Reference was also made to a judgment in the case of ***P.Anand and Sons Vs. C.S.T. 2004 U.P.T.C. 217.*** It has been held in that case that once the notice under section 21 of the Act is quashed, penalty under Section 15-A (1) (C) of the Act cannot be sustained.

8. For the reasons given above the revision is allowed and the penalty order as well as penalty proceedings under section 15-A (1) (C) of the Act is set aside with costs.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.07.2004

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

Criminal Contempt No. 13 of 2004

Criminal Contempt of the High Court of Judicature at Allahabad on the Application of District Judge, Ghaziabad ...Petitioner

Versus

Subhas Tyagi, President of District Bar Association, Ghaziabad ...Respondents

Counsel for the Petitioner:

Counsel for the Respondents:
Sri C.L. Pandey

Contempt of Courts Act 1972- Jurisdiction to punish for contempt- Discretionary-In view of apologies and undertaking by contemnors proceedings for contempt Dropped- Contemnors the office bearers of District Bar Association Ghaziabad-Call for strike despite of supreme court direction-held highly objectionable-Considering their undertakings and unconditional apology- contempt proceeding dropped with strong warning.

We have in several earlier decisions observed that if district court lawyers go on strike then the Judges must sit in Court and decide the cases even in the absence of lawyers, and if Advocates disturb the Court then the District Judge must call the police to prevent them from doing so. No one will be allowed to hold the judiciary at ransom. Para 6

However, since contempt jurisdiction is discretionary jurisdiction hence this Court is not bound to take action as this is the discretion of the Court. On the facts and circumstances of case while we

deplore the conduct of Sri Tyagi and others who were responsible for this incident we are not taking any action against them in view of their apologies and undertaking but we give severe warning to Sri Tyagi and others that they must not misbehave like this in future otherwise they will face serious consequences. With this observation the contempt proceedings are discharged.

Para 7

Case law discussed:
(2003) 2 SCC 45
(1995) 5 SCC 716

(Delivered by Hon'ble M. Katju, J.)

1. This matter has come before us on a reference made by the District Judge, Ghaziabad. The details have been mentioned by us in our earlier order dated 8.7.2004. Today the President, High Court Bar Association Sri C.L. Pandey alongwith the President and Secretary of Ghaziabad District Bar Association (who had been summoned by us by our order dated 8.7.2004) appeared before us. Sri Pandey has placed before us a copy of the resolution of District Bar Association Ghaziabad of the meeting held on 9.7.2004 by which they have recalled the resolution of dated 5.7.2004 for boycotting the court of Sri P.K. Srivastava, A.C.J.M., Ghaziabad. They have also given assurance that such act will not be repeated in future.

2. This Court is extremely reluctant to take action against lawyers as they are also members of the judicial family. However, there are limits beyond which the lawyers should not go. In this case Sri P.K. Srivastava, A.C.J.M. wrote a letter dated 6.7.2004 to the District Judge, Ghaziabad (which is on the record of this case) in which it is mentioned that Sri Subhash Tyagi, President, District Bar Association, Ghaziabad with others entered into the Chamber of C.J.M., Ghaziabad, where, Sri Srivastva was also sitting. Sri Tyagi caught hold of the shoulder of Sri P.K. Srivastava and told him that he must grant bail to Sri M.L. Rai. This was a highly objectionable and deplorable conduct of Sri Tyagi. Lawyers must know how to behave in Court. It is the discretion of the court to grant bail or not, and no lawyer can demand that bail must be granted by the court. However, in view of the apologies and assurance on behalf of the President and Secretary of Ghaziabad District Bar Association that such behaviour will not be repeated we are not taking any action against Sri Tyagi and others who misbehaved with Sri P.K. Srivastava, but we are giving a serve warning to them that in future such misbehavior will not be tolerated.

3. In this case the Ghaziabad Bar Association had resolved on 5.7.2004 to boycott the court of Sri P.K. Srivastava as he had refused bail in a case pertaining to a lawyer who was allegedly impersonating as a High Court Judge.

4. It had been repeatedly held by the Supreme Court that lawyers strike is illegal vide **Ex. Captain Harish Vs. Union of India (2003) 2 SCC 45 U.P. Sales Tax Service Association Vs. Taxation Bar Association, Agra and others (1995) 5 SCC 716, etc.**

Apart from the above, the strike by the district court lawyers in Ghaziabad was wholly unjustified, irresponsible reckless and uncalled for. This Court is not going to tolerate this kind of behaviour by the lawyers of the district courts. The people of the State are fed up of lawyers strikes, which often take place at the drop of a hat.

In **U.P. Sales Tax Service**

Association Vs. Taxation Bar Association, Agra and others (supra) the Supreme Court observed:

"It has been a frequent spectacle in the recent past to witness that advocates strike work and boycott the courts at the slightest provocation overlooking the harm caused to the judicial system in general and the litigant public in particular and to themselves in the estimation of the general public."

5. In the present case the facts as reported reveal that an advocate impersonated as a Judge and enjoyed the State facilities which are meant for a High Court Judge. He was arrested and his bail application was rejected. If the lawyers were dis-satisfied with the order of the Addl. Chief Judicial Magistrate, Ghaziabad it was open to them to move a bail application before the District Judge, Ghaziabad, and if the learned District Judge (or the Judge to whom he assigned the application) would have also rejected the bail application then they could have moved this Court, but taking the law into their own hands and going on strike on such a frivolous pretext was highly objectionable and deplorable.

6. We have in several earlier decisions observed that if district court lawyers go on strike then the Judges must sit in Court and decide the cases even in the absence of lawyers, and if Advocates disturb the Court then the District Judge must call the police to prevent them from doing so. No one will be allowed to hold the judiciary at ransom.

7. However, since contempt jurisdiction is discretionary jurisdiction hence this Court is not bound to take action as this is the discretion of the Court. On the facts and circumstances of case while we deplore the conduct of Sri Tyagi and others who were responsible for this incident we are not taking any action against them in view of their apologies and undertaking but we give severe warning to Sri Tyagi and others that they must not misbehave like this in future otherwise they will face serious consequences. With this observation the contempt proceedings are discharged.