ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE DILIP GUPTA, J.

Company Petition No. 57 of 2001

Registrar of Companies, U.P. & Uttaranchal, Kanpur ...Petitioners
Versus
M/s Kamal Infosys Ltd. & ors. ...Respondents

Counsel for the Petitioner:
Sri Subodh Kumar
Sri Umesh Chandra

Counsel for the Respondents:
Sri A.B.L. Gaur
Sri Anil Tiwari
Sri Avanish Mishra
Sri S.P. Pandey
Sri Shyamal Narain
Sri Piyush Agarwal

Company Act 1956-S-10- Jurisdiction of the Court- winding up proceeding Registered office at Lucknow- only the Lucknow Bench has jurisdiction Petition filed at Allahabad- the only course open- the petition should be returned for presentation before Lucknow Bench.

Held- Para 26

In the present case, transfer is not required at all if the Court comes to the conclusion that it has no jurisdiction, it has to return the plaint/petition to the petitioner concerned to present it before the Court of competent jurisdiction, in view of the principles enshrined in the provisions of Order 7, Rule 10 of the Code of Civil Procedure and the party may be entitled to the benefit of limitation as provided for under Section 14 of the Limitation Act.
Case law discussed:

AIR 1971 SC- 206
AIR 2000 SC-579
AIR 1976 SC 331
2001 (2) SCC-294
AIR 1976 Alld- 532
2005 (1) SCC-73
1993 (1) RLW-554
1991 (4) SCC-139
1999 (3) SCC-112
1999(5) SCC-638
AIR 2001 SC-2293
2004 (4) SCC-590
2001) 105 Company cases 435

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

1. A learned Judge of this Court has referred the following question to the Division Bench:-

"Whether this company petition filed for winding up of the company (M/s. Kamal INFOSYS Ltd., Respondent no.1) having its registered office at Lucknow is maintainabale in the High Court at Allahabad."

2. The facts and circumstances giving rise to this case are that the Companies and their Directors are being prosecuted after investigation made by the C.B.I. for cheating several investors, Banks and financial institutions through forgery, corruption and illegal means. The C.B.I. had registered the cases against Directors of the said Companies. Company petitions were filed by the Registrar of the Companies before this Court and the same were advertised in accordance with Rule 24 of the Companies (Court) Rules, 1959, and notices were issued to the respondents. Appointment of the Official Liquidator of the Company was also made and further directions had been issued to him. However, the said orders have subsequently been kept in abeyance. The

respondent-Companies have raised a preliminary objection regarding the jurisdiction of Allahabad High Court to entertain the said winding up petitions.

3. The learned Judge, after hearing the learned counsel for the parties, realised that the issue of jurisdiction of Allahabad High Court and its Bench at Lucknow had been considered several times. However, a Division Bench of this Court in Sumac International Ltd. Vs. P.N.B. Capital Services Ltd., AIR 1997 All 424 had rejected the similar contention, holding that such Company matters can be heard only at Allahabad, and the jurisdiction of the Lucknow Bench stood excluded completely. Hence this Reference.

4. Shri Umesh Chandra, learned Senior Counsel, appearing for the Companies has submitted that the Hon'ble Apex Court has considered the issue of jurisdiction of the Allahabad High Court and its Lucknow Bench in a large number of cases, and it has always been held that the jurisdiction will depend upon the cause of action arising, partly or fully, within the respective territorial jurisdiction of the High Court and its Bench. The jurisdiction of the Lucknow Bench in Company matters had been excluded by Notification dated 15.7.1949 issued by the Hon'ble Chief Justice under the second proviso to Clause 14 of the United Provinces High Courts (Amalgamation) Order, 1948 (hereinafter called the Amalgamation Order). However, the same stood restored vide Notification dated 5.8.1975, but the said Notification dated 5.8.1975 could not be brought to the notice of this Court while deciding Sumac International Ltd. (Supra). Therefore, the said judgment remains per in curium and does not have any binding force. Thus, the objections of the Companies should be allowed and the matter should be transferred to the Lucknow Bench for further proceedings till the winding up proceedings are completed.

5. Shri Subodh Kumar, learned counsel appearing for the Registrar of Companies and Shri Piyush Kumar Agrawal, learned counsel for the Official Liquidator have submitted that while deciding the case in Sumac International Ltd. (Supra), the Division Bench had also considered other issues and held that it was merely a technical breach and the Allahabad High Court cannot be held to be patently lacking the jurisdiction, and their Lordships opined that even otherwise the cases could not be transferred to Lucknow Bench, and in view of the above, the objections are liable to be rejected.

6. We have considered the rival submissions made by the learned counsel for the parties and have perused the record.

7. As per the provisions of Section 10 of the Companies Act, 1956, the jurisdiction in Company matters lies with the High Court where the Company has its Registered Office. Therefore, as all the Companies are registered at Lucknow, the cases could have been filed only before the Lucknow Bench in ordinary circumstances. Sub-section (3) further provides that for the purpose of jurisdiction to wind up Companies, the expression 'Registered Office' means the place which has longest been the Registered Office of the Company during the six months immediately preceding the

presentation of the petition for winding up. The Hon'ble Supreme Court in Hanuman Prasad Gupta Vs. Hiralal, AIR 1971 SC 206; and H.S. Jaya Ram Vs. Indian Credit and Investment Corporation of India Ltd., AIR 2000 SC 579, while dealing with company matters, held that the jurisdiction of the Court is to be determined only by examining the territorial jurisdiction of the Court where the Registered Office of the Company is situated.

8. Learned Counsel appearing for the Registrar of Companies and Official Liquidator have fairly conceded that the cause of action either fully or partly had not arisen within the territorial jurisdiction of this Court but had arisen only within the territorial jurisdiction of the Lucknow Bench. However, the matter was required to be examined in the light of the Notifications issued by the Hon'ble Chief Justice from time to time in exercise of the power under clause 14 of the Amalgamation Order excluding or including the jurisdiction of the Lucknow Bench in the Company matters. Clause 14 of the Amalgamation Order reads as under:-

"14. The new High Court, and the Judges and division Courts thereof, shall sit at Allahabad or at such other places in the United Provinces as the Chief Justice may, with the approval of the Governor of the United Provinces, appoint:

Provided that unless the Governor of the United Provinces with the concurrence of the Chief Justice otherwise directs, such Judges of the new High Court, not less than two in number, as the Chief Justice may from time to time nominate, shall sit at Lucknow in order to exercise in respect of cases arising in such area in Oudh as the Chief Justice may direct, the jurisdiction and power for the time being vested in the new High Court:

Provided further that the Chief Justice may in his discretion order that any case or class of cases arising in the said areas shall be heard at Allahabad."

9. The first proviso enables the Hon'ble Chief Justice to fix the territorial jurisdiction of the Lucknow Bench. However, second proviso confers the power to take away the jurisdiction of the Lucknow Bench in any case or class of cases arising in the said area, and to confer the same upon the Allahabad High Court.

10. Large number of Notifications have been issued in exercise of the power under the Amalgamation Order, particularly, Notifications dated 26.7.1948, 15.7.1949, 2nd July, 1954, 5th August, 1975, 4th January, 2003 and 14.1.2003. The issue of question of jurisdiction of the Lucknow Bench and this Court has been considered time and again by the Hon'ble Apex Court as well as by this Court.

11. A Constitution Bench of the Hon'ble Supreme Court in Nasiruddin Vs. State Transport Appellate Tribunal, AIR 1976 SC 331 examined the correctness of the judgment of the Full Bench of this Court between the same parties, reported in AIR 1972 All 200. In that case, the question arose regarding grant of permits under the provisions of Motor Vehicles Act, 1939 by the Regional Transport Authority, Bareilly. Against the resolution of the RTA, appeals were preferred before the State Transport Appellate Tribunal, Lucknow, and against the orders passed

by the Appellate Tribunal, writ petitions were filed before the Lucknow Bench. A question arose as to whether the cause of action arose at Bareilly, in spite of the fact that the appeals had been disposed of by the Tribunal at Lucknow and consequently as to whether the writ petitions could have been entertained by the Lucknow Bench for the reason that Bareilly was within the territorial jurisdiction of the Allahabad High Court. It was held that Lucknow Bench had territorial jurisdiction over 12 districts, namely, Lucknow, Faizabad, Sultanpur, Rai Bareli, Pratap Garh, Barabanki, Gonda, Baharaich, Sitapur, Kheri, Hardoi and Unnao, and the Lucknow Bench can entertain a petition if the cause of action had arisen partly or fully within those 12 districts. The Court held that it was immaterial that the original order had originated from Bareilly and as the appeal was decided by the Tribunal at Lucknow, it cannot be said that the cause of action had not partly arisen within the territorial jurisdiction of the Lucknow Bench. The Court held as under:-

"If the cause of action arises in part within the specified areas in Oudh it would be open to the litigant who is the **dominus litis** to have his forum conveniens. The litigant has the right to go to a Court where part of his cause of action arises. In such cases, it is incorrect to say that the litigant chooses any particular Court. The choice is by reason of the jurisdiction of the Court being attracted by part of cause of action arising within the jurisdiction of the Court. Similarly, if the cause of action can be said to have arisen partly within specified areas in Oudh and partly outside the specified Oudh areas, the litigant will have the choice to institute proceedings either at Allahabad or Lucknow. The Court will find out in each case whether the jurisdiction of the Court is rightly attracted by the alleged cause of action."

12. The Hon'ble Apex Court had further held that in terms of the Clause 14 of the Amalgamation Order once the Hon'ble Chief Justice had exercised the power fixing the territorial jurisdiction no further order can be passed in this respect, as the order had to be determined only once and there was no scope for changing the same. However, the Hon'ble Chief Justice had the power under second proviso to the said Clause to direct, in his discretion, that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Hearing therein includes institution. Where the cause of action had arisen in respect of civil matters, it should be left to the litigant to institute cases at the Lucknow Bench or at the Allahabad High Court according to where the cause of action had arisen, wholly or in part. However, in cases where the cause of action had arisen in part within the jurisdiction of the Lucknow Bench as well as the Allahabad High Court, it must be left to the choice of the litigant to institute the proceedings either at Lucknow Bench or at Allahabad High Court.

In U.P. Rashtiya Chini Mill Adhikari Parishad Vs. State of U.P., AIR 1995 SC 2148, a similar question was raised. As the said Parishad wanted to dispose of the sugar factories, it invited the tenders by issuing the Notification from Lucknow. Though only one factory was situated within the Awadh area and the rest outside the said area, petitions were filed at Lucknow. While dealing with the matter the Hon'ble Apex Court, following its earlier decision in Nasiruddin (Supra),

held that as the Notification had been issued at Lucknow and the parties could be aggrieved only by the said Notification, the Lucknow Bench had the jurisdiction to deal with the matter as the cause of action had arisen at Lucknow. The Hon'ble Apex Court also held that the Amalgamation Order was a special law, and this being so must prevail over the general law. Therefore the jurisdiction is to be taken strictly as per the provisions of the Amalgamation Order.

13. Similar view has been reiterated by the Hon'ble Apex Court in Rajasthan High Court Association Vs. Union of India & Ors., (2001) 2 SCC 294. The Jaipur Bench of Rajasthan High Court was established in 1976 and 11 districts had been placed in its territorial jurisdiction. The Court applied the same principle and held that if the cause of action either fully or partly had arisen in the district specified to the Jaipur Bench, it would have the competence as the territorial jurisdiction was bifurcated between the principal seat and the permanent Bench of the Rajasthan High Court, and therefore, their jurisdiction is to be determined strictly in view of the provisions of Clauses 1 and 2 of Article 226 of the Constitution of India.

14. The judgment in Ram Lakhan Saran Vs. Sunni central Board Waqf, AIR 1976 All 532 referred to by both the parties, is not relevant for determining the controversy involved herein as the said judgment is only to the extent that once the Hon'ble Chief Justice has fixed the territorial jurisdiction of the Lucknow Bench, it cannot be changed.

15. The Hon'ble Supreme Court in Dr. Manju Verma Vs. State of U.P. & Ors., (2005) 1 SCC 73 considered the whole issue as well as the aforesaid judgments in Nasiruddin (Supra); Rajasthan High Court Association (Supra) and interpreted the provisions of Clause 14 of the Amalgamation Order holding that as in the said case the order had been issued by the State Government having a seat at Lucknow, the Lucknow Bench had the jurisdiction to entertain the petition, and by transferring the case to Allahabad High Court by passing a quasi-judicial order, the Hon'ble Chief Justice deprived the said petitioner of her right as **dominus litis**.

16. The issue similar to the one in hand was considered by the Rajasthan High Court in Bimal Kumar Vs. M/s. Bhilwara Wooltax Limited, (1993) 1 RLW 554. While considering the case of winding up petition of a Company, the Court held that in view of the provisions of Section 10, the winding up petition could be filed in the High Court in whose territorial jurisdiction the Registered Office of the Company is situated. In the said case it was in Bhilwara which was within the jurisdiction of the main seat at Jodhpur, and therefore, the Court directed that the matter be transferred. The Court held that it had wrongly been filed before the Jaipur Bench and direction was given to file the same at Jodhpur, the main seat of Rajasthan High Court, for the reason that the liquidation proceedings could not be allowed to continue at Jaipur as it was having no jurisdiction over the matter.

17. In view of the above, we reach the conclusion that the jurisdiction of the Lucknow Bench or this Court would depend in whose jurisdiction the cause of action had arisen, partly or fully, and in case it has arisen partly within the

territorial jurisdiction of both, the litigant has a right to choose the forum of his choice. However, it remains undisputed that in a matter like this, the Bench within whose jurisdiction the Company has its Registered Office will have the jurisdiction to entertain the petition unless the jurisdiction of the Lucknow Bench stands excluded by issuing a Notification in exercise of the power under the second proviso to Clause 14 of the Amalgamation Order. Thus, the said Notifications require examination.

Notification dated 26.07.1948:

"In exercise of the powers conferred by Art. 14 of the United Provinces High Courts (Amalgamation) Order, 1948, the Chief Justice of the High Court of Judicature at Allahabad is pleased to direct that as from the 26.7.1948 until further orders, the Bench of the High Court at Lucknow shall exercise the jurisdiction and powers vested under the said Order in the High Court in respect of cases arising in the whole of Oudh."

Notification dated 15.07.1949:

"In exercise of the powers conferred by Article 14 of the United Provinces High Courts (Amalgamation) Order, 1948, and in partial modification of the Court's notification no. 6103, dated July 26, 1948, as amended up-to-date, the Chief Justice of the High Court of Judicature at Allahabad is pleased to direct that with effect from July 25, 1949, the Lucknow Bench of the High Court of Judicature at Allahabad shall not exercise jurisdiction and power in respect of cases under the following Act arising within the existing territorial jurisdiction:-

....

3. The Indian Companies Act, 1913 (Act VII of 1913)

....

Provided that nothing herein contained shall affect the jurisdiction and power of the Lucknow Bench in respect of proceedings already pending before that Bench prior to the coming into force of this Notification."

Notification dated 05.08.1975:

"WHEREAS by notification No. 8427/Ib-39-49 dated the 15th of July, 1949, the Lucknow Bench of the High Court of Judicature at Allahabad was not to exercise the jurisdiction and power of the High Court in respect of cases arising in the areas of erstwhile Oudh under the following Acts and those cases were to be heard at Allahabad.

....

5. The Indian Companies Act 1913 (Act VII of 1913)

....

AND WHEREAS by the subsequent notification No. 6948/Ib-39 dated the 2nd of July, 1954, the Lucknow Bench of the High Court of Judicature at Allahabad was to exercise the jurisdiction and power of the High Court in respect of the cases under the following Acts arising in the areas of erstwhile Oudh:

....

and the cases **under the Indian Companies Act**, 1913 (Act VII of 1913) and Indian Income Tax Act, 1922 (Act XI of 1922) arising in the areas of erstwhile Oudh continued to be heard and decided at Allahabad and the Lucknow Bench was not to exercise jurisdiction and power of the High Court in respect to those class of cases.

AND WHEREAS it is desirable that the Lucknow Bench of the High Court of Judicature at Allahabad should exercise the jurisdiction and power of the High Court in respect of cases **under the Income Tax Act, 1961 and under the Companies Act, 1956 up to the stage of winding up arising within the area of erstwhile Oudh.**

1. The Income Tax Act, 1961 (Act No. XLIII of 1961)

2. The Companies Act, 1956 (Act No. 1 of 1956)

upto the stage of winding up i.e. upto the stage of proceedings under Section 439 Companies Act, 1956.

PROVIDED that after the winding up order is passed the subsequent proceedings will be heard at Allahabad.

PROVIDED FURTHER that all proceedings under the above Acts instituted or commenced before the date of enforcement of this notification, shall continue to be heard at Allahabad. ....."

Notification dated 04.01.2003

"1. .....

2. Taking into consideration the judgment rendered by a Division Bench of this court in the case of **Sumac International Ltd. Vs. P.N.B. Capital Services Ltd**., decided on July 2, 1997 reported in 1998 Company Cases Vo. 93 Page 236 as well as the judgment of this court rendered by another Division Bench in the case of **Smt. Padmawati Vs. The Official Liquidator** (Special Appeal No. 7 of 1979) connected with the case of **Sri Jugal Kishore Vs. Official Liquidator** dated 24.9.1982, which have since attained finality, specially the observations made therein, the position in regard to the exercise of jurisdiction, entertainment and disposal of the matters falling within the **ambit of the Companies Act** as enforced w.e.f. 25th July, 1949 shall stand restored in supersession of the intervening orders covering the subject passed thereafter.

3.Let the consequential steps be taken in the light of the observations made in para 39 of the judgment of this Court rendered by a Full Bench of five Judges in the case of Ram Lakhan Saran Vs. The Sunni Central Board of Waqf, U.P., Lucknow reported in A.I.R. 1976 Allahabad -532"

18. The Acting Chief Justice on being informed about the 1975 Order passed another order on 14.1.2003 modifying the earlier order dated 4.1.2003 to the extent that the figures 25.7.1949 be substituted by 1.10.1975.

19. Thus, it is evident from the aforesaid that by the Notification dated 15.7.1949, the Hon'ble Chief Justice in exercise of his powers under the second proviso to Clause 14 of the Amalgamation Order, had withdrawn the jurisdiction of the Lucknow Bench to deal with the matters under the Companies Act, but by the Notification dated 5.8.1975, the Hon'ble Chief Justice conferred the said jurisdiction under the Companies Act upon the **Lucknow Bench up to the stage of winding up**.

20. This Court in Sumac International Ltd. (Supra) decided the issue but the Notification dated 5th August, 1975 could not be brought to the notice of the Court. We are of the view that had it been so pointed out to the Bench, the judgment could have been otherwise. Thus, in view of the above the

submission made by Shri Umesh Chandra, learned Senior Counsel for the Company that the said judgment was rendered per in curium is worth acceptance.

21. "Incuria" literally means "carelessness". In practice, per incurium is taken to mean per ignoratium. Per-in-curium are decisions given in ignorance or forgetfulness of some statutory provisions or of some Authority binding on the Court concerned. In case a decision is rendered without considering the statutory bar, the same cannot have any precedent value. (Vide Mamleshwar Prasad & Ors. Vs. Kanhaiya Lal, AIR 1975 SC 907; A.R. Antulay Vs. R.S. Nayak, AIR 1988 SC 1531; Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38; State of U.P. Vs. Synthetics and Chemicals Ltd., (1991) 4 SCC 139; Ram Gopal Baheti Vs. Giridharilal Soni & Ors., (1999) 3 SCC 112; Sarnam Singh Vs. Dy. Director of Consolidation & Ors., (1999) 5 SCC 638; Government of Andhra Pradesh Vs. B. Satyanarayana Rao, AIR 2000 SC 1729; Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., AIR 2001 SC 2293; Suganthi Suresh Kumar Vs. Jagdeeshan, AIR 2002 SC 681; Director of Settlements A.P. & Ors. Vs. M.R. Apparao & Anr., (2002) 4 SCC 638; State Vs. Ratan Lal Arora, (2004) 4 SCC 590; and Sunita Devi Vs. State of Bihar, (2005) 1 SCC 608).

22. The submission made by Shri Subodh Kumar and Shri Piyush Agrawal placing reliance on the observation made by this Court in Sumac International Ltd. (Supra), cannot be accepted. The relevant part of the judgment on which they placed reliance, is as under:-

"Even assuming for the sake of argument that the contention of learned counsel for the appellant is correct, as learned counsel does not dispute that the case can be lawfully heard at Allahabad, it shall be only a technical breach if the petition is instituted at Allahabad instead of Lucknow as it has to be ultimately heard at Allahabad and for this technical defect or reason, in our opinion, it shall not be appropriate to hold that the proceedings are not maintainable at Allahabad. If the petition is instituted and heard at Allahabad, it shall not be a case of total lack of jurisdiction. At the most it can be said to be a defective exercise of jurisdiction at one stage but which is rendered ineffective if the stage of hearing has come. Ultimately, both the Benches at Allahabad and Lucknow form one High Court."

23. The observations are only in respect of institution and hearing. Their Lordships have not observed that even otherwise, it could have been possible that the matter be heard at Allahabad if the Notification dated 15th July, 1949 was not there. The observation was only to save the party from harassment that it was not desirable that they should file a petition at Lucknow and only then it could be transferred to Allahabad. It has not been held that had the Notification dated 15th July, 1949 been not there, the petition could be entertained by the Allahabad High Court.

24. After the judgment in Sumac International Ltd. (Supra) when the matter was placed before the Hon'ble Acting Chief Justice, His Lordship was pleased to pass an order dated 4.1.2003 providing for enforcement of the Notification dated 15th July, 1949. While passing the said

order, the Hon'ble Acting Chief Justice had also taken note of decisions in other cases in Smt Padmawati and Shri Jugal Kishore referred to in that judgment. However, immediately thereafter, the notification dated 5.8.1975 issued under Clause 14 of the Amalgamation Order was brought to the notice of the Acting Chief Justice and, therefore, His Lordship thought it necessary to pass the order dated 14.1.2003 in supersession of the earlier order dated 4.1.2003, and in view thereof, no room for doubt is left that the Acting Chief Justice had enforced the order dated 5th August, 1975. In view thereof the matter could have been filed only before the Lucknow Bench.

25. Very heavy reliance has been placed by Shri Subodh Kumar on the judgment of the Patna High Court in Bihar State Industrial Development Corporation Ltd. Vs. Presiding Officer & Ors., (2001) 105 Company Cases 435, wherein the issue arose regarding the transfer of the proceedings from the Ranchi Bench to Patna, in view of the provisions of High Court at Patna (Establishment of Permanent Bench at Ranchi) Act, 1976 and the Patna High Court Rules. In the said Act 1976 there had been analogous proviso enabling the Hon'ble Chief Justice to transfer a case from Ranchi Bench to Patna High Court but not vice versa, and the Court held that transferring a case from Patna to Ranchi was impermissible as it would amount to an illegality. However, the Court considering the provisions of Sections 448 and 449 of the Companies Act, 1956 held that winding up petitions should be filed where the official liquidator had the office and there cannot be different winding up proceedings within the same High Court away from the establishment of the official liquidator attached to the High Court.

26. We are of the opinion, with all respect and humility at our command, that the Patna High Court failed to take into consideration the provisions of Section 10 of the Act 1956. More so, there can be no difficulty for initiating the proceedings before the Lucknow Bench, at least upto the stage of winding up. Though it may be more expensive and may also amount to harassment of the parties, as has been noticed by this Court in Sumac International Ltd. (Supra), but as the matter raises the question of jurisdiction, the case requires to be decided seriously as an order without jurisdiction becomes a nullity. More so, there is also a clear distinction as the Patna High Court was dealing with the issue of transfer of a case. In the present case, transfer is not required at all if the Court comes to the conclusion that it has no jurisdiction, it has to return the plaint/petition to the petitioner concerned to present it before the Court of competent jurisdiction, in view of the principles enshrined in the provisions of Order 7, Rule 10 of the Code of Civil Procedure and the party may be entitled to the benefit of limitation as provided for under Section 14 of the Limitation Act.

27. To sum up, our conclusions are that in company matters, that Court has the jurisdiction in whose territorial jurisdiction the Company has the Registered Office. It is so necessary also for the reason that Directors of a Company may be prosecuted at hundred of places, as in a given case, share holders of the Company may file complaints at different places throughout India. Section 10 (3) of the Act, 1956 clarifies the

necessity further, as the Company may change the location of its registered office. In the instant case, registered office of the Company is at Lucknow. Jurisdiction of the Lucknow Bench in Company matters ousted by the Notification dated 15.07.1949 has been restored vide Notification dated 05.08.1975. However, it is only **upto the stage of winding up proceedings**, and subsequent thereto, the case is required to be decided by this Court. This position is crystal clear from the Notifications dated 05.08.1975, 04.01.2003 and 14.01.2003. The petitions require to be returned to the petitioners to be presented before the Lucknow Bench.

28. In view of the above, we are of the opinion that the instant petition is not maintainable before this Court as the registered office of the Company is situated within the territorial jurisdiction of the Lucknow Bench. Reference is answered accordingly.

Send the papers back to the learned Judge.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 25977 of 2005

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

Counsel for the Petitioners:
Sri J.P. Singh

Counsel for the Respondents:
Sri C.K. Rai
Sri N. Misra
S.C.

Constitution of India, Article 226- Election management of cooperative society-voter list published and final- the name of petitioners society excluded as it was defaulter- once the date for election notified- court should not intervene to stop the election process- otherwise grave in justice would be done to the crores of other voters- proper remedy file election petition.

Held- Para 9

If this was allowed to be done, no election would ever take place because someone or the other would always find some excuse to move the Court and stall the elections. The importance of holding elections at regular intervals cannot be overemphasized. If holding of elections was allowed to stall on the complaint of a few individuals then grave injustice would be done to crores of other voters who had a right to elect their representatives to the democratic bodies.

Case law discussed:
AIR 1995 Alld-57
AIR 1992 SC-64
AIR 1988 SC-616
1982 (2) SCC-218
1987 SC-1577
AIR 1988 SC-66
1988 AWC (i) 503
AIR 1994 SC-1673
1998 (8) SCC-703
2000 (8) SCC-216
AIR 2004 SC- 3600

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

1. This writ petition has been filed for a direction to the District Collector/Returning Officer to include certain members for the purpose of participation in the election of the District

Cooperative Bank Limited, Ghazipur and to quash the order dated 23.03.2005.

2. The facts and circumstances giving rise to this case are that there is a Cooperative Society, namely Sadhan Sahakari Limited, Mania Block Bhadaura, District Ghazipur. On 23rd March, 2005, a provisional voters' list was notified for the purposes of holding election of the Cooperative Societies which did not contain the name of the petitioners' Society, as it had been shown as a defaulter. The said list had been made final and the petitioners' Society has not been included in the voter list for the reason that vide order dated 23.03.2005, the said Society has been shown to be a defaulter. Hence, this petition.

3. Shri J.P. Singh, learned counsel for the petitioners has submitted that the findings recorded by the authority concerned in its order dated 23.03.2005 that the Society is a defaulter, is factually not correct. Petitioners' Society is not a defaulter. Therefore, the petitioners' Society should be permitted to participate in the forthcoming election.

4. Shri C.K. Rai, learned Standing Counsel appearing for the respondents has submitted that once the notification of the election has been issued, the writ Court has to keep its hands off and should not entertain a writ petition particularly for the purpose of inclusion or exclusion of any one's name in the voter list. If the petitioners are so aggrieved, they must wait for the result of the election and challenge the same subsequently before the appropriate forum but no relief can be granted at this stage and the petition is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

The issue involved herein is no more res-integra.

6. In Suresh Kumar Tyagi Vs. Krishna Kumar & Ors., AIR 1995 Alld. 57, while dealing with the election for the Committee of Management of a Credit Society under the provisions of U.P. Cooperative Societies Act, 1965 (hereinafter called the Act 1965) and the U.P. Cooperative Societies Rules, 1986 (hereinafter called the Rules 1968), this Court held that the general principles of election law are applicable in the case of Cooperative Society and once the notification has been issued, the Court cannot interfere. The only remedy available to the person aggrieved is to challenge the result showing that it has materially affected by action or inaction on the part of the authority concerned. While deciding the said case, reliance had been placed on large number of judgments of the Hon'ble Apex Court particularly in N.P. Ponnuswami Vs. Returning Officer Namakkal Constituency, AIR 1952 SC 64; S.T. Muthusami Vs. K. Natarajan, AIR 1988 SC 616; A.K.M. Hassan Uzzaman Vs. Union of India, (1982) 2 SCC 218; Dhartipakar Madanlal Agarwal Vs. Sri Rajiv Gandhi, AIR 1987 SC 1577; and Gujarat University Vs. N.U. Rajguru, AIR 1988 SC 66. In all the aforesaid cases, it has categorically been held that the High Court should be very cautious and slow and should keep its hands off and should not generally interfere with the election process. The person who is aggrieved by any order of any authority, for any reason, whatsoever, must wait till the election

result is declared and the only remedy for him is to challenge the same by filing the election petition before the appropriate forum. The said judgment was rendered interpreting the provisions of Rule 444-C of the Rules 1968, which are involved in the case in hand.

7. Another Division Bench of this Court in R.P. Singh Baghel Vs. City Magistrate/Election Officer, Allahabad District Co-operative Bank Ltd. & Ors., 1988 (1) AWC 503, considering similar provisions followed the earlier judgment of this Court in Suresh Kumar Tyagi (supra), and the Court held as under:-

"For the reasons stated above, we are of the considered view that this is not a fit case to exercise jurisdiction of this Court to interdict and retard the election process in its midway. Accordingly, the writ petition is dismissed."

8. In the said case, the grievance had been raised that the petitioner therein and similarly situated delegates of Primary Societies, whose names had been included in the provisional voters' list, had been arbitrarily and illegally excluded from the final voters' list, while some other persons, who were disqualified to be delegates to the general body of the Central Society, had been arbitrarily and illegally **included** in that final voters' list. The Court held that the only remedy available to the person aggrieved in such a fact situation is under Section 70 of the Act 1965 after conclusion of the election. The Court held that in such a case, the writ Court should not interfere and for that purpose reliance had also been placed upon the judgment of the Hon'ble Apex Court in Ramchandra Ganpat Shinde Vs. State of Maharashtra, AIR 1994 SC 1673, wherein it had been observed as under:-

".....there is no constitutional bar in the exercise of the jurisdiction in respect of election to local bodies. It is equally sound exercise of discretion to bear in mind the policy of the Legislature to have the dispute decided speedily through the machinery of election petition and decline to exercise its writ jurisdiction in election dispute. Once the election process was set in motion according to law, any illegality or irregularity committed while the election process is in progress or the conduct of the election is vitiated by any illegality or irregularity in its process, the proper remedy is to lay action before the Tribunal constituted under that Act by means of an election petition and have the dispute adjudicated without the election process being interdicted or retarded in its midway."

9. Anugrah Narain Singh Vs. State of U.P. & Ors., (1996) 6 SCC 303 was a case relating to Municipal elections in this State. Barely one week before the voting was scheduled to commence, in the writ petitions complaining of defects in the electoral rolls and delimitation of constituencies and arbitrary reservation of constituencies for the Scheduled Castes, Scheduled Tribes and Backward Classes, the High Court passed interim order stopping the election process. The Apex Court quashed interim orders and observed that if the election is imminent or well under way, the Court should not intervene to stop the election process. If this was allowed to be done, no election would ever take place because someone or the other would always find some excuse to move the Court and stall the elections. The importance of holding

elections at regular intervals cannot be overemphasized. If holding of elections was allowed to stall on the complaint of a few individuals then grave injustice would be done to crores of other voters who had a right to elect their representatives to the democratic bodies.

10. This view stands fortified by judgments of the Apex Court in C. Subrahmanyam Vs. K. Ramanjaneyullu & Ors., (1998) 8 SCC 703; Election Commission of India Vs Ashok Kumar & Ors., (2000) 8 SCC 216; Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 SC 1657; and Manda Jaganath Vs. K.S. Rathnam, AIR 2004 SC 3600. Thus, it is settled legal proposition that once the notification for holding elections is issued, the Court should not interdict and retard the election in the midway, nor it should interfere with the election process. It is not permissible in law that High Court can interfere with the election process having the effect of interrupting, obstructing or protracting the same. The party aggrieved has to wait till the conclusion of the election process and challenge the result of the election by filing the appropriate petition before the appropriate forum.

11. The case in hand is squarely covered by the judgments of this Court, referred to above. It has been held that writ should not be issued for **inclusion or exclusion** of a person in or from the voters' list. We do not see any justification to take a different view, rather judicial discipline and decorum warrant to follow the same. Petition is dismissed. However, petitioners shall be at liberty to approach the appropriate forum for appropriate relief after the elections stand concluded.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 3129 of 2005

Fakharuddin ...Petitioners
Versus
Nagar Palika Parishad, Sikandrabad and others ...Respondents

Counsel for the Petitioner:
Sri M.K. Gupta

Counsel for the Respondents:
Sri Prem Chandra
Sri Yasharth

U.P. Government Servant Determination of date of birth Rules- r. 4- correction in date of birth- Petitioner appoin0ted as class 4th employee- in Nagar Palika Sikandrabad- appointed on 1.9.70- in service book date of birth entered as 21.1.48- as such he achieved the age of superannuation on 21.1.08 e.g. 31.1.05- by impugned order dated 21.11.04- Noticed retiring the petitioner on 28.2.05- the basis of alteration in the date of birth is medical certificate issued in the year 1975- held- even the employer can not unilaterally change the date of birth as recorded in service book- at the fag end of service.
Held- Para 3
Just as an employee is not entitled to have his date of birth changed at the fag end of his career, the employer also cannot be permitted to change the date of birth of its employee without there being any concrete evidence for the same and that too, at the fag end of his career. The certificate on the basis of which the respondents are claiming that the petitioner has attained the age of 60 years on 7.2.2005, had been issued in the year 1975 and was on the record of the Nagar Palika Parishad. After 30

years, they cannot be permitted to unilaterally change the date of birth of the petitioner when, admittedly his date of birth had been, since his inception in service, recorded to be 21.1.1948. The impugned order dated 29.11.2004 whereby the date of birth of the petitioner has been changed, thus, deserves to be set aside and is hereby quashed.

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

1. Heard learned counsel for the petitioner as well as Sri Prem Chandra, learned counsel appearing on behalf of the respondents. A counter affidavit has been filed on behalf of the respondents. Learned counsel for the petitioner states that the petitioner does not wish to file any rejoinder affidavit. With consent of the learned counsel for the parties this writ petition is being disposed of at this stage.

2. The petitioner was in the service of respondent-Nagar Palika Parishad Sikandrabad, District Bulandshahr. He was initially appointed on a class IV post on 8.2.1966 and was thereafter confirmed in service on 1.9.1970. Admittedly in the service book of the petitioner maintained by the respondent-Nagar Palika Parishad, his date of birth has been entered as 21.1.1948 and it has also been indicated that the age of superannuation of the petitioner would 21.1.2008. On 29.11.2004 the petitioner had received an order passed by Respondent no.3 (who, according to the petitioner, is not even the appointing authority of the petitioner) wherein it has been stated that on the basis of a medical certificate which had been produced by the petitioner, he would be attaining the age of 60 years on 7.2.2005 and thus would retire on the last day of the said month which would be 28.2.2005. Aggrieved by the said order the petitioner has filed this writ petition with a further prayer that he may be permitted to continue in service till 21.1.2008 as per the date of birth recorded his service records.

Having heard learned counsel for the parties and on perusal of record, in my opinion, this writ petition deserves to be allowed.

3. The date of birth as recorded in the service took is to be taken as final unless it is validly changed in accordance with the relevant Rules in this regard. Sri Prem Chandra, learned counsel for the respondents, has not been able to place before me any rule in accordance with which the date of birth would be treated as different from the one which has been recorded in the service book of an employee. He has placed reliance on a medical certificate, a copy of which has been filed as Annexure-3 to the writ petition, in which the petitioner's age, according to his statement as well as by his appearance, is said to be 30 years. The said certificate was issued on 7.2.1975. It is only on this ground that the respondent-authorities are treating the petitioner to be 30 years of age on 7.2.1975 and thus calculating his date of birth on such basis, the petitioner is said to have attained the age of 60 years on 7.2.2005. Just as an employee is not entitled to have his date of birth changed at the fag end of his career, the employer also cannot be permitted to change the date of birth of its employee without there being any concrete evidence for the same and that too, at the fag end of his career. The certificate on the basis of which the respondents are claiming that the

petitioner has attained the age of 60 years on 7.2.2005, had been issued in the year 1975 and was on the record of the Nagar Palika Parishad. After 30 years, they cannot be permitted to unilaterally change the date of birth of the petitioner when, admittedly his date of birth had been, since his inception in service, recorded to be 21.1.1948. The impugned order dated 29.11.2004 whereby the date of birth of the petitioner has been changed, thus, deserves to be set aside and is hereby quashed. The petitioner shall be permitted to continue in service on the basis of his date of birth as entered in the service book i.e. 21.1.1948. The petitioner shall be entitled to all consequential benefits.

4. Consequently, this writ petition stands allowed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.03.2005

BEFORE
THE HON'BLE SABHAJEE YADAV, J.

Civil Misc. Writ Petition No. 7425 of 2002

Udai Pratap Singh ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Yogesh Agarwal

Counsel for the Respondents:
Sri Jai Bahadur Singh
S.C.

U.P. Intermediate Education Act 1921- S-7AA-Part time teacher- engaged by management whether entitled for salary from public exchequer? Held-'No"-the post neither sanctioned nor approved by Director of Education-No question of payment of salary from public exchequer.

Held- Para 16

Thus in view of the aforesaid discussion and law laid down by Hon'ble Apex Court and this court from time to time as indicated in foregoing paragraphs, it is clear that being a part time teacher the petitioner is not entitled for payment of salary from the state exchequer as the post on which he is working has not been sanctioned/approved by Director of Education (Secondary) as required under law.

Case law discussed:
AIR 1998 SC -295
JT 2000 (i) SC- 159
JT 2003 (5) SC -448
AIR 1982-SC-879
AIR 1993 SC-286
AIR 1988 SC 1291

(B) U.P. Intermediate Education Act 1921 Section-7 AA(6) equal pay for equal work-part time teacher-Regular teacher-difference between the two–mode and procedure of selection, quality of work and duty-vast difference–a regular teacher can be a part time teacher in the same institution or other but part time teacher is for limited purpose-held-both can not be comparable-principle of equal pay for equal work not applicable.

Held- Para 26

Thus an intensive analysis and close scrutiny of the aforesaid provisions of law go to show that there is vast difference in the manner, mode and procedure of selection of part time teacher and regular teachers appointed in substantive vacancies in the Secondary institutions recognized by the Board of High School and Intermediate Education. On this count both the teachers cannot be comparable to each other in standard of recruitment and accordingly the qualities of work and duties discharged by them can also not be comparable. Besides this it is also

relevant to mention here that even a regular teacher already working in any institution can be appointed as part time teacher in the same institution or in any other institution as provided under Sub-section 6 of Section 7-AA of U.P. Act No. 2 of 1921.

Case law discussed:

AIR 1998 SC -295
JT 2003 (5) SC-544
AIR 1992 SC-2130
2002(2)UPLBEC-1595
AIR 2001 SC-706
1994(2) SCC-Suppl. 316
AIR 1986 SC-584
AIR 1986 (1) SCC-637
AIR 1987 SC-2342
AIR 1988 SC-517
AIR 1990 SC-371
AIR 1996 SC-2898
AIR 1998 (9) SCC-595

(C) Constitution of India, Article 226- Regularization part time lecturer-in absence of enactment-neither can be considered for regular aborption- nor can be treated to be a regular lecturer- court can not mandate the legislature for enactment.

Held- Para 36

As indicated herein before since this Court cannot mandate the legislature to enact law regarding regularization of part time teachers working in the institutions recognized by the Board. Therefore, in absence of legislative enactment, the petitioner's case can neither be considered for regularisation nor absorption on the post of lecturer nor he can be treated to be regular lecturer in the institution in question. Thus, in view of the aforesaid discussions, the above question formulated by me is answered accordingly.

Case law discussed:

AIR 1989 SC -1899
AIR 1990 SC-1251
AIR1992 SC 435
AIR 1992 SC-2130
AIR 1990 SC-883
AIR 1990 SC-2228
AIR 1994 SC 1808
A (1992) SCC-331
AIR 1992 SC 2130

(D) U.P. Intermediate Education Act 1921 S-7 AA- (5)-Honorarium-as fixed by G.O. dated 10.8,.01- Para 6 use of word skilled workman held-illegal- teacher can not treated skilled or semi skilled-as the teacher are not within the meaning of workman-Power to fixed honorarium-can not be delegated to the management-provisions for delegation of power-held-ultra virus-hence–struck down.

Held- Para 40

Thus in view of the aforesaid discussion and the law laid down by the Apex Court in the aforesaid cases and I am of considered view that the submissions of learned counsel of petitioner have substance and deserves to be accepted. Since the teachers cannot be treated as "skilled", "semi-skilled" and "unskilled" employees of various enactments under labour laws, therefore, while issuing the Government order dated 10th August, 2001 it was not within the competence of State Government to prescribe any honorarium to be paid to the part time teachers of educational institution prescribing a wage not less than minimum wage fixed under the provisions of Minimum Wages Act and this power too cannot be further delegated to any other body like committee of management of the institutions in absence of such power of delegation under statute. Therefore, the provisions of paragraph 6 of the aforesaid Government order is beyond the competence of State Government and held to be null and void as ultra virus to the aforesaid provisions of Act on both the counts on the ground of incompetence inasmuch as on the ground of abdication of powers to other bodies. Accordingly, the aforesaid provisions are liable to be struck down by this Court, as such hereby quashed.

Thus the question formulated in this regard is answered accordingly.

Case law discussed:

1996 (4) SCC -225
2004 (100) FLR-601
1988 (4) SCC 42

(Delivered Hon'ble Sabhajeet Yadav, J.)

By this writ petition the petitioner who is a part time Lecturer in the institution in question has moved to this Court seeking relief in the nature of writ of certiorari quashing the term and conditions of his appointment letter which provides that he will be paid honorarium at a rate of Rs.10/- per period and further writ in the nature of mandamus directing the respondent to pay him regular and equal remuneration/salary as being paid to a lecturer teaching in the intermediate classes in the subjects in question in the institution which is on grant-in-aid list of the State Government and further direction of payment of arrears of salary and interest at the rate of 10% thereon has also been sought for. By amendment application moved in the writ petition further relief has been sought in the nature of mandamus directing the respondent to treat the petitioner as a regular teacher and quash the provisions of para 6 of the Government order dated 10.8.2001.

2. The facts of the case in brief are that Baba Gaya Das Technical Inter College, Barhaj, Deoria is privately managed recognized institution under the provisions of ***U.P. Intermediate Education Act, 1921*** *(hereinafter referred to as "U.P. Act No. 2 of 1921*'. Vide order/letter dated 12.8.1993 contained in Annexure-1 of the writ petition, the Secretary, U.P. Secondary Education Board (hereinafter referred to as "Board') communicated to the Manager of the institution that under the provisions of Section 7-A of the "U.P. Act No. 2 of 1921' the "Board' with previous approval of the State Government recognized the institution for imparting the instruction in the intermediate classes in Physics, Chemistry, Biology and Mathematics subjects with conditions indicated in the letter. In pursuance there-of the committee of management of the institution has appointed the petitioner for teaching intermediate classes in the subject of Biology as a part time teacher on a honorarium payment of Rs.10/- per period vide letter of appointment issued by manager of the institution dated 26.8.1993 (Annexure-2 of the writ petition). In pursuance thereto the petitioner has immediately joined the institution on the aforesaid post as a part time teacher in Biology by submitting his joining report on 27.8.1993 (Annexure-3 of the writ petition). According to the petitioner, that prior to his appointment as such he was fully eligible and qualified for the post and duly selected by the selection committee constituted for the purpose by the Committee of Management of the institution. Since the aforesaid date of joining on 27.8.1993 he is continuously teaching the students of Intermediate and High School classes in Biology subject but being paid very meagre remuneration at a rate of Rs.10/- per period although he is teaching the classes like other regularly appointed Lecturers in the institution in question who are getting remuneration at a rate of Rs.12,000/- per month, whereas the petitioner is being paid for the same and similar work a sum of rupees not more than 500/- per month. According to the petitioner that although he has been appointed as a part time lecturer for teaching Biology subject in the intermediate classes but besides the

intermediate classes he is also teaching the students of High School in the aforesaid subject and is performing duties and responsibilities like a regular lecturer as a invigilator as well as valuar of answer books in the examinations conducted by the "Board'. In this regard he has also filed several certificates issued by the relevant authorities from time to time along with paper book of the writ petition. It is further stated that for redressal of his grievances several representations have been moved by the petitioner to the authorities concerned as contained in Annexure nos. 15, 16, 17 and 18 of the writ petition but since no heed has been paid over the same, therefore, he has been compelled to file above noted writ petition. By way of amendment application the petitioner has also filed a Government order dated 10th August, 2001 which has been issued prescribing eligibility, procedure for recruitment and other term and conditions of services of part time teacher including the provisions regarding their remunerations, disciplinary action and termination of services. The petitioner has challenged the provisions of para 6 of aforesaid Government order on various grounds mentioned in the amendment application wherein it is stated that under the provisions of Sub-section 5 of Section 7-AA the power has been conferred upon the State Government to fix honorarium to be paid to the part-time teacher by a general or special order issued in this behalf. The power in this regard cannot be delegated to the management of the institution so far as fixation amount of payment of salary as honorarium is concerned. In substance the petitioner has alleged that since he is discharging duties and responsibilities at par with regular lecturer in the institution in question and also eligible and qualified for the post and has been duly selected by the committee of management of the institution, therefore, the respondents cannot discriminate the petitioner in the matter of payment of salary which is being paid to the regular lecturer teaching the aforesaid subject. The action of respondents is violative of Article 14 and Article 39 (d) of the Constitution of India. It is also alleged that the services of petitioner are not comparable from the services of "skilled workman" and term and conditions of the services fixed by the Government in the aforesaid Government order is highly unreasonable and arbitrary inasmuch as runs contrary to the several decisions of Apex Court mentioned in the amended pleadings of the writ petition. It is further alleged that despite request made to the Director through the representations made to him and fulfillment of conditions under relevant Government orders including the Government order 20th November, 1977, the Director of the Secondary Education who is competent authority to create and sanction the post for the purpose of payment of salary from the State Exchequer did not create such post by now although the petitioner is continuously working on the aforesaid post since very inception of his appointment till the date.

3. On behalf of respondents of the writ petition three detailed counter affidavits have been filed, one by Associate District Inspector of Schools, Deoria, another by Joint Secretary, Secondary Education, Government of Uttar Pradesh and the third by the management of the institution in question. In the counter affidavit filed on behalf of District Inspector of Schools, Deoria,

respondent no. 3 it is stated that under the provisions of Section 7-A of U.P. Intermediate Education Act, the "Board' with previous approval of the State Government has recognized the institution in some new subjects or group of subjects for intermediate classes on 12.8.1993 and while granting such recognition the "Board' has directed the committee of management of the institution to make payment of salary of teachers to be employed on account of such recognition from its own resources. The recognition so granted was without sanction of finance (Vittavihin). It is further stated that since the petitioner was appointed for imparting instruction in the subject which was recognized by the "Board' without financial sanction to it and without creating any post for such appointment by competent authority, as such the liability of payment of salary to the petitioner cannot be fastened upon the State Exchequer. In para 11 of the counter affidavit it has been stated that except to the teachers appointed for teaching Science subjects in intermediate classes, other teachers already working in the institution against duly sanctioned posts are being paid salary from State Exchequer under the provisions of Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971, herein after referred to as U.P. Act No. 24 of 1971. Since the petitioner's appointment was not made against duly sanctioned post of a teacher, therefore, the relief for payment of salary to the petitioner from State Exchequer is liable to be rejected and the petition is liable to be dismissed. Another counter affidavit has been filed on behalf of respondents no.1, 2 and 3 of the writ petition sworn by one Sri Shiv Prakash Gupta, Joint Secretary, Secondary Education, Government of Uttar Pradesh, Lucknow also reiterates the averments made in the counter affidavit filed by District Inspector of Schools, Deoria, but on account of direction of this Court dated 19.3.2004 the same has been filed to place Government order dated 10th August, 2001 which has been issued in purported exercise of power of State Government under Section 7-AA (4) and (5) of the U.P. Act No. 2 of 1921. One more counter affidavit has also been filed on behalf of respondent No. 4 i.e. committee of management of the institution wherein in para 7 of the counter affidavit it has been stated that the petitioner has been appointed on the post of Biology lecturer in pursuance of appointment order dated 26.8.1993 and joined the service on 27.8.1993. From the bare perusal of which, it seems that the committee of management of the institution has virtually admitted the averments made in the writ petition.

4. I have heard learned counsel for the petitioner Sri Yogesh Agrawal, Advocate and learned Standing counsel on behalf of respondents no. 1,2 and 3 as well as Sri Jai Bahadur Singh counsel for the respondent no. 4 of the writ petition and also perused the record.

5. Having gone through rival contentions and submissions made by the counsel of parties and on perusal of records following questions arise for consideration of this Court:

(1) As to whether part time teachers appointed under Section 7-AA of the U.P. Act No. 2 of 1921 are entitled for payment of salary under U.P. Act No. 24 of 1971?

(2) As to whether the liability of payment of salary to the petitioner as part time lecturer in the institution in question can be fastened upon the State Exchequer in absence of sanction and creation of post by the competent authority?

(3) As to whether the petitioner is entitled for payment of salary at par with the salary payable to regular lecturer of recognized institution receiving grant-in-aid from State Exchequer on a principle of equal pay for equal work?

(4) As to whether in given facts and circumstances of the case any direction for treating the petitioner as regular lecturer and/or direction to regularise him and/or direction to frame rule of regularisation can be given?

(5) As to whether the paragraph 6 of the Government order dated 10th August, 2001 is ultra virus to the provisions of Section 7-AA (5) of the U. P. Act No. 2 of 1921 ?

(6) As to whether the terms and conditions of employment of petitioner in respect of payment of honorarium to him at a rate of Rs.10/- per period for teaching the Intermediate classes is violative of provisions of Section 23 of the Contract Act and provisions of Articles 14 and 23 of the Constitution of India?

6. Now the question arises for consideration is that (i) As to whether a part-time teacher appointed under Section 7-AA of U.P. Act No. 2 of 1921 is entitled for payment of salary under U.P. Act No. 24 of 1971; (ii) As to whether liability of payment of salary to the petitioner can be fastened upon the State Exchequer in absence of creation of necessary post by competent authority. The aforesaid questions are intermixed and related to each other, therefore, it is necessary to deal with them together. In this regard the submission of learned counsel for petitioner is that in view of decision of the Hon'ble Apex Court rendered in J.P. Unnikrishnan's case ***(A.I.R. 1993 S.C. 2178)*** the right of education has been recognized as one of the facet of fundamental right guaranteed under Article 21 of the Constitution of India. The aforesaid guarantee cannot be ensured unless the teacher like petitioner is paid their full remuneration by the respondents i.e. by the state authorities.

7. Before I proceed to deal with the aforesaid submission of the petitioner in the light of law laid down by the Apex Court it is necessary to examine relevant provisions of statute having material bearing with the issue in question. For ready reference the provisions of Section 7-A, 7-AA and 7-AB of U.P. Act No. 2 of 1921 are being reproduced as under:-

"7-A. Recognition of an institution in any new subject or for a higher class.- *Notwithstanding anything contained in Clause (4) of Section 7-*

(a) the Board may, with the prior approval of the State Government, recognize an institution in any new subject or group of subjects or for a higher class;

(b) the Inspector may permit an Institution to open a new section in an existing class".

*"**7-AA. Employment of part-time teachers or part-time instructors.- (1)** Notwithstanding anything contained in this Act, the management of an institution may, from its own resources, employ-*

(i) as an interim measure part-time teachers for imparting instructions in any subject or group of subjects or for a higher class for which recognition is given or in any Section of an existing class for which permission is granted under Section 7-A;

(ii) part-time instructors to impart instructions in moral education or any trade or craft under socially useful productive work or vocational course.

(2) No recognition shall be given and no permission shall be granted under Section 7-A, unless the Committee of Management furnishes such security in cash or by way of Bank guarantee to the Inspector as may be specified by the State Government from time to time.

(3) No part-time teacher shall be employed in an institution unless such conditions may be specified by the State Government by order in this behalf are complied with.

(4) No part-time teacher or part-time instructor shall be employed unless he possesses such minimum qualifications as may be prescribed.

(5) A part-time teacher or a part-time instructor shall be paid such honorarium as may be fixed by the State Government by general or special order in this behalf.

(6) Nothing in this Act shall preclude a person already serving as a teacher in an institution from being employed as a part-time teacher or a part-time instructor under Section 7-AA".

*"**7-AB. Exemption.**- Nothing in the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 (U.P. Act No. 24 of 1971), or the Uttar Pradesh Secondary Education Services Selection Boards Act, 1982 (U.P. Act No. 5 of 1982), shall apply in relation to part-time teachers and part-time instructors employed in an institution under Section 7-AA."*

8. From a bare reading of the aforesaid provisions of law it is clear that the "Board' with prior approval of the State Government is empowered to recognize an institution in any new subject or group of subjects or for a higher class and inspector may permit an institution to open a new section in an existing class. In order to cater the need of the institution the provisions of Section 7-AA have been enacted by the legislature of State which provides that notwithstanding anything contained in this Act, the management of the institution as interim measure may employ, part time teachers from its resources for imparting instructions in any subject or group of subjects for which recognition is given or in any section of an existing class for which permission is granted under Section 7-A of U.P. Act No. 2 of 1921. Sub-section (2) deals with prior condition, which is required to be complied with by the committee of management of the institution before such recognition under Section 7-A is given to the institution. Sub-section (3) provides

that no part time teacher shall be employed in an institution unless such conditions as may be specified by the State Government by order in this behalf are complied with. Sub-section (4) further provides that no part time teacher or part time instructor shall be employed unless he possess such minimum qualifications, as may be prescribed. Sub-section (5) provides for payment of honorarium to the part time teacher or part time instructor, as may be fixed by the State Government by general and special order in this behalf.

9. Thus a joint reading of the aforesaid provisions leads to a conclusion that a part time teacher employed under Section 7-A cannot invoke the provisions of U.P. Act No. 24 of 1971, which contains provisions for payment of salary to the teachers and other employees of recognized institution, which are grant-in-aid of the State Government for payment of salary from the State Exchequer for simple reason that under Section 7-A.B. of U.P. Act No. 2 of 1921 the applicability of the provisions of U.P. Act No. 24 of 1971 have been exempted. The provisions of statute contained therein are only existing law casting an obligation to pay salary to the teachers and other employees of the institution recognized under the aforesaid U.P. Act No. 24 of 1971. Admittedly the petitioner's appointment has been made under the provisions of Section 7-AA of the Act as a part time teacher/lecturer in the institution, therefore, he cannot claim payment of salary under the provisions of U.P. Act No. 24 of 1971 as the provisions of the aforesaid Act are exempted from applicability in respect of part time teacher employed under Section 7-AA of U.P. Act No. 2 of 1921.

10. At this juncture it is also necessary to point out that in Regulation 19 under Chapter II of the Regulations framed under U.P. Act No. 2 of 1921 it is laid down that where any person is appointed or any promotion is made on any post of the head of the institution or teacher in contravention of the provisions of this Chapter or against any post other than a sanctioned post, the Inspector shall decline to pay salary and other allowances, if any to such person where the institution is covered by the provisions of U.P. Act No. 24 of 1971 and in other case shall decline to give grant for salary and allowances in respect of such person. For ready reference the provisions are reproduced as under:

> **"19**. Where any person is appointed as, or any promotion is made on any post of head of institution or teacher in contravention of the provisions of this Chapter or against any post other than a sanctioned post of the Inspector shall decline to pay salary and other allowances, if any to such person where the institution is covered by the provisions of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971, and in other cases shall decline to give any grant for the salary and allowances in respect of such person";

11. From bare reading of the aforesaid provisions of the regulation it is emphatically clear that Inspector is not obliged to pay salary and other allowances to the teachers and other employees of the institution receiving grant-in-aid out of state fund and recognized under U.P. Act No. 24 of 1971, who are not appointed against

sanctioned posts. Admittedly the petitioner is appointed as part-time teacher not against any sanction post, therefore, the Inspector cannot pay him salary and other allowances from the State Exchequer.

12. In this connection it is also necessary to point out that a Division Bench of this court in case of ***Mahipal Singh Pawar and others versus State of U.P. and others reported in 1992 (2) UPLBEC 1497, in para 13 and 14*** of the judgment, a specific question had framed as to whether on account of grant of recognition u/s 7-A of U.P. Act No. 2 of 1921 by the Board with prior approval of the State Government in any new subject or group of subject or for a higher class, and on permission given by Inspector to open a new section in an existing class in an institution itself amount to creation of a post for a teacher in that subject ? The Division Bench of this court has answered the aforesaid question in negative. For ready reference the observation made by Division Bench of this court is reproduced as under:-

"13. *In deciding the above question, it would be necessary to examine the provisions of Section 7-A of the Intermediate Education Act, read with Section 9 of the U.P. Act of 1971. These provisions are already quoted in preceding paragraphs."*

"14. *The provision of Section 9 of the High School and Intermediate Colleges (Payment of Salaries) Act, 1971 is reproduces as under:*

"9. ***Approval for posts.***- *No institution shall create a new post of teacher or other employee except with the previous approval of the Director, or such other officer as may be empowered in that behalf by the Director."*

The perusal of the aforesaid provisions clearly go to show that the fact that the institution is approved and recognized by the Board for the first time or any new subject or group of subjects or for a higher class or addition of selection to a existing class shall have no effect unless it is approved by the State Government. It is also made clear that the permission to start teaching of a new subject or opening a class or section by D.I.O.S. shall be of no consequence unless approved by the State Government e.g. Director of Education. The number of posts for teacher and other employee of an institution is required to be created and sanctioned by the Director of Education according to the prescribed norms and standard laid by the Education Department. It is the sole domain of the Director of Education to sanction and create posts of teacher and other staff. If the management committee on the D.I.O.S. considers and decides the number of posts needed for the institution according to the strength of students, it is of no consequences. The power of creation and sanctioning posts for institution is specified. It cannot be said that the D.I.O.S. approved and permitted opening of a section or a class or approved teaching of a new subject, itself would amount to creation of a post, fastening legal duty and obligation of paying salary to such staff under the Act No. 24 of 1971."

13. A similar controversy has also been decided by the Hon'ble Apex Court in case of ***Director of Education and***

others Vs. Gajadhar Prasad Verma, A.I.R. 1995 S.C. 1121 in which while considering the provisions of Section 9 of U.P. Act No.24 of 1971 in respect of creation and sanction of post for grant of salary to the employees of the institution recognized under U.P. Act No. 24 of 1971, the Hon'ble Apex Court held that prior approval of Director or any other authorized officer for creation of post is necessary condition precedent for reimbursement of salary payable to such teachers by management of the institution. For ready reference para 4 of the decision is being quoted as under: -

"4. Be that as it may, the crucial question is whether the school of the respondent can claim reimbursement of the salary of such Clerk from the Government? The U.P. High Schools & Intermediate Colleges (Payment of Salaries of Teachers & other Employees) Act 24 of 1971 (for short "the Act'), regulates the payment of the salary by the Government. Section 9 is relevant in that behalf. It provides that no institution shall create a new post of teacher or other employee except with the previous approval of the Director or such officer as may be empowered in that behalf by the Director. Admittedly, no steps have been taken by the Management to have obtained prior approval of the Director or any other authorized officer for creation of the additional post of Clerk. The prior approval of the Director or the empowered officer is a condition precedent and mandatory, for creation of an additional posts (sic) the government had before it the relevant data of the posts for which the grant of aid was sanctioned. To make the government to reimburse the salary of an additional teacher or an employee, the government should have similar relevant material and data to have it duly verified and decision taken to grant sanction of the additional post. The inspecting and reporting officers are enjoined to make personal inspection and submit the report of the existing correct facts. The dereliction of duty or incorrect or false reports would be misconduct entailing them in disciplinary action for dismissal from the posts held by them. Therefore, the failure to obtain prior approval disentitles the Management to obtain reimbursement of the salary of such teacher or other employee."

14. In case of ***Gopal Dubey versus DIOS Maharajganj and others reported in (1999) 1 UPLBEC-1*** a Full Bench of this court after examining the provisions of Section 7-A and Section 7-AA and Section 7-A.B. of U.P. Act No. 2 of 1921, Regulation 19 of Chapter II of Regulation framed under the aforesaid Act and provisions of Section 9 and 10 of U.P. Act No. 24 of 1971 has held that Sanction of the post by a competent authority i.e. a Director, Secondary Education or person authorized by him is a condition precedent for payment of salary to a teacher or an employee of the Institution from the state exchequer. In this case while approving the decision rendered by a Division Bench of this court in Mahipal Singh's case (Supra) and relying upon the decision of Hon. apex Court rendered in Gajadhar Prasad Verma's case (supra) and after analyzing the situation in detail in para 21 and 22 of the decision, it has been held that on recognition being granted by the Board in respect of the subject in an institution u/s 7-A of U.P. Act No. 2 of 1921, it will not be presumed that the post of lecturer in such subject stand sanctioned by Director of Education u/s 9 of the Payment of the Salary Act. For

ready reference para 21 and 22 of the decision of Full Bench is being reproduced as under:-

"21. On the other hand, the decision of this Court in the case of Mahipal Singh Pawar and others Vs. State of U.P. and others, (1992) 2 UPLBEC 1497, has our approval. In that case it was held, inter alia, that a perusal of Section 7-A of the U.P. Intermediate Education Act, 1921 and Section 9 of the U.P. Act 24 of 1971 would clearly go to show "that the fact that the Institution is approved and recognized by the Board for the first time or any new subject or group or for a higher class or addition of selection to a existing class shall have no effect unless it is approved by the State Government," that is, Director of Education. It was further observed in that decision that Section 3 of the Payment of Salaries Act; provides that the Committee of Management is also equally responsible for payment of salary to the teachers/employees in their Institutions. It is relevant to point out in this connection that Section 7-AA of the Intermediate Education Act, enables the management to engage teachers for imparting instructions in any subject or group of subjects for a higher class for which recognition is given or any section of an existing class for which permission is granted under Section 7-A notwithstanding anything contained in that Act and also in the Payment of Salaries Act (See Section 7-AB). We must to be understood to say that a teacher or other employee appointed by the management for teaching a new class or section or a new subject for which recognition has been granted is not entitled to receive salary. What we have held is that before saddling the State Government with financial liability in respect of such posts the approval of the Director has to be obtained. In the absence of such approval, the State Government cannot be said to be under any obligation to pay salary to such staff. The view taken by us gains support from the decision of the Supreme Court in the case of Director of Education and others Vs. Gajadhar Prasad Verma, AIR 1995 SC 1121, in which the Apex Court, interpreting the provisions of the Payment of Salaries Act, ruled that prior approval of competent officer, for creation of post is a condition precedent for getting reimbursement of the salary of teacher/employee of High School...."

"22. In view of the above discussion the answer to the question formulated by us is that on recognition being granted by the Board in respect of a subject in an Institution under Section 7-A of the U.P. Intermediate Education Act, 1921 it will not be presumed that the post of lecturer in such subject stands sanctioned by the Director of Education under Section 9 of the Payment of Salaries Act."

15. In J.P. Unni Krishnan's case (supra) the Hon'ble Apex Court has held that right to education is implicit in and flows from the right to life guaranteed by Article 21 of the Constitution of India and right to receive the education is fundamental right flowing from right to life. While dealing with the contents and parameter of the right under Articles 21,41,45 and 46 of the Constitution of India in para 180 of the judgment at page 2253 (AIR 1993), it has been held that the citizens of this country have a fundamental right to education. The said right flows from Article 21. This right is however, not an absolute right. Its content

and parameters have to be determined in the light of Article 45 and 41. In other words every child/citizen of this country has a right to free education until he completes the age of fourteen years. Thereafter his right to education is subject to the limits of economic capacity and development of the State. The obligation created by Article 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institution of its own or by aiding recognising and or granting affiliation to private educational institutions. Where aid is not granted to the private educational institutions and merely recognition or affiliation is granted it may not be insisted that the private education institution shall charge only that fee as is charged for similar courses in governmental institutions. The private educational institutions have to and are entitled to charge a higher fee, not exceeding the ceiling fixed in that behalf. In this case the question of admission of the students and the charging of fee in government schools, government aided private schools and government recognized private schools were under consideration. The Hon'ble Apex Court did not hold that all the teachers appointed in privately managed institution or even in directly entitled to receive salary from Government fund if they are teaching the students up to the age of 14 years. It is also necessary to point out that it is well settled that a decision is an authority only on the question decided in it. Thus, the decision of apex court rendered in J.P. Unni Krishnan case should be understood in the context of the issue involved in the case in which it had been rendered. The issue involved in the case in hand altogether different, therefore, the aforesaid decision can be of no assistance to the case of the petitioner.

16. Thus in view of the aforesaid discussion and law laid down by Hon'ble Apex Court and this court from time to time as indicated in foregoing paragraphs, it is clear that being a part time teacher the petitioner is not entitled for payment of salary from the state exchequer as the post on which he is working has not been sanctioned/approved by Director of Education (Secondary) as required under law.

17. The next question arises for consideration is as to whether the petitioner is entitled for payment of salary at par with the salary payable to regular lecturer of recognised institution receiving grant-in-aid from State Exchequer on a principle of equal pay for equal work. In this regard the submission of petitioner is that although he was appointed as part time teacher for interim measure but he is working in the institution since very inception of his appointment till the date and teaching intermediate and High School classes regularly in Biology subject and discharging all other duties and responsibilities attached to the post of regular teacher/lecturer working in the institution. He has also been required by Board to work as invigilator and valuar of answer books of the examinees in the examinations conducted by the Board. In support of his submission he has placed reliance upon the documents filed in the writ petition referred earlier. It is not in dispute that the recognition has already been granted by the Board to the institution in question for teaching Biology subject in the Intermediate classes and in pursuance thereof the petitioner's appointment was made for teaching Biology subject in Intermediate classes, therefore, he cannot be discriminated in the matter of his

employment including the payment of salary admissible to the post of lecturer in the institution in question. In support of his submission learned counsel of petitioner has placed reliance upon the decisions of the Hon'ble Apex Court rendered in case of K. ***Krishnamacharyulu & others Vs. Sri Venkateswara Hindu College of Engineering and another A.I.R. 1998 SC 295*** and ***Chandigarh Administration and others Vs. Mrs. Rajni Vals & others J.T. 2000(1) S.C. 159*** and ***State of West Bengal and others Vs. Pantha Chatterjee and others, J.T. 2003 (5) S.C. 448***.

18. Before I proceed to deal with the submissions and cases relied upon by learned counsel of petitioner it is necessary to point out that the doctrine has its roots in the directive principles of state policy under Article 39 (d) of the Constitution of India. Because of reason that this Article is under Part IV of the Constitution of India and in view of Article 37 contained in the aforesaid part, the earlier approach of the court was that the doctrine is not enforceable in any Court but it is first time in case of ***Randhir Singh Vs. Union of India and others A.I.R. 1982 S.C. 879*** in para 8 Hon'ble Apex Court has held that it is true that the principles of "equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right, but it certainly is a Constitutional goal. While considering the provisions of Articles 14 and 16 inasmuch as the Preamble of the Constitution and Article 39(d) of the Constitution, Hon'ble Apex Court has held that the principles "equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer. In paragraphs 6 and 7 of the judgement the Hon'ble Apex Court has held that the equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for the Courts:

"6. We concede that equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission and not for Courts but we must hasten to say that where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differentially in the matter of their pay merely because they belong to different departments. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely because the posts are of the same rank and the nomenclature is the same."

"7. It is well known that there can be and there are different grades in a service, with varying qualifications for entry into a particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualifications for the higher grade, which may be either academic qualifications or experience based on length of service, reasonably sustain the classification of the officers into two grades with different scales of pay. The principle of equal pay for equal work would be an abstract doctrine not attracting Article 14 if sought to be applied to them."

19. It appears that after the pronouncement of the aforesaid judgement in Randhir Singh's case (Supra) a new chapter has been opened in the service law jurisprudence and later on in the subsequent decisions Hon'ble Apex Court has explained the doctrine and expanded its horizon and dimension. In case of ***State of Madhya Pradesh and another Vs. Pramod Bhartiya and others AIR 1993 S.C. 286***, Hon'ble Apex Court has held in para 1 of the decision that equal pay for equal work, it is self-evident, is implicit in the doctrine of equality enshrined in Article 14, it flows from it. Because clause (d) of Article 39 spoke of "equal pay for equal work for both men and women' it did not cease to be a part of Article 14. In para 3 of the decision the Apex Court has noticed the cases in which the aforesaid principle has been followed and applied by the Apex Court. In para 11 of the aforesaid decision after testing at touch stone of the law laid down by the Hon'ble Apex Court and in para 12 after referring the case of ***Federation of All India Customs and Excise Stenographers (AIR 1988 SC 1291)*** the Hon'ble Apex Court has held that the quality of work may vary from post to post. It may vary from institution to institution. It is not a matter of assumption but one of proof. The respondents have failed to establish that their duties, responsibilities and functions are similar to those of the non-technical lecturers in the college. For ready reference paragraphs 1 and 3 are reproduced as under:

Equal pay for equal work, it is self-evident, is implicit in the doctrine of equality enshrined in Article 14, it flows from it. Because clause (d) of Article 39 spoke of "equal pay for equal work for both men and women" it did not cease to be a part of Article 14. To say that the said rule having been stated as a directive principle of State policy is not enforceable in a Court of Law is to indulge a sophistry. Parts IV and III of the Constitution are not supposed to be exclusionary of each other. The rule is as much a part of Article 14 as it is of clause (1) of Article 16. Equality of opportunity guaranteed by Article 16(1) necessarily means and involves equal pay for equal work. It means equally that it is neither a mechanical rule nor does it mean geometrical equality. The concept of reasonable classification and all other rules evolved with respect to Articles 14 and 16(1) come into play wherever complaint of infraction of this rule falls for consideration. This is the principle affirmed in Randhir Singh Vs. Union of India, (1982) I SCC 618: (AIR 1982 SC 879) as well as in the subsequent decisions of this Court. It would be instructive to notice a few of them."

"3. The above principle was followed and applied in P.K. Ramachandra Iyer, (1984) 2 SCC 141 : (AIR 1984 SC 541);P. Savita & Others vs. Union of India and others, 1985 Suppl. SCC 94 : (AIR 1985 SC 1124); Dhirendra Chamoli, (1986) 1 SCC 637; Surinder Singh, (1986) 1 SCC 639: (AIR 1986 SC 584); Jaipal, (1988) 3 SCC 354: (AIR 1988 SC 1504) and in Federation of All India Customs and Excise Stenographers Vs. Union of India, (1988) 3 SCC 91 : (AIR 1988 SC 1291). While it is not necessary to refer to all the decisions, a brief reference to the decision last mentioned may be in order. S. Mukherji,J. speaking for himself and R.S. Pathak, C.J., had this to say about the content of the rule (at page 1300 of AIR 1988 SC 1291):

"In this case the differentiation has been sought to be justified in view of the nature and the types of the work done, that is, on intelligible basis. The same amount of physical work may entail different quality of work, some more sensitive, some requiring more tact, some less - it varies from nature and culture of employment. The problem about equal pay cannot always be translated into a mathematical formula. If it has a rational nexus with the object sought for, as reiterated before a certain amount of value judgment of the administrative authorities who are charged with fixing the pay scales has to be left with them and it cannot be interfered with by the Court unless it is demonstrated that either it is irrational or based on no basis or arrived malafide either in law or in fact. In the light of the averments made in the facts mentioned before, it is not possible to say that the differentiation is based on no rational nexus with the object sought for to be achieved."

20. In case of ***State of U.P. and others Vs. Ministerial Karamchari Sangh*** reported in ***AIR 1998 SC 303***, the Apex Court has held that even if persons holding same posts performing similar work -if their recruitment, qualification and promotion is different, it would be sufficient for fixing different scales. In para 16 and 17of the judgement the Apex Court has quoted the observation of the decisions rendered in ***Federation of All India Customs and Central Excise Stenographers, AIR 1988 SC 1291 and State of Haryana Vs. Jasmer Singh reported in AIR (1997) SC 1788***. Thereafter in para 18 of the aforesaid decision it has been held that the mode of recruitment, qualification, promotion are totally different in both the categories of posts. For ready reference para 16 and 17 of the aforesaid judgement is quoted as under:-

"16. It is also settled proposition that the evaluation of such jobs for the purpose of pay scales must be left to expert body and unless there are any malafides, its evaluation should be accepted. In the case of Federation of All India Customs and Central Excise Stenographers (Recognized) Vs. Union of India, (1988) 3 SCC 91: (AIR 1988 SC 1291), this Court observed as follows (para 7 of AIR):

"Equal pay for equal work is a fundamental right. But equal pay must depend upon the nature of the work done. It cannot be judged by the mere volume of work, there may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgment is made bonafide, reasonably on an intelligible criterion which has a rational nexus with the object of differentiation, such differentiation will not amount to discrimination. It is important to emphasize that equal pay for equal work is a concomitant of Article 14 of the Constitution. But it follows naturally that equal pay for unequal work will be a negation of that right."

"17. The same view was reiterated in a recent judgment State of Haryana Vs. Jasmer Singh (1996) 11 SCC 77. This Court in that case held as follows:-

"The principle of "equal pay for equal work" is not always easy to apply. There are inherent difficulties in comparing and evaluating work done by different persons in different organizations, or even in the same organization. The principle was originally enunciated as a part of the Directive Principles of State Policy in Article 39 (d) of the Constitution. In the case of Randhir Singh Vs. Union of India (AIR 1982 SC 879), however, this Court said that this was a constitutional goal capable of being achieved through constitutional remedies and held that the principle had to be read into Articles 14 and 16 of the Constitution. In that case a Driver-constable in the Delhi Police Force under the Delhi Administration claimed equal salary as other Drivers and this prayer was granted. The same principle was subsequently followed for the purpose of granting relief in Dhirendra Chamoli Vs. State of U.P. (1986 (1) SCC 637) and Jaipal Vs. State of Haryana (AIR 1988 SC 1504). In the case of Federation of All India Customs and Central Excise Stenographers (Recognized) Vs. Union of India (AIR 1988 SC 1291), however, this Court explained the principle of "equal pay for equal work" by holding that differentiation in pay scales among Government servants holding same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. In that case different pay scales fixed for Stenographers (Grade I) working in the Central Secretariat and those attached to the heads of subordinate offices on the basis of a recommendation of the Pay Commission was held, as not violating Article 14 and as not being contrary to the principle of "equal pay for equal work". This Court also said that the judgment of administrative authorities concerning the responsibilities which attach to the post, and the degree of reliability expected of an incumbent, would be a value judgment of the authorities concerned which, if arrived at bonafide, reasonably and rationally, was not open to interference by the Court."

21. In case of ***State of Haryana & another Vs. Haryana Civil Secretariat Personal Staff Association, J.T. 2002(5) SC 189*** while dealing with doctrine of "equal pay for equal work" in para 8 and 9 of the decision, Hon'ble Apex Court has held as under :-

"8. From the discussions in the impugned judgment it is clear to us that the High Court has ignored certain settled principles of law for determination of the claim on parity of pay scale by a section of government employees. While making copious reference to the principle of equal pay for equal work and equality in the matter of pay, the High Court overlooked the position that the parity sought by the petitioner in the case was with employees having only the same designation under the central government. Such comparison by a section of employees of state government with employees of central government based merely on designation of the posts was misconceived. The High Court also fell into error in assuming that the averment regarding similarity of duties and responsibilities made in the writ petition was unrebutted. The appellants in their counter affidavit have taken the specific stand that no comparison between the two sections of employees is possible since the qualifications prescribed for the P.A.s. in the central secretariat are different from

the P.A.s. in the state civil secretariat. Even assuming that there was no specific rebuttal of the averment in the writ petition that could not form the basis for grant of parity of scale of pay as claimed by the respondent. The High Court has not made any comparison of the nature of duties and responsibilities, the qualifications for recruitment to the posts of P.A.s in the state civil secretariat with those of P.A.s of the central secretariat."

"9. This court in the case of Secretary, Finance Department & others Vs. West Bengal Registration Service Association & others., dealing with the question of equation of posts and equation of salaries of government employees, made the following observations:

.....Courts must, however, realize that job evaluation is both a difficult and time consuming task which even expert bodies having the assistance of staff with requisite expertise have found difficult to undertake sometimes on account of want of relevant data and scales for evaluating performances of different groups of employees.....Ordinarily a pay structure is evolved keeping in mind several factors, e.g. (i) method of recruitment, (ii) level at which recruitment is made, (iii) the hierarchy of service in a given cadre, (iv) minimum educational/technical qualifications required, (v) avenues of promotion, (vi) the nature of duties and responsibilities, (vii) the horizontal and vertical relativities with similar jobs, (viii) public dealings, (ix) satisfaction level, (x) employer's capacity to pay, etc.....There can, therefore, be no doubt that equation of posts and equation of salaries is a complex matter which is best left to an expert body unless there is cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and court's interference is absolutely necessary to undo the injustice."

22. In case of ***State of Haryana and another Vs. Tilak Raj and others, J.T. 2003(5) S.C. 544***, Hon'ble Apex Court has occasion to consider the doctrine of equal pay for equal work again in context of daily wages helpers of Haryana Roadways. While taking note of earlier decision rendered in case of ***Federation of All India Customs and Central Excise Stenographers (Recognised) and others Vs. Union of India and other***s reported in ***AIR 1988 S.C. 1291***, ***State of U.P. Vs. J.P. Chaurasia*** reported in ***AIR 1989 S.C. 19, Harbans Lal Vs. State of Himachal Pradesh reported in J.T. 1989 (3) S.C. 296, Ghaziabad Development Authority Vs. Vikram Chaudhary*** reported in ***A.I.R. 1995 S.C. 2325, State of Haryana and others Vs. Jasmer Singh and others*** reported in ***A.I.R. 1997 S.C. 1788***, the Apex Court has set aside the judgement and order of High Court under challenge and in para 11 of the decision held that appellant State has to ensure that minimum wage prescribed for such worker may be paid to the respondents. The observation made in para 10 of the judgement is apt to be reproduced as under :

"10. A scale of pay is attached to a definite post and in case of a daily wager, he holds no post. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to

substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-Ã -vis an alleged discrimination. No material was placed before the High Court as to the nature of duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

"Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula."

23. From a close and intensive analysis of the decisions of the Hon'ble Apex Court it is clear that there appears three line of cases have been under consideration before the Hon'ble Apex Court on this point. One line of the cases was that where the employees were engaged on daily wage or casual work charge or on ad-hoc basis to cater the needs of increased work in a particular establishment or in a project for short duration without sanction of any permanent post for them in the regular establishment, their wages were paid and charged against particular work or projects. The employees have invoked the doctrine of equal pay for equal work while claiming pay parity with regular employees of the establishment working on the corresponding posts. In such cases the relief of regularisation have also been sought for wherein in some cases Hon'ble Apex Court has directed to frame the scheme of regularisation within a time frame and in some cases on direction of the Hon'ble Apex Court scheme of regularisation and payment of remuneration framed by the authorities concerned have been under consideration before the Hon'ble Apex Court. In case of ***Surendra Singh & another Vs. the Engineer in Chief, C.P.W.D. & others reported in AIR 1986 S.C. 584, Dhirendra Chamoli Vs. State of U.P. reported in AIR 1986 (1) S.C.C. 637, Post and Telegraph Department through Bhartiya Dock Mazdoor Manch Vs. Union of India reported in AIR 1987 S.C. 2342, U.P. Income Tax Department Contingent Paid Staff Welfare Association Vs. Union of India reported in AIR 1988 S.C. 517, Bhagwati Prasad Vs. Delhi State Mineral Corporation reported in AIR 1990 S.C. 371, Dharward District C.P.W.D. Literate Daily Wage Employees Association & others Vs. State of Karnataka & others reported in AIR 1990 S.C. 883, Chief Conservator of Forest Vs. Jagannath Maruti Kundhare reported in AIR 1996 S.C. 2898 and State of Punjab Vs. Devendra Singh reported in 1998 (9) S.C.C. 595.*** In one set of cases referred above the Apex Court has directed to regularise the employees in one block and pay them the same minimum pay scale as admissible to the regular employees. In other set of cases directions were made to absorb them in a phased manner under scheme, which depends upon facts of each case under scheme. In ***Mool Raj Upadhyay Vs. State of H.P., 1994 Supplement-2 S.C.C. 316***, the Apex Court has approved the scheme under which daily wage workers who have not completed ten years of service were to be paid daily wage at the rate prescribed by

the Government of H.P. from time to time for daily wage employees falling under class III or class IV till they are appointed regularly. Similar view has also been taken by the Apex Court in ***Gujrat Agricultural University Vs. Rathed Labhu Baker & others reported in AIR 2001 S.C. 706***, wherein the proposed scheme of the University for payment of remuneration which contains payment of minimum wage as prescribed by the Government from time to time to such daily wage employees was approved by Hon'ble Apex Court. Similar view has also been taken by the Hon'ble Apex Court in ***State of U.P. & others Vs. Putti Lal,(2002) 2 UPLBEC 1595***, wherein direction for framing of scheme of regularisation of daily wage employees of forest department was given by the Apex Court. In pursuance of which scheme of regularisation has been framed by the State Government in exercise of rule making power under the proviso of Article 309 of the Constitution of India. In connection of payment of wages to such daily wage employees the Apex Court has observed that daily wager would be entitled to draw at minimum of pay scale being received by their counter-part in the Government and would not be entitled to other allowances or increment so long as they continue on daily wage. The question of their regularisation was directed to be dealt with in accordance with statutory rules framed by the Government. In ***State of Haryana Vs. Piyara Singh reported in AIR 1992 S.C. 2130***, the Apex Court has held that work charge daily wage and casual employees who are not workman in Industrial Dispute Act blanket direction to regularise all of them on completion of one year service are not sustainable and similarly direction to regularise persons of above categories who are workmen on completion of four or five years is also not sustainable and similar direction to apply rule of "equal pay for equal work' without discussion has also been held not sustainable. Last case referred earlier is case of ***State of Haryana & others Vs. Tilak Raj & others reported in J.T. 2003 (5) S.C. 544***, Hon'ble Apex Court while setting aside the judgment of High Court under challenge has held that the appellant State has to ensure the minimum wages which are prescribed for such worker and the same is paid to them.

24. The second line of cases were those cases in which the fixation of pay of regular employees on account of various revisions of pay scale and amalgamation and bifurcation of posts were almost under consideration. However in certain cases different group of employees having similar designations and posts and similar nature of work performed by them have also invoked the doctrine of "equal pay for equal work'. Although in forgoing paragraphs the sufficient discussion in respect of such cases have already been made. The last such case referred earlier is ***Haryana Civil Secretariat Personal Staff Association's case (supra)*** wherein the Hon'ble Apex Court has held that there can be no doubt that the equation of posts and equation of salaries is complex matter which is best left to an expert body unless there is a cogent material on record to come to a firm conclusion that a grave error had crept in while fixing the pay scale for a given post and court's interference is absolutely necessary to undo the injustice. The third line of cases were that in which part time employees have claimed regularisation and pay parity with the regular employees on allegation that they are also discharging similar and identical duties to that of

regular employees. The third line of cases are more akin and nearer to the first line of cases referred earlier, therefore, the principles of enunciated in both the lines of the cases referred above have some material bearing for deciding third lines of cases also.

25. The case in hand comes under the category of third line of cases. Thus for testing at the touchstone of principles enunciated by the Apex Court in aforesaid cases, it is necessary to examine the qualification for the post, procedure, mode and manner of recruitment, duties and responsibilities discharged by the regular employees and part time teacher including the quality, nature, volume of the work. In this connection at very outset it is necessary to mention here that before commencement of U.P. Secondary Education Services Selection Board Act, 1982, hereinafter referred to as U.P. Act No. 5 of 1982, for recruitment of teachers in Higher Secondary Institution recognized by the Board, the provisions of U.P. Act No.2 of 1921 were in operation. Earlier to insertion of Section 7-AA by U.P. Act No. 18 of 1987 there was no provision either under the provisions of U.P. Act No. 5 of 1982 or under the provisions of U.P. Act No. 2 of 1921 for employment of part time teacher in the Higher Secondary Institution recognized by the Board. It is first time the provision has been made by the U.P. Act No. 18 of 1987 for employment of part time teacher with effect from 14.10.1986 to cater the need of teaching in the institution on account of recognition of any new subject or group of subject or higher classes or opening of a new section in existing class. Although the educational qualification prescribed for such teacher is same as provided in regulation 1 of Chapter II of U.P. Intermediate Education Act but the procedure of recruitment is quite different. In case of part time teacher the selection has to be made by selection committee constituted by the committee of management of the institution though after advertisement of vacancies in two daily newspapers which have wide circulation in State as well as locality in question; whereas before commencement of U.P. Act No. 5 of 1982 the regular teachers were also recruited by the committee of management of the institution but the constitution of selection committee was of different nature as provided under Chapter II of the regulations and manner and criteria of selection was also of different nature which was of much high standard than that of the part time teacher. After commencement of U.P. Act No. 5 of 1982 the recruitment of teachers to be employed in the Intermediate Colleges and Higher Secondary Schools or High School recognised by the Board a total altogether different scheme has been framed under the Act. The statement of objects and reasons appended to the bill of the aforesaid Act throws sufficient light, which is also much significant and have material bearing on the question in issue. The statement of objects and reasons, inter alia, Postulates that the appointment of teachers in Secondary institutions recognized by Board of High School and Intermediate Education was governed by the Intermediate Education Act, 1921 and regulations made there under. It was felt that the selection of teachers under the provisions of said Act and regulations was some time not free and fair. Besides the field of selection was also very much restricted. This adversely affected the availability of suitable

teachers and standard of education. It was, therefore, considered necessary to constitute Secondary Education Service Commission at State level to select Principals, Lecturers, Head Master and L.T. Grade Teachers. The provisions of Section 3 of U.P. Act No. 5 of 1982 pertains to establishment of Board which means Uttar Pradesh Secondary Education Services Selection Board. Section 4 of the Act contains provisions for composition of Board, which inter alia provides for appointment of Chairman, Vice-chairman and nine members of Board to be appointed by State Government. The qualifications of Chairman of the Board is also of sufficiently high standard, unless a person is or has been a Vice-Chancellor of University established by law is or has been in the opinion of the State Government an outstanding officer of administrative service not below the rank of Secretary of the State Government or Director of Education, he cannot be appointed as such. Similarly the qualifications prescribed for appointment of Vice-Chairman and members of Board are also of much standard. Under Section 10 of the Act procedure for selection by direct recruitment has been given and under Section 12 of the Act the procedure for selection by promotion have been laid down. Besides this the Rules have also been framed to give effect the provisions of Act. Initially U.P. Secondary Education Services Commission Rules, 1983 was framed in the rule making power under the U.P. Act No.5 of 1982. Later on it was replaced by U.P. Secondary Education Services Commission Rules, 1995. Ultimately, 1995 Rule was also replaced by another set of rules, namely, U.P. Secondary Education Services Selection Board Rules, 1998. These rules are very much comprehensive, transparent and have also intended to ensure fair selection of suitable candidates on merits. Under the rules every institution through officers of Education Department is required to intimate the vacancies of teachers to the Board, thereupon the Board has to take steps for holding selection. The selections are made by clubbing the vacancies of all the institutions available throughout the State after due advertisement atleast in two daily newspapers having wide circulation in the State. The functioning of Commission/Board is also regulated by statutory regulations framed for the purposes. After selection and placement of selected candidates, the institutions are directed to issue letter of appointment to the selected candidates. Now the committee of management of the institution has no role to play in the process of selection and recruitment of such teachers except to issue the letter of appointment to such recommended teacher by the Board.

26. Thus an intensive analysis and close scrutiny of the aforesaid provisions of law go to show that there is vast difference in the manner, mode and procedure of selection of part time teacher and regular teachers appointed in substantive vacancies in the Secondary institutions recognized by the Board of High School and Intermediate Education. On this count both the teachers cannot be comparable to each other in standard of recruitment and accordingly the qualities of work and duties discharged by them can also not be comparable. Besides this it is also relevant to mention here that even a regular teacher already working in any institution can be appointed as part time teacher in the same institution or in any other institution as provided under Sub-

section 6 of Section 7-AA of U.P. Act No. 2 of 1921. This piece of legislation, which is intrinsic evidence in the matter, also leads to an irresistible conclusion that both the teachers part time and regular cannot be equated at the same footing. It is also because of the reason that part time teacher can be appointed for a limited purpose as an interim measure to teach a particular subject in the institution in the contingencies referred under Section 7-A of U.P. Act No. 2 of 1921; whereas regular teachers are appointed against substantive vacancies. Therefore, the part time teachers are not comparable to the regular teacher in the manner or mode of recruitment, quality and volume of work and duties and responsibilities assigned to and discharged by them. Although in the pleadings of the writ petition the petitioner has made assertion that he is discharging duties similar to the regular lecturer who has been appointed against substantive vacancy and against sanctioned post and he has also been assigned the duties of Invigilator and as a valuer of answer-books of examinees of High School and Intermediate examination conducted by U.P. Intermediate Education Board but the aforesaid pleadings in my considered view cannot take the place of proof for treating both categories of teachers on identical footing because of the other reason also. It is possible that certain duties and responsibilities of the part time teacher and regular teacher may be similar to each other but that alone can also not be sufficient proof for the same as some time duties of part time teacher might have trappings of regular teacher but the same can also not be treated to be a sufficient foundation for treating both the teachers at identical footings. It might also be possible that there may be a large degree of difference in responsibilities of part time teacher and regular teacher. That apart it is also well settled that a pay scale is attached to definite post and in case of daily wager and similarly part timer who holds no post cannot be held liable to hold any post to claim even any comparison with regular and permanent staff for any/or all purposes including equal pay and allowances. Thus in view of the aforesaid discussion, I am of considered opinion that the petitioner cannot be held entitled to be treated to be identical in any manner indicated herein before at par with regular teachers employed in the Secondary institutions recognised by the Board, as such cannot be held entitled at par with regular teachers in respect of payment of salary and other allowances paid to the regular teachers.

27. In the case of ***K. Krishnamacharyulu and others Vs. Sri Venkateswara Hindu College of Engineering and another reported in AIR 1998 S.C. 295***, the admitted position was that the appellant and six others had been appointed on daily wages to the post of Lab Assistant and non-teaching staff of the respondent-private college. They were being paid daily wages. On dismissal of their writ petition for direction to pay equal pay for equal work on par with the regular employees, they have filed appeal before Hon'ble Apex Court. The Apex Court has held that it is not in dispute that executive instructions issued by the Government have given them right to claim pay scale so as to be on par with the Government employees. The question was when there is no statutory rule issued in that behalf, at relevant time the institution being not in receipt of any grant-in-aid whether the writ petition under Article 226 of the Constitution of

India is not maintainable? In consequence are they also not entitled to parity of pay scales as per executive instructions of the Government? In that context of the matter the Hon'ble Apex Court has held that private institutions cater to the needs of educational opportunities, the teacher duly appointed to the post in private institutions also entitled to seek enforcement of the orders issued by the Government and it was also held that when an element of public interest is created and the institution is catering to that element, the teacher, the arm of the institution is also entitled to avail of the remedies provided under Article 226 of the Constitution of India and accordingly while holding that writ petition is maintainable, it was also held that on the basis of executive instructions the appellants are also entitled to same benefits as provided to the other employees. Thus in this view of the matter this case can be no assistance in any manner to the petitioner's case as there does not exist any executive instruction in favour of petitioner on the basis of which he can claim the parity of pay scale at par with regular teachers working on corresponding posts.

28. In case of ***The Chandigarh Administration & others Vs. Mrs. Rajni Vali and others*** reported in ***J.T. 2000(1) SC 159*** in para 4 of the judgement the Apex Court has observed that "from the discussions in the impugned judgement it appears that the writ petitioners pressed their claim mainly on the principle of equal pay for equal work. They also made a grievance about discriminatory treatment meted out to them by Chandigarh Administration and Management. The appellants on other hands refuted the claim on the ground of conditional grant of permission to open higher secondary classes and paucity of funds to meet the additional burden in case the prayer in writ petition is allowed. Substantially the same position was repeated during the hearing of the case in this Court. Learned counsel for the appellants further submitted that under the rules governing the grant-in-aid, the staff position of aided institution as on 30th November, 1967 has been frozen. Since all the respondents were appointed subsequent to that date, they are not entitled to salary at par with teachers of other aided schools who were in service by cut of date." In that context of the matter after taking note of earlier decisions mentioned in paragraphs 6, 7, and 8 of the judgements, the Hon'ble Apex Court has held in paragraph 9 of the judgement that "tested on the touch stone of the principles laid down in aforementioned decisions, the position is manifest that there is no justification for denying the claim of respondents for parity of pay scale and to accept the contention of appellants will amount to confirming the discriminatory treatment against the respondents". In this regard, it is necessary to point out that the Hon'ble Apex Court has rendered the aforesaid decision in context of different statutory schemes, which is not similar to the statutory schemes, which is subject matter under consideration. Beside this the question involved in this case is also on different footing and was not under consideration before the Apex Court in the aforesaid judgement. Therefore, the aforesaid case is clearly distinguishable on the facts, accordingly it can be of no assistance to petitioner's case.

29. In case of ***State of West Bengal and others Vs. Pantha Chatterjee and***

others reported in J.T. 2003(Vol.(5) SC 448 the West Bengal Government raised a battalion of part-time Border Wing Home Guards in the year 1977. The Union of India agreed to reimburse the expenditure thereon to the State Government. The Memorandum of appointment stipulating that the volunteers are recruited for casual work as part-time staff of the Government and they would render voluntary service and be subject to rotational duty annually, but the voluntary concept was not followed in letter and spirit, instead thereof they were made to render services similar to the regular Border Wing Home Guards of West Bengal and for long years they were deployed for patrolling the borders. However their emoluments and service conditions were not at par with regular Border Wing Home Guards. Therefore, they filed writ petition seeking pay parity and application of service conditions as applicable to the regular Home Guards. While deciding the writ petition the learned Single Judge has found that part time Home Guards are rendering services similar to the regular Home Guards and noticed discriminatory treatment meted out to the part timers and directed the State to extend the benefit admissible to the regular Border Wing Home Guards to the part time Border Wing Home Guards also. The Division Bench has also upheld the findings of Single Judge except the direction regarding award of cost to each writ petitioners. Feeling aggrieved against which the State of West Bengal had preferred Special Leave to Appeal before Hon'ble Apex Court. While dismissing the appeal of the State the Hon'ble Apex Court has held that High Court had rightly concluded that so-called part timer could not be treated differently from the regular Border Wing Home Guards, hence they were entitled to parity with them in respect of pay, allowances and other service conditions. The facts of the case in hand are quite distinguishable to the facts and circumstances of the aforesaid case. In the aforesaid case it was found as a fact that part time Border Wing Home Guards of West Bengal were made to rendered services similar to regular Border Wing Home Guards of West Bengal for long times about fifteen years and they were continuously deployed for patrolling the border like regular Border Wing Home Guards, as such in the aforesaid facts and circumstances of the case High Courts and Hon'ble Apex Court has treated the part timers at par with regular Home Guards. Accordingly all the service benefits admissible to the regular Home Guards have been extended to the part timers including similar pay scale attached to them. As indicated earlier the facts of the instant case is not similar to the facts of aforesaid case, as such the same cannot be any assistance to the petitioner's case.

30. Thus in view of the discussions made above, I have no hesitation to hold that the principle of equal pay for equal work cannot apply in the facts and circumstances of the case in hand, as such it cannot be held that the petitioner is entitled to parity in the pay scale at par with regular lecturer appointed in the institutions recognized by the Secondary Education Board. Therefore, the question formulated in this regard is answered accordingly.

31. Now the next question which arises for consideration as to whether in given facts and circumstances of the case, any direction for treating the petitioner as regular lecturer or direction to regularise

him on the post of lecturer can be given? In this regard the submission of the learned counsel for petitioner is that from the date of appointment till date, the petitioner is continuously working and discharging the duties of lecturer in the subject of Biology in the institution in question. Therefore, he is entitled to be absorbed and to be treated as regular lecturer or a direction to regularise his services may be given to the authorities. In this connection, it is necessary to point out that the regularisation has been recognised as a different mode of recruitment for that purpose, there must exist post for which regularisation is to be made and there must exist rules under which regularisation is to be made. Thus these two conditions are required to be examined before any direction can be issued to consider for regularisation. It is not in dispute that petitioner's recruitment has been made to cater the need of imparting education in Biology subject in Intermediate classes on account of recognition of the aforesaid subject given by the Secondary Education Board in the contingencies mentioned in Section 7-A of U.P. Act No.2 of 1921 and no post of lecturer in Biology subject has been created by the competent authority i.e. Director of Secondary Education, Uttar Pradesh. Therefore, his appointment cannot be treated against any vacancy in respect of any sanctioned post. The petitioner himself has moved an application before the Director of Secondary Education Board, Uttar Pradesh, Allahabad for creation and sanction of post of lecturer in Biology subject on 13.11.2001 contained in Annexure-15 of the writ petition and reminder dated 26.11.2001 contained in Annexure-16 of the writ petition and again an application to the same effect addressed to the Secretary, Madhyamik Education, Government of Uttar Pradesh, Lucknow contained in Annexure-17 of the writ petition and reminder addressed to him contained in Annexure-18 of the writ petition. These facts demonstrate that there exists no sanctioned post entitling the petitioner for seeking any direction to be considered for regularisation. At the best, the authorities can be directed to consider the creation and sanction of necessary post provided the application is moved by the Committee of Management of the institution according to the norms for sanction of the post having regard to the strength of the students inasmuch as other conditions required to be fulfilled by the institution. The application/representation of the petitioner straight way to the Director of Secondary Education, Uttar Pradesh, Allahabad and other Officers of the education department can be of no avail unless the same is moved by the Committee of Management of the institution. The petitioner has filed the Government Order dated 20.11.1977, which provides the norms of the teachers and other employees of Secondary Education. In paragraph 3 of the Note appended to the aforesaid Government Order, it has been specifically mentioned that formal creation and sanction of the post by the competent authority is necessary and it cannot be treated to be automatically created/sanctioned on the basis of the norms alone. Therefore, in view of the facts and circumstances of the case, no direction can be issued to the authorities of the education department to consider for creation and sanction of the post of lecturer in Biology subject, as sought by the petitioner through the aforesaid applications/representations. However, it shall be open to the

Committee of Management of the institution to take fresh steps by moving an application for creation and sanction of the post of lecturer in Biology subject on a prescribed format according to the Government Order and rules applicable for creation of such post, thereupon the respondent no.2 is directed to examine the matter in accordance with law and pass appropriate order thereon as soon as possible within two months from the date of moving such application by the institution in question.

32. So far as the rule in respect of the regularisation is concerned, the petitioner did not point out any statutory rule on the basis of which his claim for regularisation on the post of lecturer in Biology subject can be considered. It is well settled that unless there exists any rule for regularisation, no direction can be issued by this Court to consider the claim for regularisation of an employee. At this juncture, an incidental question arises for consideration as to whether the Court can issue any direction to the authority to frame rule, as indirectly sought by the petitioner? In this connection, it is necessary to point out that in the process of judicial review under Article 226 of the Constitution of India this Court has a very limited scope as laid down by the Hon'ble Apex Court from time to time. In **Asif Hameed and others v. State of Jammu and Kashmir and others, reported in AIR 1989 Supreme Court 1899**, Hon'ble Apex Court while examining the scope of judicial review under Articles 32 and 226 of the Constitution of India vis-a-vis doctrine of separation of powers, has very categorically held in paragraphs 17 and 19 of the decision as under:-

"17. Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the constitution make have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

19. When the State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned

under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self imposed limits. The court sists in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to sermonize qua any matter which under the constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

33. Similarly, in **Mullikarjuna Rao and others v. State of A.P.and others, reported in AIR 1990 Supreme Court 1251**, in para 12 after relying upon earlier judgments, the Hon'ble Apex Court has held that the High Court or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution of India. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to itself a supervisory role over the rule making power of the executive under Article 309 of the Constitution of India.

34. Similar view has also been taken by the Hon'ble Apex Court in **Chandigarh Administration and another v. Manpreet Singh and others, AIR 1992 SC 435**. In para 20 of the aforesaid judgment also Hon'ble Apex Court has held that the Courts cannot assume role of rule making authority and cannot also act as appellate authority over rule making power of the executive and the Courts cannot usurp the functions assigned to the executive authority over the rule making power. In case of **State of Haryana and others v. Piara Singh and others, reported in AIR 1992 Supreme Court 2130**, Hon'ble Apex Court has taken a note of earlier cases of **Dharwad District PWD Literate Daily wage Employees Association v. State of Kerala, AIR 1990 SC 883 and Jacob v. Kerala Water Authority and others, AIR 1990 SC 2228.** In the first case a direction has been issued to regularise the casual and daily rated employees, who have completed ten years service by 31st December, 1989. Guidelines were also issued for regularisation and in the second case while issuing guidelines for regularisation to the employees of certain length of service, other guidelines have also been issued for consideration of their claim for regularisation as well as for relaxation of their age in regular recruitment, but in para 19 of the judgment the Hon'ble Apex Court has held that blanket directions by the High Court for regularisation of all the work-charged, daily wage workers and casual labourers, who are not workmen under the Industrial Disputes Act , on completion of one year, are unsustainable and similar directions to regularise the persons of the above categories, who are workmen, on completion of 4 or 5 years of service, are also unsustainable. But in para 25 of the decision it is further observed that efforts should be made to regularise such daily wage, casual and work-charge employees as far as possible and as early as possible subject to fulfillment of qualifications prescribed for the post and availability of the work.

35. In **J. & K. Public Service Commission etc. v. Dr. Narinder Mohan and others, reported in AIR 1994 SC 1808**, in para 11 of the judgment Hon'ble Apex Court has held that the directions issued by the Hon'ble Apex Court from time to time for regularisation of ad hoc appointments, are not ratio of the decision, rather the aforesaid directions were to be treated under Art. 142 of the Constitution of India and ultimately held that the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the Public Service Commission to consider the cases of the respondents of the aforesaid case. For ready reference the observations made by the Hon'ble Apex Court in paragraph 11 of the decision is reproduced as under:-

"11. This Court in Dr. A. K. Jain V. Union of India, 1988 (1) SCR 335, gave directions under Article 142 to regularise the services of the ad hoc doctors appointed on or before October 1, 1984.It is a direction under Article 142 on the particular facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents. Article 142 -power is confided only to this Court. The ratio in Dr. P.C.C. Rawani v. Union of India (1992) 1 SCC 331, is also not an authority under Article 141 .Therein the orders issued by this Court under Article 32 of the Constitution to regularise the ad hoc appointments had become final. When contempt petition was filed for non-implementation, the Union had come forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In Union of India v. Gian Prakash Singh, 1993(5) JT (SC) 681 this Court by a Bench of three Judges considered the effect of the order in A.K. Jain's case and held that the doctors appointed on ad hoc basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the PSC for recruitment. In H.C. Puttaswamy v. Hon'ble Chief Justice of Karnataka, AIR 1991 SC 295: (1991 Lab IC 235), this Court while holding that the appointment to the post of clerk etc. in the subordinate courts in Karnataka State without consultation of the PSC are not valid appointments, exercising the power under Article 142, directed that their appointments as a regular, on humanitarian grounds, since they have put in more than 10 years service. It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141. In State of Haryana v. Piara Singh, (1992 AIR SC 2130), this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary employees by regularly selected employees, as early as possible. Therefore, this Court did not appear to have intended to lay down as a general rule that in every category of ad hoc appointment, if the ad hoc appointee continued for long period, the rules of

recruitment should be relaxed and the appointment by regularisation be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned single Judge is right in directing the State Government to notify the vacancies to the PSC and the PSC should advertise and make recruitment of the candidates in accordance with the rules."

36. At this juncture it is also necessary to point out that in view of the provisions of Section 16 of U.P. Act No.5 of 1982 any other appointment, which is not covered by the provisions of the aforesaid section, would be void abinitio. Therefore, even on creation of necessary post of Biology lecturer and on occurance of vacancy in respect thereof, it would not be legally permissible to issue any direction for absorption of the petitioner or to treat him as regular lecturer or to consider his case for regularisation. The provisions contained in Section 33-A, 33-B, 33-C and 33-D of U.P. Act No.5 of 1982 are also indicative of the fact that for regularisation of teachers of Higher Secondary Institutions, who have been appointed against the sanctioned post on ad hoc basis, the State legislature had intervened from time to time and regularised the services of such ad hoc teachers. As indicated herein before since this Court cannot mandate the legislature to enact law regarding regularization of part time teachers working in the institutions recognized by the Board. Therefore, in absence of legislative enactment, the petitioner's case can neither be considered for regularisation nor absorption on the post of lecturer nor he can be treated to be regular lecturer in the institution in question. Thus, in view of the aforesaid discussions, the above question formulated by me is answered accordingly.

37. Now the next question arises for consideration is as to whether the provisions of paragraph 6 of the Government order dated 10th August, 2001 is ultra virus to the provisions of Section 7-AA (5) of U.P. Act No. 2 of 1921? In this regard the submission of learned counsel for the petitioner is that under the provisions of Sub-section 5 of Section 7-AA of the U.P. Act No. 2 of 1921, the State Government is empowered to fix honorarium payable to the part time teacher by general or special order issued in this behalf, the State legislature has conferred the aforesaid power upon the State Government but State Government instead of exercising the aforesaid power by itself has virtually abdicated/delegated its power to the committee of management of the institution to fix honorarium payable to the part time teachers. While doing so only guideline provided under the aforesaid Government order is that the payment of such honorarium may not be less than fixed for payment of "skilled workman". Learned counsel for the petitioner while relying upon decisions of the Hon'ble Apex Court rendered in ***Haryana Unrecognised Schools' Association Vs. State of Haryana (1996) 4 SCC 225*** and a case which was between ***Ahmedabad Private Primary Teachers' Association and Administrative Officer and others reported in 2004 (100) FLR 601***, has further submitted that State Government is incompetent to treat the "teachers of educational institution" at par with workmen of Industrial establishment and direct the committees of Management to fix their wages not less than wage fixed

for "skilled workman" under the provisions of Minimum Wages Act.

38. In case of **Haryana Unrecognised Schools' Association (Supra)** the question for consideration before the Hon'ble Apex Court was that whether teachers of an educational institution can be held to be "employees" under Section 2 (i) of the Minimum Wages Act, 1948 to enable the Government to fix their minimum wages. It appears that the Government of Haryana in exercise of power conferred under Section 27 of the aforesaid Act added in Part I of the Schedule Item 40 describing employment in private coaching classes, schools including nursery schools and technical institutions, for the purpose of fixing minimum rate of wages for the employees therein. By notification dated 30.4.1983 the State Government in exercise of power conferred under Sub-section (2) of Section 5 of the aforesaid Act fixed the minimum rate of wages in respect of the different categories of employees serving in such schools. Challenging these notifications the writ petitions were filed essentially on the ground that teachers of educational institutions cannot come within the purview of the Act since they are not "workman" within the meaning of Industrial Dispute Act, 1947 nor would they be employees under Section 2(i) of the Act. The High Court however dismissed the writ petition on the ground that power of the State Government to add any employment to the schedule under Section 27 of the Act is without any fetter and further the appropriate Government has tried to mitigate the sufferings and exploitation of educated trained/untrained teachers at the hands of management/employer of private educational institution and Section 5 of the Act gives large power to the State Government but in Special Leave to Appeal Hon'ble Apex Court has held that a combined reading of Sections 3, 2(1) and Section 27 of the Minimum Wages Act, 1948 and statement of object and reasons of the legislation makes it explicitly clear that State Government can add to either part of the schedule any employment where the persons are employed for hire or reward to do any work skilled or unskilled, manual or clerical. If the persons employed do not do the work of any skilled or unskilled or of manual or clerical nature then it would not be possible for the State Government to include such an employment in the schedule in exercise of power under Section 27 of the Act. Since the teachers of educational institution are not employed to do any skilled or unskilled or manual or clerical work and therefore, could not be held to be a employee under Section 2(i) of the aforesaid Act. It is beyond the competence of the State Government to bring them under the purview of the aforesaid Act by adding the employment in educational institution in the schedule in exercise of power under Section 27 of the Act. The State Government in exercise of power under Section 5 (2) the Act is not entitled to fix minimum wage of such teachers. Accordingly the notifications so far as teachers of educational institution are concerned had been quashed. For ready reference paragraphs 10 and 11 of the decision of Hon'ble Apex Court are extracted as under:

"10. A combined reading of the aforesaid provisions as well as the object of the legislation as indicated earlier makes it explicitly clear that the State

Government can add to either part of the Schedule any employment where persons are employed for hire or reward to do any work skilled or unskilled, manual or clerical. If the persons employed do not do the work of any skilled or unskilled or of a manual or clerical nature then it would not be possible for the State Government to include such an employment in the Schedule in exercise of power under Section 27 of the Act. Since the teachers of an educational institution are not employed to do any skilled or unskilled or manual or clerical work and therefore could not be held to be an employee under Section 2(i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational institution in the Schedule in exercise of power under Section 27 of the Act. This Court while examining the question whether the teachers employed in a school are workmen under the Industrial Disputes Act had observed ***in A. Sundarambal Vs. Government of Goa, Daman & Diu 1988 (4) SCC 42 (SCC p. 48, para 10)****:*

"We are of the view that the teachers employed by educational institutions whether the said institutions are imparting primary, secondary, graduate or postgraduate education cannot be called as "workmen' within the meaning of Section 2(s) of the Act. Imparting of education, which is the main function of teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. A teacher educates children; he moulds their character, builds up their personality and makes them fit to become responsible citizens. Children grow under the care of teachers. The clerical work, if any they may do, is only incidental to their principal work of teaching."

"11. Applying the aforesaid dictum to the definition of employee under Section 2(i) of the Act it may be held that a teacher would not come within the said definition. In the aforesaid premises we are of the considered opinion that the teachers of an educational institution cannot be brought within the purview of the Act and the State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers. The impugned notifications so far as the teachers of the educational institution are concerned are accordingly quashed. This appeal is allowed. Writ petition filed succeeds to the extent mentioned above. There will be no order as to costs."

39. In case of **Ahmedabad Private Primary Teachers' Association (Supra)** the question for consideration before the Hon'ble Apex Court was whether the teachers who are mainly employed for imparting education fall within the definition of the expression "employee" under Section 2(e) of Payment of Gratuity Act, 1972 and on that account whether they are entitled to claim the payment of gratuity under the provisions of the aforesaid Act. The Apex Court while taking note of para 7 of the earlier decision rendered in A. Sundarambal (Supra) wherein it was held that even though an educational institution has to be treated as an Industry, teachers in an educational institution cannot be considered as workman and after examining the various definitions of the word "employee" in different labour law enactments considered alongwith definition of word "employee" used in

Section 2 (e) of Payment of Gratuity Act has held that teachers who are mainly employed for imparting education do not answer the description of "employees" who are skilled, semi-skilled or unskilled and accordingly not covered for availing gratuity benefits under the aforesaid Act.

40. Thus in view of the aforesaid discussion and the law laid down by the Apex Court in the aforesaid cases and I am of considered view that the submissions of learned counsel of petitioner have substance and deserves to be accepted. Since the teachers cannot be treated as "skilled", "semi-skilled" and "unskilled" employees of various enactments under labour laws, therefore, while issuing the Government order dated 10th August, 2001 it was not within the competence of State Government to prescribe any honorarium to be paid to the part time teachers of educational institution prescribing a wage not less than minimum wage fixed under the provisions of Minimum Wages Act and this power too cannot be further delegated to any other body like committee of management of the institutions in absence of such power of delegation under statute. Therefore, the provisions of paragraph 6 of the aforesaid Government order is beyond the competence of State Government and held to be null and void as ultra virus to the aforesaid provisions of Act on both the counts on the ground of incompetence inasmuch as on the ground of abdication of powers to other bodies. Accordingly, the aforesaid provisions are liable to be struck down by this Court, as such hereby quashed. Thus the question formulated in this regard is answered accordingly.

41. Now the next question arises for consideration is whether the terms and conditions of employment of the petitioner in respect of payment of honorarium to him at a rate of Rs.10/- per period is held to be based on unconscionable bargaining of employer with the petitioner and contrary to the provisions of Section 23 of Contract Act inasmuch as provisions of Article 14 and Article 23 of the Constitution of India? In this connection the assertion of petitioner in writ petition is that although he is discharging duties similar to the lecturers in the institution but being paid at a rate of Rs.10/- per hour which will come to tune of Rs.500/- in a month, whereas teachers appointed on regular basis on the post of lecturers in recognised institution are being paid salary at a rate of Rs.12,000/- per month. Learned counsel for the petitioner has submitted that on account of want or poverty and absence of alternative employment/job the petitioner is compelled to render the service as part time teacher since long back and still continuing on the aforesaid post at a rate of wage/remuneration Rs.10/- per hour as such the action of respondents is violative of Articles 14 and 23 of the Constitution of India inasmuch as the aforesaid terms and conditions in the letter of appointment of the petitioner are contrary to the public policy and violative of Section 23 of Contract Act and is also contrary to the law laid down by the Apex Court in case of ***People's Union for Democratic Rights and others Vs. Union of India and others reported in AIR 1982 S.C. 1473*** and ***Central Inland Water Transport Corporation Ltd. and another Vs. Brojo Nath Ganguly and another reported in AIR 1986 S.C. 1571***.

42. In the case of **People's Union for Democratic Rights (Supra)** the Hon'ble Apex Court in para 12 of the decision while interpreting the provisions of Article 23 has held that although other fundamental rights are enforceable against the State but there are certain fundamental rights conferred by the Constitution which are enforceable against whole of the world and they are to be found inter alia under Article 17, 23 and 24 of the Constitution of India. While dealing with the contents and scope of Article 23 of the Constitution of India in para 14 and 15 of the decision the Hon'ble Apex Court has discussed the matter in detail and in para 15 of the judgment held that where a person provides labour or service to another for remuneration which is less than minimum wage, the labour or service provided by him clearly falls within the scope and ambit of word "forced labour" under Article 23. For ready reference it would be necessary to quote the relevant extract of observations of Apex Court made in para 14 and 15 of the judgement as under:

"14.. . . . ..The question is what is the scope and ambit of the expression "begar and other similar forms of forced labour'?. . . ..It is very difficult to formulate a precise definition of the word "begar', but there can be no doubt that it is a form of forced labour under which a person is complelled to work without receiving any remuneration. Molesworth describes "begar' as "labour or service exacted by a government or person in power without giving remuneration for it." Wilson's glossary of Judicial and Revenue Terms gives the following meaning of the word "begar' : "a forced labourer, one pressed to carry burthens for individuals or the public. Under the old system, when pressed for public service, no pay was given. . . . ..Now it is not merely "begar' which is unconstitutionally prohibited by Article 23 but also all other similar forms of forced labour. This article strikes at forced labour in whatever form it may manifest itself, because it is violative of human dignity and is contrary to basic human values. The practice of forced labour is condemned in almost every international instrument dealing with human rights. .. . . . .Moreover, in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, a contract of service may appear on its face voluntary but it may, in reality, be involuntary, because while entering into the contract, the employee, by reason of his economically helpless condition, may have been faced with Hobson's choice, either to starve or to submit to the exploitative terms dictated by the powerful employer. It would be a travesty of justice to hold the employee in such a case to the terms of the contract and to compel him to serve the employer even though he may not wish to do so. That would aggravate the inequality and injustice from which the employee even otherwise suffers on account of his economically disadvantaged position and lend the authority of law to the exploitation of the poor helpless employee by Article 23 therefore says that no one shall be forced to provide labour or service against his will, even though it be under a contract of service."

"15. Now the next question that arises for consideration is whether there is any breach of Article 23 when a person provides labour or service to the State or to any other person and is paid less than the minimum wage for it. It is obvious that ordinarily no one would willingly supply

labour or service to another for less than the minimum wage, when he knows that under the law he is entitled to get minimum wage for the labour or service provided by him. It may therefore be legitimately presumed that when a person provides labour or service to another against receipt of remuneration which is less than the minimum wage, he is acting under the force of some compulsion which drives him to work through he is paid less than what he is entitled under law to receive. What Article 23 prohibits is "forced labour' that is labour or service which a person is forced to provide and "force' which would make such labour or service "forced labour' may arise in several ways.. . . . .We are therefore of the view that where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23. Such a person would be entitled to come to the Court for enforcement of his fundamental right under Article 23 by asking the Court to direct payment of the minimum wage to him so that the labour or service provided by him ceases to be "forced labour' and the breach of Article 23 is remedied."

43. In **Central Inland Water Transport Corporation Ltd. case (Supra)**, Hon'ble Apex Court while giving some illustrations of unreasonable and unfair clauses in contracts, based on unconscionable bargaining in para 90 of the decision and explaining the scope of expression "public policy", in para 93 held in para 94 that the type of contracts to which the principle formulated by us above applies, are not contracts which are tainted with illegality, but are contracts which contain terms, which are so unfair and unreasonable that they shock the conscience of the court. It is apt to reproduce the relevant extract of para 90 as under:-

"90. This principle is that the courts will not enforce and will when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable cause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard from or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a cause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations

and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its own facts and circumstances."

44. Thus in view of the aforesaid discussions, I am of the considered view that the honorarium/remuneration fixed by the Committee of Management of the institution at the rate of Rs.10/- per period/ hour for teaching the students of Intermediate classes in Biology subject is very meager amount. The payment of honorarium/remuneration in a month only in tune of Rs.500/- to the petitioner in comparison to the regular lecturers of the institution, who are getting salary at the rate of Rs.12000/- per month is highly unfair, unreasonable and based on unconscionable bargaining and shocking the conscience of the court. This Court cannot loses sight of the facts that even unskilled labourers working on daily wage basis are paid more than the amount paid to the petitioner. It is necessary to mention here that according to the Government Order dated 20.11.1977 (Annexure-21 of the writ petition) the teaching norms prescribed for teachers of Intermediate classes i.e. for lecturers of institutions recognised by the Board are 30 periods/hours in a week, which would come to 5 periods/ hours every day. Thus the remuneration, which is being paid to the petitioner at a rate of Rs.10/- per hour, in five hours teaching day, would come to only Rs.50/- per day. Such meager payment of remuneration to the petitioner, in my considered opinion is violative of Article 23 of the Constitution and contrary to the public policy inasmuch as violative of the provisions of Section 23 of the Contract Act. Thus, the aforesaid conditions in the letter of appointment of petitioner being contrary to the aforesaid provisions of law are held to be null and void and not sustainable at all. Accordingly, the same is hereby quashed. Thus the question formulated herein before is answered accordingly.

45. Now further and last question arises for consideration that what would be the reasonable and appropriate remuneration? Although the power to fix honorarium payable to the part time teacher under Section 7-AA (5) of U.P. Act No.2 of 1921 has been conferred upon the State Government by the State legislature and normally this Court can neither assume the role of the State Government in the process of judicial review under writ jurisdiction nor can sit in appeal over the judgments of executive Government, but at the same time since I have already taken the view that the provisions of Minimum Wages Act cannot be held applicable in the case of part time teachers, therefore, it is not legally permissible for the Government to fix the remuneration/honorarium to the part time teachers according to the provisions of Minimum Wages Act as fixed for skilled, semi skilled and unskilled employees of industrial establishments. Since the principle of equal pay for equal work has also no application in given facts and circumstances of the case and part time teachers cannot claim salary at par with regular teachers, therefore, no direction can be issued to the respondents to pay the petitioner a remuneration/honorarium

at par with the salary of regular teachers /lecturers of the institutions recognised by the Board, but at the same time it cannot be said that it is not justiciable issue and beyond the scope of judicial scrutiny where the action of the authorities are found to be highly arbitrary, unreasonable and contrary to the provisions of Article 23 of Constitution inasmuch as held to be against the public policy and violative of Section 23 of the Contract Act and Court's interference is absolutely necessary to undo injustice. Therefore, necessary directions can be issued in this regard. In this connection it is to be noted that it is not always necessary to engage part time teachers for full day work, rather their employment depends upon the need of work in contingencies contemplated under Section 7-A of U.P. Act No.2 of 1921. In such facts and circumstances of the case, it would be appropriate to direct the State Government to fix honorarium/ remuneration payable to the part time teachers on hour/ period basis and the honorarium so fixed should be paid for the period in which they are engaged. While doing so, the State Government is directed to take into account the working norms of teachers of institution recognized by the Board in the Government Order dated 20.11.1977, wherein the regular teachers of Intermediate classes i.e. lecturers are required to teach 30 periods/hours in a week, meaning thereby five period/ hours in a day and 30x4=120 periods/hours in a month. Thus in order to meet the ends of justice, the minimum pay scale without including dearness allowances and any other allowances and increments admissible to the regular lecturer may be divided by 120 for working out per period/ hour rate of remuneration and the amount so worked out is to be paid to the part time teachers /lecturers for the period in which they are engaged. While doing so, I should not be understood to say that the part time teachers or lecturers are intended to be accorded the benefits of minimum pay scale admissible to the regular teachers working on corresponding post in recognised institutions. Accordingly, the State Government is further directed to ensure the payment to the petitioner according to the aforesaid rate indicated above with effect from his date of appointment till date by asking the Committee of Management of the institution to make payment to the petitioner from its own resources and not from the State Exchequer. The amount already paid to the petitioner shall be adjusted towards arrears of honorarium/ remuneration payable to the petitioner. The petitioner shall also be entitled for payment of simple interest at annual rate of 5% on the arrears of remuneration payable to him. The aforesaid arrears and interest thereon shall be paid to the petitioner within a period of four months from the date of production of certified copy of this order before the respondents. The State Government is directed to complete exercise of fixation of honorarium payable to the petitioner within a period of two months from the date of production of certified copy of this order before the Secretary, Secondary Education, Government of Uttar Pradesh in the light of observations made in the judgment. The Committee of Management of the institution is directed to take necessary steps towards fixation of honorarium by the State Government payable to the petitioner and make payment to the petitioner according to the rate of remuneration fixed by the

Government within the stipulated period indicated herein before.

46. In view of the aforesaid discussions and observations, the writ petition succeeds in part hence allowed partly.

47. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.04.2005
DATED: ALLAHABAD 31.03.2005

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

Review Application No. 1689 of 2002
IN
Second Appeal No. 1434 of 2001

Smt. Raj Pati Devi ...Appellant
Versus
Ram Sewak Singh & ors. ...Respondents

Counsel for the Appellant:
Sri A.N. Bhargava
Sri R.K. Tiwari
Sri R.K. Ojha
Sri R.N. Singh

Counsel for the Respondents:
Sri R.S. Dwivedi
Sri R.N. Upadhyay
Sri V.S. Dwivedi

Code of Civil Procedure-S. 100- read with order 47 r. 1-Review application second appeal decided on merit-after hearing to both parties- whether can be reviewed by another judge ? held-'yes'- where the lower appellate court did not take into pivotal importance of record- re-appreciated the evidence without considering the evidence of two hand writing experts-single judge dismissed the second appeal-non consideration of the facts which flews the substantial question of law-held–good ground for review.

Held- Para 10

In my considered view, the evidence of two Experts and other allied evidence on record as considered by the trial court were very material which lower appellate court did not take into reckoning and proceeded to upset the finding on re-appreciation of evidences without considering the evidence of pivotal importance on record. Therefore, the question that the lower appellate court omitted from consideration the evidence of two Hand-writing Experts is a question of pivotal significance and the learned Single Judge while dismissing the second appeal in limine neither noticed nor considered the question which in fact was a substantial question of law and therefore, in the facts and circumstances, it is a fit case for review by reason of an error of law apparent on record.

Case law discussed:
2004 (4) SCC -122
1995 (1) SCR-1104
1964 (5) SCR-64
AIR 1989 SCR-22
AIR 1995 SC-1607
AIR 1988 SC-1858
2005 AIR SEW-1476

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

1. The defendant appellant has preferred this review petition in which is impugned the judgment of this Court dated 28.12.2004 rendered by Hon. B.K. Rathi, J whereby second appeal was dismissed holding that no substantial question of law arose for decision.

2. Initially, a preliminary objection was brought to bear assailing the jurisdiction of this Court which was a Court presided over by a Judge other than

the Judge who decided the second appeal and therefore, arguments were heard and the preliminary objection was disposed of by means of order dated 31.3.2005 in which plea was upheld that review was maintainable. The case was set down for hearing on merit on sustainability of review petition on grounds as envisaged in Order 47, Rule 1 C.P.C. for today. It is today that the matter has been heard on merit at prolix length.

3. A brief resume of necessary facts is essential for proper appreciation of the dispute involved in this case. It would appear that a suit was instituted by the plaintiff appellant for specific performance on the basis of agreement to sale attended with further relief to deliver possession of the property in question. The plaintiff set up a case that defendant Ram Prasad had executed an agreement in favour of plaintiff Jagjit Singh on 3.8.75 for sale of property in question agreeing to a consideration of Rs.40,000/- out of which a sum of Rs.30,000/- was accepted by the defendant no.1 and the balance was agreed to be paid at the time of execution of sale deed. It is alleged that plaintiff was delivered possession of the property in question after receipt of Rs.30,000/-. It is further alleged that the defendant no.1 dodged the issue of execution of sale deed and subsequently, executed sale deed in favour of defendant no.2. As a result, the deceased plaintiff Jagjit Singh served a registered notice and when it elicited no response, he instituted the suit aforestated. The defendants filed a joint written statement repudiating the plaint allegations and denying execution of agreement to sale as well as receipt of consideration. It was pleaded by them that the document was forged and unenforceable in law and it was also refuted that it bore signatures of defendant no.1.

4. The trial court framed as many as seven issues and in ultimate analysis, dismissed the suit by means of judgment and decree dated 27.1.1984. The plaintiff, thereafter, preferred an appeal, which culminated in being allowed, vide judgment and decree dated 21.9.2001 attended with direction to execute sale deed in terms of agreement excepting plot nos. 1235, 1236, 1239, 1306 and 1407. It is in this backdrop that the second appeal came to be preferred in this Court. As stated supra, the second appeal was dismissed in limine by Hon. B.K. Rathi, J by means of judgment dated 28.11.2001. The judgment dated 28.11.2001 rendered by Hon. B.K. Rathi, is excerpted below.

"Hon. B.K. Rathi, J.

The suit was filed by respondent nos. 1 and 2 for specific performance of contract for sale against the appellants Smt. Rajpati Devi and her father Ram Prasad Singh, who has since died. The suit was dismissed by the trial court. The first appellate court has allowed the appeal and decreed the suit for specific performance of contract for sale. Aggrieved by it, this second appeal has been preferred.

I have heard Sri R.K. Ojha, learned counsel for the appellant and Sri R.N. Upadhyaya, learned counsel for the respondents nos. 1 and 2.

It is contended that the agreement was unilateral and it was not signed by the purchasers. However, the learned counsel for the appellant could not show that the agreement to sale should be bi-lateral.

The next question is that prior to the agreement of sale certain plots were already transferred by the defendants. The plaintiff respondents, therefore, requested that they forego claims regarding those plots and the suit may be decreed regarding other plots for the agreed consideration. Therefore, this is also no illegality in the order for specific performance of contract for sale.

The other facts argued are factual regarding the execution of the deed and payment of the consideration.

The second appeal cannot be admitted on facts. No substantial question of law arise for decision in this appeal.

The appeal is accordingly dismissed."

5. Learned counsel for the appellant premised his submission by arguing that the judgment of this Court dated 29.11.2001 wears the taint of an error of law apparent on the face of record and therefore, there is substantial reason writ large for review. He also referred to trial court judgment to bring home the point that trial court on consideration of the opinions of two hand-writing experts examined by the parties, converged to believe the opinion of the hand-writing expert examined by defendant and disbelieved the opinion of hand-writing expert examined by the plaintiff and in ultimate analysis, recorded a finding that there was no similarity between the disputed and admitted signatures. The learned counsel also canvassed that finding on question of execution of agreement to sale was rightly recorded on consideration of oral as well as documentary evidence including the appraisal of opinions of two hand-writing experts examined in the case but the lower appellate court ignored altogether the opinions of the hand-writing experts while deciding the appeal and arrived at a conclusion by ignoring such material evidence which constituted substantial question of law and ought to have been framed in the second appeal. He further canvassed that while considering the question of execution of deed, the learned Single Judge has recorded a finding that other arguments as to the execution of deed and payment of consideration are factual and second appeal cannot be admitted on facts and it, proceeds the arguments, is thus manifested that though substantial question of law was urged before the second appellate court but the Court has erred in holding otherwise. The learned counsel also relied upon a decision of the Apex court in **Green View Tea and Industries v. Collector, Golaghat, Assam and another**[1], and urged that mistake being apparent on the face of record, it is a fit case for review by the Court. **Per contra**, learned counsel appearing for the Opp. Parties contended that judgment of this Court while dismissing the second appeal does not make out a case of error of law apparent on the face of record and therefore, it is not a fit case for review. He further contended that this Court is wholly incompetent to interfere with the finding sitting in review over the judgment of this Court. In order to bolster up his contentions that Court cannot re-appreciate the entire evidence by reversing the finding of the appellate court, the learned counsel relied upon a decision reported in **AIR 1975 SC 455 and AIR 2000 SC 1650**. The learned

[1] (2004) 4 SCC 122

counsel further urged that error apparent on the face of record means an error, which strikes one by mere looking at it and does not require any long process of reasoning on the point. He also relied upon a decision reported in AIR 1987 SC 1160 and contended that other Judge is wholly incompetent to review the finding recorded by a previous Judge sitting in judgment over the decision of Judge who decided the second appeal and construed the document. The learned counsel also contended that mistake apparent on the face of record cannot mean an error, which has to be fished out, and searched. He further contended that phrase "for any other sufficient reason" used in Order 47 Rule 1 of the C.P.C. should be interpreted as meaning a reason sufficient on grounds at least analogous to those specified in the rule. He further contended that even if opinion of experts was omitted from consideration, the finding could be maintained from other evidence and this cannot be a ground for review.

I have bestowed my anxious considerations to the respective submissions made across the bar by the learned counsel for the parties.

ERROR APPARENT ON THE RECORD

6. As specified in Order 47, Rule 1 of the C.P.C. a review is restricted to (1) discovery of new and important evidence matter, which could not be produced at the time of hearing, (2) error apparent on the face of the record and (3) for any other sufficient reason. Main brunt of the argument of the learned counsel for the appellant hinges on "error apparent on the face of the record'. Review, it is well enunciated, is not a routine procedure and the party seeking review must prove the material error manifest on the face of order resulting in miscarriage of justice. It is also settled by a catena of decision that no error could be said to be apparent on the face of the record if it was not self evidence and if it required an examination or argument to establish it. With the above principles bearing in mind, I proceed to scan the decision of the trial court as also the appellate court in order to appreciate whether the decision of lower appellate court suffers from an error of law in ignoring the evidence of the two hand-writing experts which was vital and was elaborately discussed and deliberated by the trial court and whether it constituted ground for review considering the expression "error apparent on the face of the record".

7. There are certain decisions in which the expression "error apparent on the face of the record" has been dealt with and explained. The first decision on the point is **Hari Vishnu Kamath v. Ahmad Ishaque**[2]. In this case, it has been enunciated that an error apparent on the record must be one which is manifest on the face of the record. At the same time, the Court also observed that the real difficulty is not so much in the statement of principle as in its application to the facts of a particular case. In **Syed Yakoob v. Radha Krishna**[3], the Apex Court observed that it is neither possible nor desirable to attempt either to define or to describe adequately cases of errors which can appropriately be described as errors of law apparent on the face of the record. Whether or not an impugned error is an error of law apparent on the face of the

[2] (1995) 1 SCR 1104
[3] (1964) 5 SCR 64

record must always depend on the facts and circumstances of the case and upon the nature and scope of legal provision, which is alleged to have been misconstrued or contravened.

8. It would thus appear that expression any error apparent on the record should be determined in the light of the facts and circumstances of each case. However, from the discussion of the above case-laws, it appears to be well settled that an error can be said to be an error apparent on the face of the record, if it is patent, manifest or self evident.

Substantial question

What is substantial question of law has to be gleaned from a discussion of the following decisions.

9. In **Suresh Kumar v. Town Improvement Trust, Bhopal**[4], the Hon. Supreme Court while dealing with the question of compensation under the Land Acquisition Act, quintessentially held that in an appeal under Article 136 of the Constitution of India involving the question of valuation of acquired land, Supreme Court will not interfere with the award unless some erroneous principle has been invoked or some important piece of evidence has been overlooked or misapplied. In **S.V.R. Mudaliar and others v. Mrs. Rajabu F. Buhari and others**[5], the Apex Court observed that before reversing a finding of fact, the appellate court has to bear in mind the reasons ascribed by the trial Court. The Apex Court also quoted the view stated by the Privy Council in **Rani Hemant Kumari v. Maharaja Jagadhindra Nath (1906) 10 Cl W.N. 630** wherein while regarding the appellate judgment of the High Court of Judicature as careful and able, it was stated that it did not come to close quarters with the judgment which it reviews and indeed never discusses or even alludes to the reasoning of the subordinate Judge. In **Dilbagrai Punjabi v. Sharad Chandra**[6], the Apex Court while dealing with M.P. Accommodation Control Act held that the court is under a duty to examine the entire relevant evidence on record and if it refuses to consider important evidence having direct bearing on the disputed issue and the error which arises is of a magnitude that it gives birth to a substantial question of law, the High Court is fully authorised to set aside the finding. It was a case in which lower courts had without considering the tenant's admission of the landlord's title to disputed property as contained in his reply to the notice given by the landlord and in the numerous rent receipts issued by the landlord, recorded the finding that the landlord had failed to establish his ownership to the disputed property. In a recent decision in **State of Punjab v. Mohinder Singh**[7], the Apex Court was seized of dispute relating to date of birth. In the case the stand of the respondent was that the date of birth was entered in the service record by relying on the horoscope and he claimed that both school leaving certificate and the horoscope were produced and the date of birth was recorded by relying on the horoscope. The Apex Court observed that apart from the fact that there was no effort to reconcile the discrepancy in the so called horoscope and the school record is

[4] AIR 1989 SC 1222
[5] AIR 1995 SC 1607
[6] AIR 1988 SC 1858
[7] 2005 AIR SCW 1476

a factor which has rightly been taken note of by the trial court and without any plausible reason the first appellate court took a different view. The Apex Court observed that the school records have more probative value than a horoscope. Where no other material is available, the horoscope may be considered but subject to its authenticity being established. These aspects were not considered by the first appellate court and the High Court. The Apex Court further observed that **since the first appellate court acted on irrelevant materials and left out of consideration relevant materials, question of law was involved**. The Apex Court also observed that the High Court was therefore not justified in dismissing the second appeal by observing that there was no substantial question of law involved.

10. From a perusal of the judgment of the trial court it is evident that in order to prove respective pleading i.e. whether the agreement to sale bore signatures of the defendant no.1 as pleaded by the plaintiff, the trial court scanned the opinions of the two experts produced and examined by the parties in suit. The trial court, it would appear, disbelieved the opinion of hand-writing expert examined by plaintiff and believed the opinion of hand-writing expert examined by the defendant no.1 and on that basis, converged to the conclusion that the document in question did not bear signatures of defendant no.1. The trial court also reckoned with other evidence both oral and documentary which were tangential to the conclusions arrived at by the trial court and held that the agreement to sale neither contained signatures of the defendant no.1 nor executed by him. **On the other hand**, from a close scrutiny of the finding of the lower appellate court, it does not appear that the court below reckoned with this material aspect in upsetting the finding of the trial court. In my considered view, evidence of the two hand-writing Experts was of pivotal importance, which goes to the roots and non-consideration thereof in his judgment by the lower appellate court leaves an imprint of error apparent on the face of record and also gives rise to a substantial question of law on the aspects of execution of agreement to sale and payment of consideration to the defendant no.1. Learned counsel for the respondents faltered and could not pinpoint from the judgment of the appellate court whether the lower appellate bestowed anxious consideration to the evidence of the hand-writing experts. Therefore, it follows that the lower appellate court altogether eschewed from consideration the evidence of the Experts which was so material to be taken into consideration in the facts and circumstances of the case. While deciding the second appeal in limine, the learned Single Judge noticed two aspects. The first aspect considered by the learned Judge was whether the agreement was unilateral or bi-lateral and proceeded to observe that the learned counsel for the appellant could not show that the agreement to sale should be bi-lateral. The next question considered by the learned Single Judge was that prior to the agreement of sale certain plots were already transferred by the defendants. It was also stated that plaintiff respondents requested that they forego claims regarding those plots and the suit may be decreed regarding other plots for the agreed consideration and in consequence held that there is no illegality in the order for specific performance of contract for sale. In my considered view, the evidence

of two Experts and other allied evidence on record as considered by the trial court were very material which lower appellate court did not take into reckoning and proceeded to upset the finding on re-appreciation of evidences without considering the evidence of pivotal importance on record. Therefore, the question that the lower appellate court omitted from consideration the evidence of two Hand-writing Experts is a question of pivotal significance and the learned Single Judge while dismissing the second appeal in limine neither noticed nor considered the question which in fact was a substantial question of law and therefore, in the facts and circumstances, it is a fit case for review by reason of an error of law apparent on record.

11. Coming to grips with the decisions cited across the bar by the learned counsel for the respondents, I would confine myself to saying that decisions cited across the bar are illuminating but they did not squarely apply to the facts of this case.

12. As a result of foregoing discussion, I am of the view that it is a fit case for review.

13. In the result, Review petition is allowed. In consequence, judgment and order dated 28.11.2001 passed by this Court dismissing the appeal in limine is set aside. In the facts and circumstances of the case there would be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2005

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

Civil Misc. Writ Petition No. 14965 of 2005

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

Counsel for the Petitioner:
Sri Rajesh Rai

Counsel for the Respondents:
Sri S.R. Jaleel
Sri V.K. Singh, S.C.

U.P. Z.A. & L.R. Act-S-122-B (4-f) Regularization of unauthorized occupation-scheduled cast agriculturer labour-continuing in possession of Gaon Sabha land since before 1.5.2002-entitled for regularization of unauthorized possession-utter misuse by the Lekhpal-manipulating favourable report in favour of those who were minor-Tehsildar also found envolve-District Magistrate directed to hold enquiry before 30.6.05 and to intimate the Court by action taken.

Held- Para 4

In view of the aforesaid judgment in Sanjai Kumar's case the petitioner can get the benefit of Section 122-B (4-F) of U.P.Z.A.L.R. only if he can show that his name was entered in the revenue record as occupant before 1.5.02 otherwise not. Mere dropping of the proceeding under Section 122-B of U.P.Z.A.L.R. Act does not determine any substantive rights.

Case law discussed:
W.P.No. 13191 of 05 decided on 9.3.03

(Delivered by Hon'ble S.U. Khan, J.)

1. In Sanjai Kumar Versus Collector writ petition no. 13191 of 2005 connected with two other writ petitions decided on 9.3.03 I have held that provision of Section 122-B(4-f) of U.P.Z.A.L.R. Act which regularizes unauthorized occupation of scheduled caste agriculturer labourer over Gaon Sabha land continuing since before 1.5.2002, is being utterly misused. After the substitution of the said cut off date several members of scheduled caste manipulated favourable report from Lekhpal and other revenue authorities to the effect that the claimants were in possession since before 1.5.02 in order to avail the benefit of the aforesaid sub section 4-f In the said judgment I have held in para 3 as follows :-

"Whenever a new cut off date for conferring benefit of Section 122-B(4-f) of the Act is provided, people belonging to scheduled caste start claiming benefit of the said Section by creating evidence of prior possession. In view of this rampant malpractice it is most essential that whenever benefit of aforesaid sub section (4-f) is claimed the claimant must show that he is in unauthorized possession over Gaon Sabha land his name is recorded in the revenue records prior to the cut off date or the proceedings for his ejectment must be pending since before the cut off date. If it is not so then no amount of evidence can be looked into in that regard. In most of the cases like the present ones Pradhans, Lekhpals and other Revenue authorities in collusion with claimants give wrong reports of possession of the claimants prior to the cut off date."

2. In the instant case also position is exactly similar. Earlier for the same relief which is claimed in the instant writ petition petitioner filed Writ Petition No. 4723 of 2005. In the said writ petition it was stated that the Tehsildar had earlier decided the matter in favour of the petitioner on 27.6.03. However, copy of the said order was not filed. That writ petition was therefore dismissed with liberty to filed. That writ petition was therefore dismissed with liberty to file fresh writ petition annexing therewith copy of order dated 27.6.03 passed by the Tehsildar. Accordingly hence this writ petition has been filed annexing therewith copy of order of Tehsildar dated 276.03 as Annexure 5.

3. The matter relates to Gaon Sabha plot no. 1413 area 906 hetares (about 9000 sq.met.) situate in village Ataur Tehsil Sadar, district Ghaziabad. In the order dated 27.6.03 passed by the Tehsildar/Assistant Collector (First class), Ghaziabad it is mentioned that the said case was initiated on the report of Halka Lekhpal dated 25.9.02. In the report it was mentioned that petitioner had occupied the land in dispute prior to 1410 Fasli and he was using that for agriculture purpose. On the basis of said report Case No. 8 under Section 122-B of U.P.Z.A.L.R. Act L.M.C. Vs. Ghanshyam was initiated. The Lekhpal also gave oral statement in the case and stated that petitioner was continuously in possession since before 1410 Fasli and petitioner was Balmiki i.e. scheduled caste and land less agricultural labourer and he had no means of livelihood except doing agriculturer in the land in dispute. It is quite clear that Lekhpal was virtually gifting the govt./Gaon Sabha land to the petitioner. Petitioner stated that he was in occupation

of the land in dispute for 17 years. Some persons intervened in the case and stated that the age of the petitioner was only 31 years hence 17 years before he would have been only 14 years of age and minor could not illegally occupy the Gaon Sabha land and that father of the petitioner was employed in Nagar Nigam, Delhi. The Tehsildar did a wonderful thing. He held that no documentary evidence was filed to show that the petitioner was in possession much before 2.5.2002 hence he was entitled to get the benefit of Section 122-B (4-f) of the Act. Thereafter petitioner filed regular suit under Section 229-B of the U.P.Z.A.L.R. Act (suit no.54 of 2003-04) Asstt. S.D.O./Assistant Collector (First Class) Ghaziabad through judgment and order dated 30.10.04 dismissed the suit on the ground that relief in the form of entry of petitioners name as owner (ought to be Bhumidar) in revenue record under Section 122-B (4-f) of the Act could be granted by the Tehsildar himself and no regular suit under Section 229-B of U.P.Z.A.L.R. was maintainable for the said purpose. Thereafter the petitioner filed an application before Tehsildar on 2.11.04 for entry of his name as Bhumidar over the land in dispute in the revenue record. For the same relief another application was filed by the petitioner on 6.1.05 before S.ED.O., Sadar, Ghaziabad. Prayer through this writ petition is that respondents may be directed to decide the aforesaid application of the petitioner for mutation of this name in revenue records over the land in dispute within the time specified by this Hon'ble Court/

4. In view of the aforesaid judgment in Sanjai Kumar's case the petitioner can get the benefit of Section 122-B (4-F) of U.P.Z.A.L.R. only if he can show that his name was entered in the revenue record as occupant before 1.5.02 otherwise not. Mere dropping of the proceeding under Section 122-B of U.P.Z.A.L.R. Act does not determine any substantive rights.

5. The matter is, therefore, sent to Collector, Ghaziabad to decide the case after full opportunity to the petitioner and Gaon Sabha. The petitioner is directed to appear before Collector, Ghaziabad on `11. 4.05 and on the said date he shall file such evidence, which he considers necessary. If the name of the petitioner was recorded as occupant in the revenue record prior to 1.5.02 then his name must be directed to be recorded in revenue record as bhumidhar otherwise petitioner must at once be ejected from land in dispute and action must be taken against Lekhpal and other authorities for giving false report in the light of the aforesaid judgment in Sanjai Kumar's case. The order of Tehsildar dated 27.6.2003 is utterly illegal and void. No reliance shall be placed thereupon. Collector shall decide the proceeding before 30.6.2005 and intimate this Court about the order passed and action taken by him.

Writ petition is accordingly disposed of.

6. List this petition before me in Chamber at 1.430 P.M. on 11.7.05 for perusal of compliance report of Collector, Ghaziabad.

7. Let a copy of this order be given free of cost within three days to Sri S.R. Jaleel learned standing counsel for immediate communication to the Collector, Ghaziabad.

8. A copy of this order be also given free of cost to Sri V.K.Singh learned

standing counsel for Gaon Sabha Village Ataur Pargana Jalalabad district Ghaziabad within three days.

ORIGINAL JURISIDCTION
CIVIL SIDE
DATED: ALLAHABAD: 27.1.2005

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 2209 of 2002

Khalil Ahmad ...Petitioner
Versus
Revisional Authority, Bareilly and another ...Respondents

Counsel for the Petitioner:
Sri R.C. Sinha

Counsel for the Respondents:
S.C.

U.P. Sugarcane Khandsari Adhiniyam 1961-5-3-B-Power of the Revising authority- once the option accepted and adjudicated revising authority- can not reject such option- legal position discussed.

Held- Para 6

Once the appellate authority has set aside the order passed by the assessing authority rejecting the application for option and held that application for option could not be rejected and the said order has become final, revising authority in exercise of power under Section 3-B of the U.P. Sugar Cane Khandsdari Adhiniyam, 1961 can not reject the option application. Order dated 10.2.2002 passed by the assessing authority was only a consequential order to the appellate order. Once the issue with regard to the acceptance of the option has been adjudicated and has become final from the stage of the appellate authority, it could not be cancelled by the revising authority in exercise of revisional power under section 3-B of the Act. In fact revision of order dated 10.1.2002 which was passed in pursuance of appellate order amounts of revising the appellate order, thus it is without jurisdiction.

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

1. Present writ petition is under Article 226 of the Constitution of India for quashing of the order dated 21.6.2002 passed by Deputy Sugar Commissioner (Administration), Revising Authority, Bareilly.

2. Brief facts of the case are that the petitioner was running a Khandsari unit having licence under the provisions of U.P. Khandsari Sugar Manufacturer Licensing Order, 1967. Petitioner was liable to pay sugar cane purchase tax under the provisions of 3 of U.P. Sugar-Cane (Purchase Tax) Act, 1961 (hereinafter referred to as 'Act'). Under the provisions of section 3 of the Act, two modes were prescribed regarding the payment of purchase tax, firstly, the tax was payable on the quantity of sugarcane actually purchased and secondly, at the option of the owner of the unit on the quantity of the sugarcane assessed in accordance with the provisions of the Act. The option referred in the provisions sub-clause (1) of section 3 of the Act should be exercised by the owner of the unit as may be prescribed and should relate to the whole of the assessment year. Option once exercised shall be irrecoverable for that year.

3. Petitioner exercised the option to pay the purchase tax on optional basis for the year 1986-87 under the provisions of the Act. The application in Form–13 as

required under Rule 12(A) of the U.P. Sugar Cane Manufacturer Licensing Rules, 1965 was sent by post on 18.12.1966, which was admittedly received in the office of the respondent no. 2 on 20.12.1986. In the application it was mentioned that the production would be started from 03.01.1987. The functioning of the unit was, in fact, started from 3.1.1987. Petitioner paid the entire purchases tax for whole of the assessment year as prescribed under the provisions applicable on option basis. It appears that the application in Form-13 was acknowledged and the payment of purchase tax on option basis have been accepted. However, on 11.2.1991 after the lapse of more than four years. The respondent no. 2 rejected the petitioner's option for the assessment year 1986-87 on the ground that form–13 kha was received in the office late by one day and consequently assessed the petitioner unit for the assessment year 1986-87 on the basis of the sugar cane actually purchased. Petitioner challenged the order dated 11.2.1991 in writ petition no. 428(Tax) of 1991, which was admitted but subsequently, dismissed on 13.12.2000 on the ground of alternative remedy. The petitioner filed appeal before the Assistant Sugar Cane Commissioner, Dhampur, Bijnor on 15.1.2001. Petitioner filed writ petition no.701 of 2001, which was allowed and the order dated 1.22001 was quashed with the direction to the appellate authority to entertain the appeal and decide the same within four months. Thereafter, the appellate authority vide order dated 3.9.2001 allowed the appeal and set a side the order dated 11.2.1991. Appeal was allowed on the ground that the cancellation of the application after more than four years was not justified. It was also held that once the option exercised by the petitioner was accepted, the same was irrecoverable as the petitioner had deposited the tax on optional basis and such application could not be rejected. It was also observed that rejection of application without giving opportunity was illegal. Order was accordingly, quashed and the assessing authority was directed to take the proceedings in accordance to the law. It appears that the assessing authority passed the order dated 10.1.2002 in which was stated that the tax had been deposited under the optional basis and there was no dues against the petitioner and the notice issued from the office has been vacated. Thereafter, a notice dated 1.5.2002 was issued by the respondent no. 1 to revise the order dated 10.1.2002 on the ground that in the application, in From-13, the date of starting unit was given on 31.1987 and according to the law, the application should have been received don 20.12.1986, which is less than fifteen days. Thereafter, vide impugned order the respondent no. 1 has passed the revisional order and cancelled the application by which option was given and directed the assessing authority to pass the assessment order.

Heard learned counsel for the parties.

4. Learned counsel for the petitioner submitted that the order passed by the revising authority is illegal and without jurisdiction. He submitted that the revising authority had no jurisdiction to cancel the application by which option was given for payment of tax on option basis. He submitted that the order dated 10.1.2002 was in pursuance of the order of the appellate authority by which cancellation of option has been set aside and the claim of the option has been

accepted. He submitted that the appellate order has not been challenged and has become final. He submitted that the cancellation of the option application, amounts to setting aside and sitting over the appellate order, which is without jurisdiction. Learned Standing Counsel supported the order of the revising authority.

5. Having learned counsel for the parties, I am of the view that the impugn ed order can not be sustained.

Section 3-B of the Act reads as follows:

"3-B, Revision- The Cane Commissioner, in the case of a factory, and the Sugar Commissioner or any other officer, not below the rank of Assistant Sugar Commissioner, authorized by the Sugar Commissioner in this behalf, in the case of a unit, may, in order to satisfy himself as to the legality or propriety of any order passed by an assessing authority under this Act, call for and examine either on his own motion or on the application of the assessee or the State Government, to be made within six months of the date of the order, the record of any proceedings of assessment and pass such orde3rs as he may think fit.

Provided that no such application shall be entertained at the instance of a party which has a right of appeal but does not avail of it.

Provided further that no enhancement shall be made under this section unless the assessee has been afforded a reasonable opportunity of being heard against the enhancement."

6. Once the appellate authority has set aside the order passed by the assessing authority rejecting the application for option and held that application for option could not be rejected and the said order has become final, revising authority in exercise of power under Section 3-B of the U.P. Sugar Cane Khandsdari Adhiniyam, 1961 can not reject the option application. Order dated 10.2.2002 passed by the assessing authority was only a consequential order to the appellate order. Once the issue with regard to the acceptance of the option has been adjudicated and has become final from the stage of the appellate authority, it could not be cancelled by the revising authority in exercise of revisional power under section 3-B of the Act. In fact revision of order dated 10.1.2002 which was passed in pursuance of appellate order amounts of revising the appellate order, thus it is without jurisdiction.

7. In the result, writ petition is allowed. Order dated 21.06.2002 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.2.2005

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

Second Appeal No. 1172 of 1996

Sadaphal Singh alias Angnu Singh
...Appellant
Versus
Hirday Narain Singh and another
...Respondents

Counsel for the Appellant:
Sri V.K. Singh

Counsel for the Respondents:
Sri Bajrangi Misra

Code of Civil Procedure- Section 100- Family Partition- agricultural land- governed by the U.P. Z.A. & L.R. Act- can be accepted and proceeded by the civil court at the time of passing final decree- when the family partition by meter and bounds has been accepted and established.

Held- Para 9

So far as the question whether any private partition/family settlement may take place regarding the land governed by U.P. Zamindari Abolition and Land Reforms Act, this Court is of the view that if a private partition/family settlement by meters and bounds has taken place the court may accept if it is established and final decree may be passed in terms of the same.

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

1. This Second Appeal has been preferred by plaintiff- appellant against the judgment and decree dated 30.11.1996 passed in Civil Appeal No. 42 of 1995 confirming the judgment and decree dated 11.2.1994 passed by trial court in original suit no. 577 of 1990.

2. Plaintiff filed a suit for cancellation of sale deed executed by Hirday Narain Singh defendant No. 1 in favour of Shyam Narain Singh defendant no. 2 on the ground that there was a private partition between the plaintiff and defendant no. 1 in which out of land of plot no. 274 area 19 biswa and in plot no. 272 out of 2 Bigha 10 Biswa 11 Dhoor, 15 Biswa 15 door was given to defendant no. 1 and plaintiff was given remaining area of plot no. 272 1 Bigha 14 Biswa and 16 door and both are in actual possession in respect of their area, but defendant no. 1 executed sale deed in favour of defendant no. 2 on 28.6.1988 showing one half share of total area of plot no. 272 in respect of Shyam Narain Singh defendant no. 2 , the sale deed is liable to be cancelled.

3. Defendants denied plaint allegation and urged that both (defendant no. 1 and plaintiff) are real brothers and are co-tenants to the extent of one half share. They denied any private partition and also said that there is no reference of any division of holding in re venue record. Defendant no. 2 purchased ½ share of plot no 272 by defendant no. 1 on consideration, which has also been mutated in the name of defendant no. 2 in the revenue record. Various other pleas were also taken in written statement.

4. Trial court on consideration of evidence on record decreed the suit in part canceling the sale deed in respect of sale of the southern portion of plot no. 272 but maintained the sale deed in terms of decree of one half share in the property in dispute. This judgment and decree was affirmed in civil appeal referred by plaintiff.

At the time of admission, this Court passed following orders regarding substantial question of law.

"Heard learned Advocates appearing for the appellant. Duly considered the submission. Substantial question regarding the family partition u/s 176 of U.P.Z.A. and L.R. Act has been raised. In the circumstances, it is admitted.

Heard learned counsel for the parties.

5. Learned counsel for appellant urged that in the sale deed itself defendant Hirday Narain Singh has admitted private

partition and claimed southern portion of plot no. 272. He urged that recital in the sale deed as well as other material on record, there was a private partition between the parties. Learned counsel for appellant referred certain other documents filed along with stay extension application supported by affidavit to prove that private partition was there. It was urged that the finding of courts below to the effect that there was no partition between the parties and the sale deed is valid to the extent of ½ share only is vitiated in law.

6. In reply to the same, learned counsel for the defendant-respondents urged that findings of the courts below to the effect that there was no private partition as urged by plaintiff does not suffer from any illegality and supported by evidence.

7. After consideration of arguments of learned counsel for the parties, careful consideration of judgments of courts below and material on record, I am of the view that courts below rightly held that there was no private partition/family settlement between the parties. Though both the parties claimed private partition, but they are at variance as regards to the terms of private partition. According to plaintiff, he was allotted one bigha 14 biswas 16 door in plot no. 272 and rest of land in suit that is remaining part of plot no. 272 and plot no. 274- area 19 biswas was allotted to defendant no. 1. To the contrary the defendant's case that he was given southern portion of plot no. 272 in his share. The term of partition of either party is not borne out from the record. No evidence was brought by any of the parties to show the terms of private partition /family settlement.

8. As there is no evidence of private partition, courts below rightly disbelieved the case of private partition/family settlement. Courts below rightly decreed the suit in art and cancelled sale deed for specific portion (southern portion) of plot no. 272.

9. I see no ground to interfere with the findings of fact arrived at by courts below which do not suffer from any error of law. So far as the question whether any private partition/family settlement may take place regarding the land governed by U.P. Zamindari Abolition and Land Reforms Act, this Court is of the view that if a private partition/family settlement by meters and bounds has taken place the court may accept if it is established and final decree may be passed in terms of the same. In the present case, as there is no evidence on record of private partition/family settlement , both the parties continue as co-tenants, plaintiff and defendant no. 1 were having one half share only are entitled to execute/alienate the property as regards to their respective share only. Defendant no. 1 was wholly incompetent to execute sale deed in respect of any specific area of any plot in suit and both co-tenants are entitled to continue as co tenants in accordance with law till actual partition by a decree for partition or by family settlement.

In view of the above, Second appeal is dismissed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.2.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 5980 of 2005

Ramesh Narain Tripathi and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Pandey

Counsel for the Respondents:
Sri C.B . Yadav, S.C.

Home guard Act 1963-S-7(2)-read with U.P. Fundamental Rules as Amended 2002-Rule–56-words and phrases-civil post- whether the Home guards are within the meaning of Government Servants?- held- no- protection, rights and privilege given to holder of civil post can not be a government servant- accordingly the provisions of Rule 56 of U.P. Fundamental Rule are not applicable-for the retirement of home guard- extension of service beyond 58 years can not be given.

Held- para 4

It is not necessary that a person holding civil post is a Government Servant or that the protection, rights and privileges given to a public servant makes him a government servant. The Fundamental Rules do not apply to all the holders of civil post and public servants. These are as such not applicable to the petitioner as a Home Guard. The amendments made in Rule 56 are also not applicable to Home guards giving the benefit of extension of service beyond 58 years.

Case law discussed:
Special Appeal No. 363/97 decided on 326.8.2004
2003 (4) ESC (Alld) 1964
W.P. No. 32279/04 de3cided on 13.8.04
W.P. No. 16093/04 decided on 22.4.04

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard learned counsel for the petitioner and Sri C.B. Yadav, learned Chief Standing Counsel for the respondents.

2. The petitioner is serving as a Home Guard. By this writ petition, he has prayed for quashing an order dated 31.1.2005 by which he is sought to be superannuated at the age of 58 years. Learned counsel for the petitioner submits that once the petitioner is called on duty, he holds a civil post. He has relied upon a Division Bench judgment of State of U.P. Vs. Dashrath Singh Parihar in Special Appeal no. 363 of 1997 decided on 26.8.2004, in which this Court had distinguished the judgment in **Riasat Ali Vs. State of U.P. and others 2003 (4) ESC (Alld), 1964** and held that when he is not enrolled under Section 7 (2) of the Home Guard Act, 1963, a Home guard can take up a private service and then he would obviously not be holding a civil post but when he was called on duty he holds a civil post and in that case explanation of Section 10 of the Act is not attracted. It was further held that in such circumstances, protection of Article 311 of the Constitution of India is applicable to the petitioner.

3. In this case we are concerned with the applicability of Fundamental Rule 56 which has been amended by U.P. Fundamental Rules, 2002, and by which the age of superannuation of a Government Servant to which these rules apply has been extended to 60 years.

Learned counsel for the petitioner has relied upon the interim order passed by me on 10.9.2002 in writ petition no. 37675 of 2002. After the decision in State of U.P. Vs. Dasharath Singh Parihar, the legal position has been more clarified. The Home guards under section 4 serving as auxiliary force to the police as and when required, for maintaining public order and internal security served under the superintendence and administration exercised by Commandant General. The Home guards is a volunteer force and when not called for service can take up any private service. The powers, privileges and protection of Home guards is maintained under section 9 of the Act. Section 10 of the Act provides that the Home guard acting in the discharge of his functions under the Act shall be deemed to be public servant within the meaning of section 21 of the Indian Penal Code. The engagement of Home guard under the U.P. Home Guards Act, 1963, is only part tie. Any person either in private or in Government Service cannot be enrolled as Home guard. He only gets as honorarium. The Act does not prescribe any retirement age. By a Government order dated 6.11.1995, it is prescribed that a Home Guard shall not be engaged after he attains 58 years of age.

4. The expressions 'Civil Post', 'Public Servant' and 'Government Servant' are well understood and have well defined attributes. It is not necessary that a person holding civil post is a Government Servant or that the protection, rights and privileges given to a public servant makes him a government servant. The Fundamental Rules do not apply to all the holders of civil post and public servants. These are as such not applicable to the petitioner as a Home Guard. The amendments made in Rule 56 are also not applicable to Home guards giving the benefit of extension of service beyond 58 years.

5. The same view was taken by me in **Surnam Singh Vs. State of U.P.** (writ petition no. 32279 of 2004 decided on 13.8.2004 and **Nandi Prasad Vs. State of U.P.** (civil misc. writ petition no. 16093 of 2004 decided on 22.4.2004).

The writ petition is consequently dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 22.12.2004

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

Civil Misc. Writ Petition No. 48402 of 2004

Mohan and others ...Petitioners
Versus
The Settlement Officer of Consolidation, Jaunpur and others ...Respondents

Counsel for the Petitioners:
Sri S.C. Tripathi

Counsel for the Respondents:
Sri Anuj Kumar, Addl. S.C., S.C.

Limitation Act, 1963, S-5 read with Constitution of India, Article 226-Practice and Procedure-condonation of delay- Appeal filed by the State barred by time for few days- No prayer for condonation of delay- even the memo of appeal not signed by the Collector-argument that the continuance of incompetent appeal- amounts to abuse the process of law- hence the writ of prohibition be issued restraining the appellate authority to entertain and decide such appeal-held-unless some exceptional circumstances are there-

extraordinary power can not be exercised-it can be pressed first before the appellate or revisional court- various aspects discussed.

Held- Para 7 and 8

It can be another situation that appeal is barred by time or it is not maintainable for various reasons but that can be an objection by the respondents in any appeal or revision and thus this Court is of the considered view that unless there are exceptional circumstances straightway extraordinary powers is not be exercised. On the facts this Court is not satisfied that petitioner cannot get their objection examined by the appellate court so as to exercise the jurisdiction as a writ court.

For the analysis as made above this Court is not convinced that this is a case where writ of prohibition can be issued, as prayed by the petitioner. The objection about maintainability of the appeal on various grounds appears to be a routine one which is to be dealt by the appellate authority while deciding the appeal on merits in accordance with law.

Case law discussed:

1987 RD 240
AIR 1962 Alld-590
AIR 1967- 1274

(Delivered by Hon'ble S.K. Singh, J.)

1. Prayer in this petition is to issue writ in the nature of prohibition, prohibiting the appellate authority to entertain and decide the appeal no. 384 and 791 (Annexure no. 1 and 2 respectively to the writ petition.

2. Facts in brief will be useful to be noticed for disposal of this petition. Against the judgment of the Consolidation Officer dated 2.5.1986 passed in case no. 1135/1136 in a proceeding under Section 9-A (2) of the U.P. C.H. Act two appeals referred above came to be filed before the Settlement Officer, Consolidation. One appeal was filed by Ram Karan and others and other appeal by the State. It is in respect to the aforesaid appeals, submission of counsel for the petitioners is that continuance of the appeal is an abuse of process and thus they may be directed not to be proceeded and respondents may be directed to withdraw the appeals.

3. Submission is that appeals filed by the respondents were barred by time and there is no prayer for condonation of delay and in fact there is no application for condonation of delay. It is also submitted that there is no order of Collector for the District Government Counsel to file the appeal and the memo do not bear the signature of the Collector. Various averments in this respect are contained in para 7 to 10 of the writ petition. Submission is that appeals filed by the respondent no. 3 and the State are in competent and they could not have been entertained by the respondents 1 and 2. In the last it was submitted that Gaon Sabha withdrew its objection against the petitioner and, therefore, the appeal filed against the order of the Consolidation Officer cannot be said to be maintainable.

4. In support of the submissions that if there is no delay condonation application then appeal is to be dismissed and that issue is to be decided first reliance has been placed on **1987 RD 240 (Raj Deo Vs. Jai Karan)** and **2000 RD 689 (Ragho Singh Vs. Mohan Singh and others)**. In support of the submissions that if the proceedings are abuse of the process of the court then this Court has to issue a writ straightaway, reliance has been placed on **AIR 1962**

Alld. 590 (Raja Sriniwas Prasad Singh Vs. S.D.O., Mirzapur and another), AIR 1966 Alld. 191 (Khaeshwar Vs. Hoshram and others) and AIR 1967 SC 1274 (S. Govinda Menon Vs. Union of India and another).

5. The Court has examined the matter in the light of the aforesaid submission. At the very outset it can be observed that entire submission of learned counsel for the petitioner proceeds on the ground that entire proceedings being abuse of the process are liable to be quashed straightaway by this Court. Thus it is clear that it is in exceptional cases where the aforesaid situation emerges and the Court is satisfied with the gravity of the matter then the writ as prayed is to be issued.

6. Before dealing the facts in detail the court may take note of the cases as has been cited by learned counsel. So far the decision as referred by the learned counsel on the question of issue of writ of prohibition suffice it to say that all the three decisions as given in the cases of Raja Sriniwas Prasad Singh Vs. S.D.O. Mirzapur and another, Klhaeshwar Vs. Hoshram and others and S. Govinda Menon Vs. Union of India and another (supra) they lays down that if there is patent lack of jurisdiction i.e. if there is want of jurisdiction then the writ can be issued. So far the case in hand is concerned it cannot be said that appeal against the order of the Consolidation Officer do not lie to the Settlement Officer Consolidation as the same is clearly provided under Section 11 of the U.P.C.H. Act and thus decision on which reliance has been place are of no help to the petitioner. So far the decision as has been referred on the question of condonation of delay is concerned it appears to be not a stage for this Court to examine this aspect as it is first for the appellate court to pass appropriate orders and it is only thereafter the matter can be examined by the higher court.

7. So far the case in hand is concerned appeals which are pending before the Settlement Officer Consolidation arises out of the order passed by the Consolidation Officer in the proceedings under Section 9-A (2) of the U.P.C.H. Act. The Consolidation of Holdings Act is a complete code for adjudication of the rights of any claimant and for settling the rights of any party. Adjudication between the parties starts on the disposal of the objection by the Consolidation Officer under Section 9-A (2) of the U.P.C.H. Act against which statutory appeal as provided under Section 11 of the Act lies. It appears that against the judgment of the Consolidation Officer stated above two appeals were filed. As stated in para 5 and 6 of the writ petition one appeal was filed on 27.7.1986 and the other appeal was filed on 18.6.1986 and thus both appeals being against the order of the Consolidation Officer dated 2.51986 there can be hardly few days delay in filing the appeal. Submission about withdrawal of the objection by Gaon Sabha before the Consolidation Officer and thus no right to appeal also appears to be totally misconceived as appeal no. 791 has been filed by State through Collector who is the overall incharge of the matter. Gaon Sabha is respondent no. 2 in that appeal. Be as it may, in respect of both aspects that whether few days delay in filing the appeal was to be condoned or not as it is alleged that there is no application for condonation of delay and there is no

prayer for the same and whether the appeal at the instance of the Gaon Sabha , who is appellant no. 2 in appeal filed by the State can proceed or not it cannot be such a situation that this Court has to intervene in the matter by issuing a writ of prohibition to the appellate authority not to proceed in the matter taking the view that proceedings are abuse of the process of Court. Needless to say that question of maintainability of the proceeding at any stage before any forum has to be first addressed before that very authority as that authority being in a more better position to examine the things in the light of the record and various factual and legal aspect can decide the same. It is only in exceptional cases where the things are so apparent and lack of jurisdiction is so clear that on accepting every fact the only conclusion comes out that the authority can not proceed in the matter, this Court has to intervene. Thus on the admitted fact of the case appeal filed by the respondents being regular appeal ass provided in the Consolidation of Holdings Act having been filed by them cannot be said to be unauthorized so as to take the view that it is abuse of the process. It can be another situation that appeal is barred by time or it is not maintainable for various reasons but that can be an objection by the respondents in any appeal or revision and thus this Court is of the considered view that unless there are exceptional circumstances straightway extraordinary powers is not be exercised. On the facts this Court is not satisfied that petitioner cannot get their objection examined by the appellate court so as to exercise the jurisdiction as a writ court. Appeals against the judgment of the Consolidation Officer dated 2.5.1986 appears to have been filed in May/June, 1986 itself and thus hardly there is few days delay but about 18 years has already passed, the disposal of the appeal appears to be still in dilemma. Various things can be inferred in respect to delay in disposal of the appeal but this may not be proper for this court at this stage to make any comment against the parties who appears to be prima facie responsible for delay in the matter.

8. For the analysis as made above this Court is not convinced that this is a case where writ of prohibition can be issued, as prayed by the petitioner. The objection about maintainability of the appeal on various grounds appears to be a routine one which is to be dealt by the appellate authority while deciding the appeal on merits in accordance with law.

9. Before parting with the case it will be useful to make an observation for appellate authority to decide the matter pending before him with all expedition preferably within three months from the date of receipt of certified copy of this order without allowing any unwarranted adjournment to either of parties unless it is required for very compelling reasons. Petitioners are directed to file certified copy of this order before the appellate court within fifteen days from today.

In view of the foregoing discussion, writ petition fails and is dismissed at admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 10.3.2005

BEFORE
THE HON'BLE MUKTESHWAR PRASAD, J.

Civil Misc. Writ Petition No. 37155 of 1998

Shiv Charan Singh ...Petitioner
Versus
The XIth Additional District Judge, Aligarh and others ...Respondents

Counsel for the Petitioner:
Sri Vipin Saxena

Counsel for the Respondents:
Sri J.J. Munir, S.C.

Code of Civil Procedure- Order 5 to 19-A readwith o. 9 rule 13 C.P.C.- Ex parte order suit for eviction-the date on which the plaint presented about from service through process server-Regd. Notices also sent- without order of Court-process server reported refusal-Regd. Letter returned back without service creates great doubt-issuing process through Regd. Post without order of court is no service-no declaration by Court about service-application under order 9 rule 13–held maintainable–ex parte order set a side with certain direction issued to the judge, small cause.

Held- Para 11 and 16

It further appears that the application for amendment of the plaint was moved and as such, a fresh summons was ordered to be issued. On 1.2.1995, none appeared on behalf of the defendant despite service of summons. Again on 4.4.1995, the court passed order for proceedings exparte and ultimately on 5.5.1995, the suit was decreed exparte.

Unless there is such declaration, the summons cannot be said to have been served under Rule 19-A. In the present case, it does not appear from the record that there was any such declaration made under sub rule (2) read with the proviso thereunder. I am, therefore, of the clear opinion that there is nothing on record to arrive at the conclusion that the summons was served upon the petitioner as alleged by the respondent.

Case law discussed:
2004 ALJ- 3852
1991 (2) ARC-305
1997 (i) ARC 328
1993 (i) ARC 21
AIR 1979 Raj-108

(Delivered by Hon'ble Mukteshwar Prasad, J.)

1. By means of this petition under Article 226 of the Constitution of India by tenant, the petitioner has prayed for quashing the judgment and order–dated 5.5.1995 and 22.51998 passed by respondent no. 2 and 2.11.1998 passed by the respondent no. 1 (Annexures 2,8 and 9 to the writ petition) respectively.

2. Counter and rejoinder affidavits have been exchanged between the parties and are on record. With the consent of learned counsel for the parties, the petition is being disposed of finally at this stage.

3. It appears that S.C.C. Suit No. 99 of 1994 was filed by the land lord for evicting the tenant-petitioner from house no. 1/27, Indra Puri, Chharra Adda, Aligarh and for recovery of arrears of rent and damages in the Court of Judge Small Cause. The suit was filed on 9.8.1994 and the Judge directed to issue summons to tenant fixing on 8.10.1994 for final hearing. On 10.10.1994, summons was received back unserved and court fixed 25.10.1994, for awaiting summons. On 25.10.1994, the plaintiff along with his

counsel appeared in the court but none appeared on behalf of defendant and as such, the court passed order for proceeding ex parte against the defendant and fixed 28.11.1994 for ex parte hearing. Ultimately, the suit was decreed ex parte on 5.5.1995.

4. The tenant-petitioner moved an application under order IX Rule 13 C.P.C. for setting aside the ex parte decree mainly on the grounds that no summons was served on him through process server or through registered post and he never refused to received summons. It was also alleged that during pendency of the suit, the land lord sold that disputed house to opposite party no. 4 to 6 (Sanjai Chopra, Vikas Chopra and Kaushal Chopra), which could not be done. The court directed to serve the notice on defendants. Again, the defendant- applicant was not served and ex parte decree was passed. On 22.8.1996 one Rajendra informed the petitioner about ex parte decree then he got the record inspected and moved an application for setting aside the ex parte decree. It was further alleged that house number of the defendant was not mentioned in the plaint.

5. A written objection was filed on behalf of the land lord denying all the allegations. The application was opposed on the grounds, inter alia, that Indra Deo Dubey, Peon, of the civil court went to serve summons on the petitioner on 1.9.1994 and the petitioner in the presence of two independent witnesses Gurvachan and Ved Prakash refused to accept the summons. Ultimately, peon affixed a copy of the summons at the door of the house. Besides, the summons was sent by registered post also on 22.8.1994 and same was also refused on 25.8.1994 and as such, no misrepresentation or fraud was practiced on the court and suit was rightly decreed ex parte.

6. After hearing the learned counsel for the parties, learned Judge, Small Cause found that summons sent through the Process server and postman was refused by tenant-petitioner and he had notice of the suit. Moreover, the application was barred by limitation. He, therefore, rejected the application. The tenant-petitioner filed S.C.C. Revision No. 26 of 1998 in the court of District Judge, which was also dismissed and the order of the learned Judge Small Cause was affirmed by the Additional District Judge on 2.11.1998.

7. Learned counsel for the petitioner has assailed the impugned orders mainly on the grounds that the court never passed any order for issuing summons to the defendant by registered post as provided under Rule 19 A of Order V. C.P.C. and alleged refusal of the petitioner and endorsement of the postman on the envelope was manipulated by the respondent. It is quite clear from the order sheet of the court below that the summons originally sent by the court was not served upon the petitioner and was received back unserved. The court passed no order for issuing summons again for service. Moreover, house number of the defendant was not mentioned in the envelope. There was absolutely no service upon the petitioner through the process server or by the registered post.

Learned counsel for the petitioner has placed reliance on the following decisions:-

1. **Smt. Munni alias Rajeshwari vs. Kshetra pal singh 2004 All.L.J. 3852**

2. **Shah Abetsham Mustafa Faridi vs. Smt. Radhika Dev I 1991(2) ARC 305**

3. **State of U.P. and others vs. Ram Prasad 1997 (1) ARC 328**

8. On the other hand, learned counsel for the land lord- respondent has supported the orders impugned in this petition and submitted that provision of order V Rule 19-A C.P.C. is enabling in nature and no specific order for issuing summons by registered post is required by Order V Rule 19-A C.P.C. In support of his contention, he placed reliance on a decision in the case of **Harkesh Chand vs. Additional District Judge, Dehradun and others 1993 (1) ARC 21**. It was also contended that the trial court took pains to record and examine evidence regarding factum of service upon the tenant-petitioner and both the courts have found that service of summons was actually made by the postman to the petitioner at his residence. The mere fact that formal declaration of service was not made by the trial court before proceeding ex parte in accordance with Order V Rule 19-A C.P.C. would not be a ground for setting aside the ex parte decree. He has also placed reliance on a decision of Rajasthan High Court **Prakash Chander vs.Smt. Sunder Bai and another AIR 1979 Raj. 108**.

9. I have considered the rival contention of the parties and have gone through the petition, counter affidavit, and rejoinder affidavit carefully. I have also perused the annexures and decisions. After having considered the arguments made on behalf of the petitioner, I find that the contention of learned counsel is well founded and has to be accepted. It is quite obvious from perusal of the copy of the order sheet (Annexure-1) that S.C.C. Suit was filed on 9.8.1994 and on the same day, after registration of the suit, the court passed order for issuing summons to the defendant fixing 8.10.1994 for final disposal.

10. The courts were closed on 8th and 9th October, 1994 on account of second Saturday and Sunday respectively. On 10.10.1994, the lawyers were on strike and summons were received back as unserved. However, the court fixed 25.10.1994 for awaiting the summons. On 25.10.1994, the plaintiff alongwith his counsel appeared in the court but non put in appearance on behalf of the defendant. Hence, the court passed order for proceeding ex parte and fixed 28.11.1994.

11. It further appears that the application for amendment of the plaint was moved and as such, a fresh summons was ordered to be issued. On 1.2.1995, none appeared on behalf of the defendant despite service of summons. Again on 4.4.1995, the court passed order for proceedings exparte and ultimately on 5.5.1995, the suit was decreed exparte.

12. Order V C.P.C. deals with issue and service of summons. Rule (5) provides that in every suit, heard by a court of Small Causes, the summons shall be for final disposal of the suit. Rules 9 to 19 of Order V C.P.C. provide mode of service on defendant. Rule 19-A lays down that the court shall, in addition to and simultaneously with, the issue of summons for service in the manner

provided in rule 9 to 19 also direct the summons to be served by registered post, acknowledgement due, addressed to the defendant, or his agent empowered to accept the service at the place where the defendant or his agent actually and voluntarily resides. Proviso (1) provides that nothing in this sub rule shall require the court to issue a summons for service by registered post, where in the circumstances of the case, the court considers it unnecessary. It is, therefore, clear that the order for issuing summons for service on defendant by registered post, in addition to service in the manner provided in rules (9) to (19), shall not be passed in every case unless the court considers it necessary. The sub rule (2) further provides that when an acknowledgement signed by the defendant is received back by the court or the postal article containing the summons is received back with an endorsement made by a postal employee to the effect that the defendant had refused to take deli very of the envelope containing summons when tendered to him, the court issuing summons shall declare that the summons had been duly served upon the defendant. Again, the proviso to sub rule (2) further requires that this declaration shall not be made by the court unless it is satisfied that the summons sent through the registered post was properly addressed, prepaid and duly sent by registered post acknowledgement due. The declaration referred to in this sub rule shall be made notwithstanding the fact that the acknowledgement having been lost or mislaid or for other reason has not been received by the court within thirty days from the date of the issue of the summons.

13. In the instant case, I find that there was no order of the court for issuing summons to the defendant by registered post. However, summons was sent for service to the defendant by registered post. This fact in itself makes the service of summons on the defendant highly doubtful. Learned counsel for the land lord- respondent could not sow any order of the court in this regard. It is noteworthy that the petitioner pleaded in para 3 of his application for setting aside the exparte decree (Annexure–3 to the writ petition) that no summons sent through the process server or by registered post was served upon him nor he refused to accept the summons. Learned counsel for the respondent in this court laid emphasis on the service of summons on the petitioner by registered post. Learned counsel for the petitioner has placed reliance on the decisions in Smt. Munni alias Rajeshwari vs. Kshetra Pal Singh 2004 ALL.L.J. 3852, Shah Abetsham Mustafa Faridi vs. Smt. Radhika Devi 1991 (2) ARC 305 and State of U.P. and others vs. Ram Prasad 1997 (1) ARC 328.

14. In Munni case (Supra), the name and address of the persons identifying the defendant and witnessing the delivery or tender of the summons, time etc. were lacking in the report of the process server and the court held that the summons were not served on the defendant in accordance with law. In the instant case, the plaintiff himself, accompanied the process server for identifying the defendant who had refused to accept the summons in presence of two independent witnesses Gurvachan and Ved Prakash.

Note 1 to Rule 138 of General Rule (Civil) Vol. 1 runs as under:-

"It should be impressed upon the process servers that it is their duty and not of the party concerned to find out the person whom the process is to be served. It is not necessary for the party to accompany them for identifying that person. They should seek the assistance of the village headman, Lekhpal, Chaukidar, etc. to find out person on whom the process is to be served".

15. It is, therefore, obvious that it was not necessary for the plaintiff to accompany the process server to identify the defendant. He, however, went to the defendant's house along with process server on his own.

16. It was held by this Court in Shah Abetsham Mustafa Faridi case (supra) that where a summons is sent by the registered post without any specific order of the Court, the summons should not be deemed to have been served. A Division Bench of this Court in State of U.P. and others (supra) clearly held that under sub rule (2) of rule 19-A , it is mandatory for the court to declare in such circumstances that the summons had been duly served on the defendants. Unless there is such declaration, the summons cannot be said to have been served under Rule 19-A. In the present case, it does not appear from the record that there was any such declaration made under sub rule (2) read with the proviso thereunder. I am, therefore, of the clear opinion that there is nothing on record to arrive at the conclusion that the summons was served upon the petitioner as alleged by the respondent.

17. For the aforesaid reasons, I am fully satisfied that the summons was snot served on the defendant-petitioner in accordance with law and courts below committed illegality in holding that the summons had been duly served on him and the suit was rightly decreed exparte. I am, therefore, of the opinion that both the courts below committed illegality in rejecting the application under Order IX Rule 13 C.P.C. I, therefore, hold that this petition has merit and orders impugned in this petition are liable to be quashed.

18. In the result, the petition succeeds and is allowed with costs. The order dated 22.5.1988 passed by the respondent no. 2 and order of the revisional court dated 2.11.1998 are hereby quashed and the judgment and decree dated 55.1995 passed by Judge, Small Causes in S.C.C. Suit no. 99 of 1994 is also quashed. The case is sent back to the court of Judge, Small Causes, Aligarh for deciding the S.C.C. Suit no. 99 of 1994 afresh in accordance with law expeditiously within a period of six months from the date of production of a certified copy of this order. The parties are directed to appear in the court below on 11.4.2005.

The Stay order dated 11.11.1998 stands vacated.

19. A copy of this order shall be made available to learned counsel for the petitioner within six days on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 7.3.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 28938 of 2004

Roshan Lal Malhotra ...Petitioner
Versus
Raj Bahadur ...Respondent

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

Counsel for the Respondent:
Sri B. Dayal

U.P. Urban Building (Regulation of letting Rent & Eviction) Act 1972-Section 21 (1) (a)-readwith–Code of Civil Procedure Order IX rule 13 read with section 151 C.P.C.-Presumption regarding service of summons- refusal by tenant/petitioner disputing the note of refusal-it was incumbent upon the prescribed authority to record specific finding asking the land lord to produce the post man- order to proceed ex parte– liable to quashed-matter remanded back to decide in accordance with law after affording opportunity of hearing.

Held- Para 2

The prescribed authority by the order impugned found that from the endorsement of the refusal, it is presumed that the service of summons is sufficient and proceeded to decide the matter ex parte. It is further submitted that the presumption of service of summons refusing by the petitioner-tenant is rebutable presumption and once the petitioner-tenant has put in appearance denying the allegations that he has ever been served and that the note of refusal has been manipulated, therefore it was incumbent upon the prescribed authority to have recorded a finding by asking the land lord to produce the postman concerned as held by this Court

Case law discussed:
AIR 1981 Alld-2008 (relied on)
AIR 1980 Alld-280 (relied on)
1978 ARC-496- (relied on)

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

1. This writ petition under Article 226 of the Constitution of India filed by the tenant-petitioner is directed against the orders dated 8th September, 2003 and 23rd July, 2004, passed by the prescribed authority under the provisions of the U.P. Act No. XII of 1972 (In short 'the Act'), copies whereof are annexed as Annexure Nos. '2' and '7', respectively to the writ petition.

2. The facts leading to the filing of the present writ petition are that the petitioner in this petition is the tenant and the respondent is the land lord of the accommodation in dispute. On 18th November, 2002 an application has been filed by the land lord- respondent purporting to be an application under Section 21 (1) (a) of the Act for release of the accommodation in dispute in favour of the land lord. The prescribed authority vide its order dated 15th February, 2003 held that the service of summons of the aforesaid application for release of the accommodation filed by the land lord is sufficient and directed the case to be proceeded ex parte. On 8th September, 2003, the prescribed authority allowed the release application ex parte filed by the land lord and directed release of the accommodation in dispute in favour of the land lord. The petitioner-tenant for the first time when came to know of the aforesaid proceedings on 23rd January,

2004, filed an application under Rule 22 (b) of U.P. Urban Building (Regulation of Letting Rent & Eviction) Rules, 1972, read with Section 151 and Order IX Rule 13 of the Code of Civil Procedure. In the present application filed by the tenant, which was supported by an affidavit, he ha categorically stated that he came to know of the pendency of the aforesaid release application only on 23rd January 2004. He further stated that the tenant-petitioner has never been served with any notice of the release application filed by the land lord and it is wholly incorrect to say that the opposite party ever met with any process server of the Court with regard to service of summons of the aforesaid release application. It is also incorrect to say that the tenant-petitioner has received any registered notice send by the Court in present release application pending before the prescribed authority, therefore there is no question of petitioner's refusing to receive any summons sent by the Court. The petitioner-tenant further stated that in fact with the collusion of postman and the opposite party–land lord it appears that a forged report regarding service of the registered letters/notice were manipulated on the basis of which the prescribed authority has presumed the service of summons to be sufficient, whereas in fact the notice has never been served upon the petitioner-tenant. The prescribed authority by the order impugned found that from the endorsement of the refusal, it is presumed that the service of summons is sufficient and proceeded to decide the matter ex parte. It is further submitted that the presumption of service of summons refusing by the petitioner-tenant is rebutable presumption and once the petitioner-tenant has put in appearance denying the allegations that he has ever been served and that the note of refusal has been manipulated, therefore it was incumbent upon the prescribed authority to have recorded a finding by asking the land lord to produce the postman concerned as held by this Court. In support of his contention, learned counsel appearing on behalf of the petitioner-tenant relied upon the case reported in ***AIR 1981 Allahabad, 208 Gur Bachan Singh Vs. Dharam Samaj Society***, particularly paragraph 11, which is reproduced below :

"11. The crucial question which thus arises in the present case now is as to whether in the state of evidence which exists on the record the defendant can be said to have rebutted the presumption which had been raised against him. The defendant in the present case stated on oath that the postman has not served the notice on him. He has not at all been cross-examined on the aforesaid point by the plaintiff. The plaintiff's only witness has made a statement that he had not accompanied the postman. The only thing which the plaintiff has been sent to the correct address of the defendant. The contention of the plaintiff's counsel that the defendant should have cross examined the plaintiff on the aforesaid question and should have also produced the postman, in my opinion, is without any force. The plaintiff himself had not accompanied the postman for effecting the service and thus there was no question of cross-examining the plaintiff on that question. The postman had made an endorsement of refusal on the notice and the defendant would not call a witness who was going to depose against him. It was for the plaintiff, in case he wanted to produce better evidence to produce the postman in evidence in order to believe the version of

the defendant that he was not served. On similar facts this Court in the case of Shiv Dutt Singh v. Ram Dass, (1980 All LR 457): (AIR 1980All, 280), held:-

"In the instant case the defendant clearly gave out that the postman never came to him to offer this notice nor he refused to take it. Nothing was elicited in cross-examination to show that he was not telling the truth. He could not have examined the postman as he would not have deposed against his own endorsement and more so if it was done to oblige the plaintiff. The defendant could not have produced any other witness as that would have been stamped as got up evidence. As a party to the suit, having knowledge of the facts, he was bound to examine himself otherwise another presumption would have been raised against him. Therefore, the presumption of service in the circumstances of this case was amply rebutted by the solitary statement and the suit was bad for ant of notice."

Similar view has been taken by this Court in Hub Lal v. Bhudeo Prasad Sharma (1980 All LJ 437); Amar Nath v. Smt. Champa Devi (1978 All LR 90), Ram Nekshatra v. Girdhar Das Kashya (1979 UP RCC 5) and also by the Delhi High Court in Jagat Ram Khullar v. Battu Mal (AIR 1976 Delhi, 111). In my opinion in the present case the defendant rebutted the presumption of service of notice against him by examining himself and deposing that the postman never served a notice on him. His testimony was not challenged by the plaintiff in the cross examination. The plaintiff did not produce the postman or any other evidence to show that the defendant was not deposing the truth and that notice had, in fact, been served on him. The plaintiff having failed to prove that he had served notice of termination of tenancy under Section 106 of the T.P. Act on the defendant, the plaintiff's suit was liable to be dismissed on this ground alone."

3. Learned counsel appearing on behalf of the tenant-petitioner further relied upon a decision reported in ***AIR 1980 Allahabad, 280 Shiv Dutt Singh Vs. Ram Dass***, wherein paragraph 10 relied upon by learned counsel for the tenant is reproduced below:

"10. In Jagat Ram Khullar V. Battu Mal (AIR 1976 Delhi,111) it was observed that a statement of the addressee on oath that the postal cover said to have been refused by him, was never tendered to him would be sufficient to dislodge the presumption and shift the onus on the other side to establish by evidence that the service had been duly effected. It is, therefore, not possible to accept the contention that the bare statement on oath of the addressee in such a case would not, as a mater of law, be sufficient to dislodge the presumption that may be raised either under S. 114 of the Evidence Act or under S. 27 of the General clauses act. A statement on oath of a party to the proceedings is a piece of oral evidence like statement of any other witnesses- and there is no rule of law that such a statement should not be accepted merely because it is made by a person who is interested in the proceedings nor is there any requirement of law that the statement on oath of a party to the proceedings must always be corroborated by any independent evidence before it could be accepted b court of law. Once the presumption is raised the matter of rebuttal need not be limited to the

instance given in the counter illustration to S. 114".

4. It is further submitted by learned counsel appearing on behalf of the tenant-petitioner that the petitioner having discharged his burden by making a statement that the service of summons has in fact never been done and that he has never refused to receive the registered letters/summon and further that the said refusal has been manipulated. In view of the law laid down, referred to above, the order to proceed ex parte by the prescribed authority is liable to be set aside. Learned counsel for the tenant-petitioner further relied upon a decision of the apex court reported in ***1978 ARC, 496 Ramji Dass and others vs. Mohan Singh***, wherein the apex court has held as under:-

"…After having heard counsel, we are inclined to the view that, as far as possible, Court's discretion should be exercised in favour of hearing and not to shut out hearing. Therefore, we think that the order of the High Court should not have been passed in the interests of justice which always informs the power under S. 115 C.P.C. We, therefore, set aside that order and also the ex parte decree. We direct the trial court to take back the suit on file and proceed forthwith to trial."

5. In view of what has been stated above, the orders passed by the prescribed authority impugned in the present writ petition dated 8th September, 2003 and 15th February, 2003 deserves to be quashed. The matter now will go to the prescribed authority to be decided in accordance with law after affording an opportunity of hearing to the tenant-petitioner.

6. In the result, the writ petition succeeds and is allowed. The order dated 8th September, 2003, passed by the prescribed authority, Annexure-2 to the writ petition and the order dated 15th February, 2003, is quashed. The matter now will go back to the prescribed authority to be decided in accordance with law after affording an opportunity of hearing to the tenant-petitioner. Since the matter is old, the prescribed authority is directed to decide the application filed by the land lord –respondent for release of the accommodation in dispute within a period of sic months' from the ate of presentation of a certified copy of this order before him.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 24.2.2005

BEFORE
THE HON'BLE AJOY NATH RAY, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 86 of 2005

Vijay Bhan Singh Kasana ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Mithilesh Kumar Tiwari

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- Cancellation of appointment- Petitioner selected as Constable in P.A.C.-false declaration concealing involvement in Criminal proceeding- within 3 days of first declaration given–another affidavit disclosing criminal cases- cancellation of appointment held- proper- Single Judge rightly not exercised discrianary power.

Held- Para 6

In these circumstances, cancellation of the provisional selection did not call for a prior hearing to be given. The facts were quite sufficient and practically admitted. Discretionary orders in the writ jurisdiction should not be exercised in favour of the writ petitioner who commits intentional lapses. The appeal is summarily rejected on merits.

Case law discussed:
JT 1998 (9) SC 429

(Delivered by Hon'ble A.N. Ray, C.J.)

1. This is for admission of Special Appeal from an order of Hon'ble Mr. Justice D.P. Singh dismissing the appellant's writ petition filed in the Court below. The writ petitioner- appellant had been provisionally selected on 7.12.2001 as a constable in the Provincial Armed Constabulary and he had filed an affidavit at that time stating that he was not involved in any criminal case. That affidavit was false, he was involved in three cases. After about one and a half year on 5.5.2003 he tendered the second affidavit stating about his involvement in the criminal cases and that he had mistaken by not mentioned it earlier. Within three days of that second affidavit i.e. on 8.5.2003, the authority pointed out that a police verification had already revealed his involvement in the criminal cases. As such on 20.5.2003 his provisional selection was cancelled.

2. The learned Single Judge has written in the judgment that the second declaration of 5.5.2003 was filed only after the police verification had revealed the involvement of the petitioner in three criminal cases.

3. There is no ground of appeal in the memorandum submitting that this finding of his Lordship was a erroneous finding of fact. It is good that there is no such ground because even if the ground were there it would have to be rejected. It is impossible to believe that in three days between 5.5.2003 and 8.5.2003, the police verification had been commenced and concluded and that such commencement had been made only because of the second affidavit filed by the writ petitioner.

4. It is quite clear that the writ petitioner tried cleverly to conceal his earlier misdemeanor by filing the second affidavit close on to his transfer and posting in a particular battalion.

5. The case relied upon by the appellant being that of Commissioner of Police, Delhi and anr. Vs. Dhaval Singh reported in JT 1998 (9) SC 429 is absolutely different on the most crucial fact. There the perspective employee involved had himself said about his mistake within a few months after the first misdeclaration and it was not a question of him trying to cover up a mistake after coming to know that he had already been found out.

6. In these circumstances, cancellation of the provisional selection did not call for a prior hearing to be given. The facts were quite sufficient and practically admitted. Discretionary orders in the writ jurisdiction should not be exercised in favour of the writ petitioner who commits intentional lapses. The appeal is summarily **rejected** on merits.

Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 18.3.2005

Before
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 8783 of 2002

Umesh Chandra Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri G.K. Singh
Miss. Pooja Agarwal

Counsel for the Respondents:
S.C.

U.P. Government Servant seniority rules 1991- Rule 8 (2) read with U.P. Police Training College Manual–Para 4`1)5)- Mode of seniority-Petitioner approved and declared successful for the post of sub inspector in the year 1987-88- but not send on training- despite of the fact writ petition was allowed–specific direction issued by the Court- second time of litigation–representation decided by the authorities–without any discussions on merit- other candidates seniority fixed w.e.f. 87-88, where as the petitioner has been shown in the gradation list of 1994-held- illegal- petitioner also entitled to be inlisted in the gradation list of 87-88- direction issued accordingly.

Held- Para 16

If the petitioner had been appointed alongwith other candidates in the year 1989, he would have been placed according to the seniority as per the merit list of 1987-88. Since he was discriminated, he had to pursue his legal remedy by filing a writ petition which was eventually allowed. This Court had passed the judgment dated 15.3.1991, but it took another three years for the respondents to issue a letter dated 27.6.1994 when contempt proceedings were staring at their faces. The delay in appointing the petitioner was caused by the respondents and, therefore, the petitioner cannot be made to suffer.

Case law discussed:
1998(5) SCC-246
1994 Scc (L.85)1158

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

1. An advertisement appeared in the newspaper inviting applications from the public for appointment to the post of Sub Inspector (Civil Police) for the session 1987-88. The petitioner applied and qualified for the interview in which he was also declared successful. However, the petitioner was prevented from being sent for training at the Police Training College, Moradabad whereas other persons of his batch were sent for training and thereafter were posted at various police stations in the State of U.P. Since the petitioner was discriminated, he and other similarly situated persons filed writ petition no. 18939 of 1989 before this Hon'ble Court. This petition was allowed by a judgment dated 15.3.1991. This Court held that the remaining 39 vacancies for the session 1987-88 shall be filled up from the remaining candidates of the select list from Sl. No. 414 onwards. The operative portion of the judgment is quoted herein:-

"All these writ petitions are therefore disposed of directing the respondents to fill up the aforesaid 39 vacancies from the residuary candidate who are placed next to the selected candidates in the selection list starting from serial no,. 414. The respondents will and offers to all the candidates stating from serial no. 414

upto last petitioner of all the categories in the selection list and offer the appointment to them strictly in accordance with the merit list subject to medical fitness and cut off percentage in respective categories. No order as to costs."

2. It further transpires that a Special Leave Petition was preferred by the State of U.P. before the Supreme Court of India which was dismissed by a judgment dated 16.9.1991. Inspite of the dismissal of the Special Leave Petition, the petitioner was not appointed and has compelled to file a Contempt Petition No. 431 of 1994 in which the Special Secretary (Home) was directed to appear in person. Eventually , a letter dated 27.6.1994 was issued indicating therein that in pursuance of the select list of 1987-88, the petitioner was directed to report for training before the Police Training College, Moradabad on or before 7.7.1994. The said letter also indicated that the order was being issued in compliance of the orders of the Hon'ble High Court. The petitioner further stated that based on the aforesaid order, he appeared before the Police Training College, Moradabad and after completing his training, was placed as a Sub Inspector. However, the petitioner was given the placement on the basis of the list prepared in the year 1994 whereas he should have been placed in the select list of the year 1987-88. The petitioner made a detailed representation praying that he should be given the correct placement which remained pending and eventually the petitioner again approached this court by filing writ petition no. 53492 of 2000 which was disposed by a judgement dated 11.12.2000 directing respondent no. 2 to decide the matter by a speaking order within four months. Based on the directions of this Court, the Deputy Inspector General of Police (Establishment) UP at Allahabad, respondent no. 2 passed the impugned order dated 12.6.2001 rejecting the claim of the petitioner holding that the petitioner was not entitled to be placed in the list of 1987-88. Consequently, the present writ petition has been filed praying for the quashing of the order dated 12.6.2001, passed by respondent no. 2 and further praying for a writ of mandamus commanding respondent no. 2 to place the petitioner as per his merit in the gradation list of the year 1987-88 and grant all consequential benefits.

3. In the writ petition, the petitioner further contended that one Sunder Singh was not sent for training along with is batch mates. He filed a civil misc. writ petition no. 9265 of 1985, which was dismissed on 16.3.1990 by the High Court, against which he preferred a special leave petition which was allowed by judgment dated 31.1.1994. The Supreme Court directed the respondents to consider his case for promotion as Sub Inspector and to fix his seniority from the date when his juniors were promoted with all consequential benefits. The petitioner submitted that based on the directions of the Supreme Court, Sri Sunder Singh was placed as a Sub Inspector and was given consequential placement and seniority with retrospective effect, i.e., from the date when his juniors were promoted. On the other hand the petitioner has been discriminated and has not been placed in the Gradation list of 1987-88.

4. Heard Sri Shashi Nandan, the learned Senior Advocate assisted by Miss Pooja Agarwal for the petitioner and the

learned Standing Counsel for the respondents.

5. Learned counsel for the petitioner submitted that as per the judgment of this Court dated 15.3.1991 the petitioner was appointed as a Sub Inspector for the session 1987-88 from the original merit list prepared by the respondent and therefore, he should be placed in the Gradation list of 1987-88 and should not be placed in the Gradation list of 1994 as is also clear from the letter of the respondents dated 27.6.1994. The petitioner further submitted that in view of Rule 8 (2) of the U.P. Government Servant Seniority Rules 1991, the petitioner was also entitled to be given the seniority as shown in the merit list. In support of his submission, the learned counsel for the petitioner has relied upon a decision of **Surendra Narain Singh and others vs. State of Bihar and others (1998) 5 SCC 246**.

6. On the other hand the learned standing counsel appearing for the respondents submitted that since there was no provision of making a waiting list, the petitioner was not selected from the original select list but was appointed subsequently in pursuance of the judgment of the High Court and was placed in the Gradation list of the year 1994 when he was appointed and that he cannot be placed in the Gradation list of the year 1987-88 with retrospective effect. The learned counsel for the petitioner further relied upon paragraph 41 (5) of the U.P. Police Training College Manual which states that the list has to be prepared in the order of seniority determined according to the marks obtained in the final exams. In support of his submission learned counsel further relied upon decision of the Supreme Court in **Gujrat State Deputy Executive Engineers Association vs. State of Gujrat and others**, *1994 SCC (L &S) 1159*, in which the Supreme Court held that unless the government had acted arbitrarily, the High Court could not direct the Government to appoint the candidates from the waiting list in the vacancies of the relevant years. The respondents further submitted that the case of Sunder Singh was different and that the respondents gave him the seniority with retrospective effect on account of the directions issued by the Supreme Court and submitted that the petitioner was not discriminated.

7. After considering the submissions made by the parties, I am of the opinion that the writ petition is liable to be allowed.

8. This Court had directed the respondents to decide the representation of the petitioner. I have perused the impugned order and I find that the authority has only narrated the stand taken by both the parties and thereafter concluded by rejecting the representation of the petitioner. No reasons have been given indicating as to why the application of the petitioner had been rejected. In my opinion, the authority has not applied its mind. The authority was required to pass a reasoned order which does not exist in the present case.

9. U.P. Government Servants Seniority Rules, 1991 have been framed under the proviso to Article 309 of the Constitution of India. These Rules are applicable to government servants including the petitioner and which is

admitted by the respondents. Rule 8 is quoted herein below:-

"8. Seniority where appointments made by promotion and direct recruit:- (1) Where according to the service rules appointments are made both by the promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order,:

Provided that if the appointment order specifies a particulars back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will means the date of issuance of the order;

Provided further that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons, when vacancy if offered to him the decision of the appointment authority as to the validity of reasons, shall be final.

(2) The seniority inter se of persons appointed on the result of any one selection:-

(a) through direct recruitments, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rules 6 or Rule 7, as the case may be, accordingly as the promotion are to be made from a single feeing cadre or several feeding cadres."

10. From a perusal of the aforesaid it is clear that the seniority of the candidate would be such as shown in the merit list in a particular selection. Paragraph 41 (5) of the U.P. Police Training College Manual is quoted herein below:-

"(5) The Examination Board shall prepare a list of cadets who have attained the requite degree of proficiency and shall place those cadets in order of seniority determined according to the marks obtained in the final examination."

11. From the perusal of the aforesaid, it is clear that the list of seniority would be of cadets which are prepared in the order of seniority determined according to the marks obtained in the final examination. Rule 8 (2) of the Rules 1991 and paragraph 41 (5) of the U.P. Police Training College Manual speaks the same language and makes it apparently clear that the seniority would be determined as shown in the merit list.

12. The petitioners and other candidates were selected in the session of 1987-88. Others were given their placement earlier whereas the petitioner was denied an appointment for reasons best known to the respondents. The petitioner filed a writ petition and succeeded in which this Hon'ble Court by judgement dated 15.3.1991 directed the respondents to appoint the petitioner from the same merit list. Based on this judgment, the respondent issued a letter dated 27.6.1994 which indicates that the petitioner was being appointed from the

same merit list of 1987-88. Therefore, in view of the directions of the High Court and, in view of the letter dated 27.6.1994, it is clear, that the petitioner was appointed as a Sub Inspector from the same merit list of 1987-88 and on the basis of the same selection. Thus, in my view, the seniority of the petitioner has to be determined on the basis of his placement in the merit list of 1987-88 and the petitioner, should be placed in the gradation list of the year 1987-88 instead of placing the petitioner in the gradation list of 1994. This is on account of the fact that the petitioner was appointed from the same Select list of 1987-88.

13. The stand taken by the respondents that there is no provision of a waiting list is irrelevant and also devoid of any merit. There is in fact no waiting list. The petitioner has been appointed from the remaining candidates of the merit list of 1987-88. The directions given by this Court in its judgment dated 15.3.1991 has become final. The petitioner was appointed from the merit list of 1987-88 and, therefore, his seniority was to be calculated on the basis of the merit list of 1987-88. In my opinion, the petitioner was entitled to be placed in the gradation list of 1987-88.

14. Further I see no justification in the stand taken by the respondents in so far as the petitioner's case is concerned. The respondents have given the seniority to one Sunder Singh, who was similarly placed with retrospective effect. The case of Sunder Singh is on the same footing as that of the petitioner and the respondents should have also given the petitioner his seniority with retrospective effect. The petitioner has been discriminated by the respondents by not giving the seniority to the petitioner with retrospective effect.

15. The judgment cited by the respondents, in my view, is not applicable to the present facts and circumstances of the case. This Court by judgment dated 15.3.1991 had directed the respondents to give the appointments from the remaining candidates from the merit list. That judgment has become final, therefore, the judgment cited by the Standing Counsel is not applicable.

16. There is another aspect of the matter. If the petitioner had been appointed alongwith other candidates in the year 1989, he would have been placed according to the seniority as per the merit list of 1987-88. Since he was discriminated, he had to pursue his legal remedy by filing a writ petition which was eventually allowed. This Court had passed the judgment dated 15.3.1991, but it took another three years for the respondents to issue a letter dated 27.6.1994 when contempt proceedings were staring at their faces. The delay in appointing the petitioner was caused by the respondents and, therefore, the petitioner cannot be made to suffer.

17. In view of the aforesaid, the impugned order dated 12.6.2001 cannot be sustained and is quashed. The writ petition is allowed. The petitioner is entitled to be placed in the gradation list of 1987-88. Consequently, mandamus is issued to respondent no. 2 to forthwith accord placement to the petitioner as per his merit in the Gradation list of 1987-88 alongwith his batch mates and thereafter accord all consequential benefits that may arise.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.2.2005

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 17493 of 2004

Dinesh Kumar ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri H.N. Shukla,
Sri R.R. Shukla

Counsel for the Respondents:
Sri K.N. Bind
S.C.

Constitution of India, Article 226-G.O. dated 3.7.90- clause-7-Fair Price shop-cancellation and appointment of Agent-District Magistrate/S.D.M.–passed order of cancellation on the basis of Gaon Sabha resolution- without affording any opportunity of hearing held- illegal-clause-7 does not exclude the principle of natural justice.

Held- Para 16

Therefore in Clause 7, the provision of opportunity of hearing being afforded to a person concerned against whom an order is proposed to be passed must necessarily be read, so as to make the same inconformity with the requirement of principle of natural justice. Clause 7 does not exclude the applicability of principle of natural justice. The contention raised on behalf of the petitioner that no notice/opportunity of hearing is required to be afforded to a person, whose appointment of Fair Price Shop Agent is to be cancelled merely because a resolution by the Gaon Sabha has been passed on certain irregularities, cannot be legally accepted.

Case law discussed:
1986(4) SCC-537
AIR 1988-SC-686
AIR 1996 SC-1669
AIR 1998 SC 2526

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

1. Heard Sri H.N. Shukla, learned counsel for the petitioner, Sri Kalp Nath Bind, learned counsel for the respondent no. 4 and learned Standing Counsel for the respondent nos. 1 to 3.

2. Respondent no. 4, Manik Chand was appointed as Fair Price Shop Agent in respect of Gaon Sabha Chheechhna, Teshildar Machhalishahar, district Jaunpur, Certain complaints were received with regard to the distribution of essential commodities by the said Fair Price Shop Agent. On the receipt of complaints, an enquiry into the allegations made against the respondent no. 4, as Fair Price Shop Agent was conducted. On the basis of the report of the Tehsildar as also on the basis of certain other materials as have been noticed by the Sub Divisional Magistrate, Machhalishahr, he passed an order dated 8th September, 1998 cancelling the appointment of the respondent no. 4 as Fair Price Shop Agent. In the order reference has also been made to the resolution of the Gaon Sabha dated 5th July, 1998.

3. A day prior to the cancellation of appointment of petitioner, there is an order of Sub Divisional Magistrate, Machhalishahr dated 7th September, 1998 appointing the present petitioner as Fair Price Shop Agent in pursuance of the resolution of the Gaon Sabha on the same day i.e. 5th July, 1998, a copy of the said appointment order has been filed as Annexure no. 3 to the writ petition.

Feeling aggrieved by the aforesaid order of the Sub Divisional Magistrate, Machchlishahr dated 8th September, 1998 cancelling the appointment of the respondent no. 4 as Fair Price Shop Agent, the respondent no. 4 preferred an appeal, which was numbered as Appeal No. 114 of 1998. The Commissioner, Varanasi Division, Varanasi by means of the order dated 3rd March, 2004 has allowed the appeal after recording a categorical finding that the order canceling the appointment of the respondent no. 4 as Fair Price Shop Agent has been passed without notice for opportunity of hearing to the petitioner. Accordingly the Commissioner set aside the order of the Sub Divisional Magistratge dated 8th September, 1998 and remanded the matter to the Sub Divisional Magistrate, Machchlishahr for deciding the dispute with regard to the continuance of the respondent no. 4 afresh in the light of the observations made in the said order.

4. The petitioner who had been appointed as Fair Price Shop Agent under order dated 7th September, 1998 has approached this Court by means of the present writ petition against the aforesaid order of the Commissioner, Varanasi Region, Varanasi dated 3rd March, 2004.

5. On behalf of the petitioner it is contended that under Government order dated 3rd July, 1990 there is no provision of any appointee of the Fair Price Shop Agent to be afforded opportunity, whose appointment is cancelled under the resolution of the Gaon Sabha. Learned counsel for the petitioner contents that the appointment of Fair Price Shop agent is made under a resolution of the Gaon Sabha, and it is the decision of the Gaon Sabha, which becomes final with regard to his removal also. On behalf of the petitioner it is further contended that the Tehsildar, who was appointed as the Enquiry Officer afforded opportunity of hearing to the respondent no. 4 but the respondent did not avail the same and therefore the Tehsildar submitted a report after making a spot enquiry. The order of cancellation on the basis of the report of the Tehsildar as also on the basis of other materials as were available before him on the date cannot be questioned.

6. On behalf of the respondent no. 4 it is contended that the order passed by the Sub Divisional Magistrate is a non-speaking order it contains absolutely no reasons. It is further contended that the order canceling the appointment of the respondent no. 4 as Fair Price Shop Agent visits the said respondent with evil civil consequences and as such could not have been passed without affording opportunity of hearing to the said respondent. It is further contended that opportunity of hearing is necessarily to be read in Clause 7 of the Government order dated 3rd July, 1990 read with Government order dated 3rd February, 2001. Therefore, the order of Commissioner calls for no interference.

7. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

8. From the record of the present writ petition, the following facts emerge. The Gaon Sabha passed a resolution for cancellation of the Fair Price Shop licence of the respondent no. 4 in its meeting dated 5th July, 1998, in the same meeting it is alleged that the petitioner was selected for being appointed as a Fair Price Shop Agent in place of respondent

no. 4. Under the Government order dated 3rd July, 1990 read with Government order dated 3rd February , 2001 both the resolutions are required to be transmitted to the District Magistrate/Sub Divisional Magistrate, for necessary orders. The Sub Divisional Magistrate, Jaunpur proceeded to pass an order appointing the petitioner as Fair Price Shop Agent on 7th September, 1998 i.e. even prior to date of passing of the order of cancellation of appointment of the respondent no. 4 as Fair Price Shop Agent of the shop in question. The date of cancellation of the appointment of respondent no. 4 as Fair Price Shop Agent is 8th September, 1998.

9. The order passed by the Sub Divisional Magistrate dated 8th September, 1998 does not disclose sufficient reasons, further no opportunity of hearing was afforded to the respondent no. 4 before passing the cancellation order. It is further apparent that the Sub Divisional Magistrate has not even cared to mention irregularities or the illegalities, which have been found proved against the respondent no. 4 in respect of distribution of essential commodities in the said order. He has not recorded a satisfaction that the allegations stood proved and they are so serious so as to warrant cancellation of the appointment of the respondent no. 4 as Fair Price Shop Agent.

10. In the opinion of the Court such an order passed by the Sub Divisional Magistrate is wholly unjustified and does not satisfy the requirement.

11. So far as the contention raised by the petitioner to the effect that no opportunity of hearing is contemplated under the Government order dated 3rd July, 1990 read with Government order dated 3rd February, 2001 before passing the order of cancellation of the appointment of the respondent no. 4 as Fair Price Shop Agent is concerned, suffice it to point out that clause 4.4 to clause 4.12 of the said Government order relied upon by the learned counsel for the petitioner, relate to the appointment of Fair Price Shop Agent and therefore, the discretion vested in the Gaon Sabha for passing the resolution in that regard cannot be relevant for cancellation of appointment of the Fair Price Shop Agent. The provisions contained in clause 4.1. to clause 4.12 of the said Government order have no application , so far as the cancellation of the appointment of Fair Price Shop Agent is concerned.

12. The main clause dealing with cancellation is the clause 7 of the said Government order, which reads as follows:-

"७. यदि किसी दुकानदार द्वारा अनुसूचित वस्तुओं के उठान या वितरण में गडबडी की जाती है तो स्वप्रेरणा, शिकायत या गांव सभा के प्रस्ताव पर जिलाधिकारी उनकी दुकान निलम्बित/निरस्त कर सकते हैं।

७.२ दुकान के निलम्बन/निरस्तीकरण के आदेश की प्रति ग्राम प्रधान एवं उप प्रधान को अनिवार्य रूप से दी जायेगी तथा ग्राम सभा की ओर से सामग्री उठाने की तात्कालिक वैकल्पिक व्यवस्था करने को कहा जायेगा तथा एक माह के अन्दर प्रस्ताव पारित कर दूसरे दुकानदार की नियुक्ति कर दी जाये।"

13. A bare reading of the aforesaid clause 7 would establish that if the power of cancellation of Fair Price Shop Agent has been conferred upon the District Magistrate/Sub Divisional Magistrate, such an order can be passed sue motto on complaints or with reference to a resolution being made by the Gaon Sabhas. The aforesaid clause 7 makes it

clear that the discretion of the District Magistrate/Sub Divisional Magistrate to pass the order is not certified in any manner merely because a resolution has been passed by the Gaon Sabha. The resolution of the Gaon Sabha is only one of the facts which may result in cancellation of the appointment of an agent after the allegations made are found to be corrected by the District Magistrate/Sub Divisional Magistrate while passing an order under clause 7.

14. It cannot be disputed that an order of cancellation of the appointment of the Fair Price Shop Agent visits the person concerned with evil civil consequences and such an order has necessary to be passed in accordance with the principle of natural of justice, failing which the provision for cancellation of appointment of the Fair Price Shop Agent would at self be liable to be struck down itself being violative of Article 14 of the Constitution of India.

15. Administrative bodies while passing orders affecting civil rights of a person are also bound to act justly and fairly, which may bringing the requirement of natural justice. When a power is conferred upon a public official to destroy, defeat or prejudice a person's right, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words or necessary intendment. Further, in India the State and every public authority or instrumentality of the State must act reasonably in public interest and fairly for these requirements have also been spelled out of Article 14 and the concept of rule of law. Article 14 is said to be the constitutional guardian of principles of natural justice. Unless the statute provides otherwise, the implication of natural justice will require absence of bias in and predecisional hearing by the adjudicating authority, and any omission by the adjudicating authority to hear the person concerned is not cured by a prior hearing given to him by the investigating authority or by a post decisional hearing given in appeal. The principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary. (Reference; ***(1986) 4 SCC 537 (Para 16) (Institute of chartered Accountants of India Vs. L.K. Ratna); AIR 1988 SC 686 (Paras 12,13,15 and 16) (K.L. Shephard Vs. Union of India)***. The Hon'ble Supreme Court has held, "Briefly stated' 'natural justice' 'fairplay in action' and requirements of natural justice depend upon the facts of each case. Therefore, in judging the validity of an order when the complaint is about non-compliance with the principles of natural justice, in cases where the attack is not on ground of bias, a distinction has to be drawn between cases of 'no notice' or 'no hearing' and cases of 'no fair hearing' or 'no adequate hearing'. If the defect is of the former category, it may automatically make the order invalid but if the defect is of the latter category, it will have to be further examined whether the defect has resulted in prejudice and failure of justice and it is only when such a conclusion is reached that the order may be declared invalid. (Reference, ***AIR 1996 SC 1669 (State Bank of Patiala vs. S.K. Sharma, AIR 1998 SC 2526 (union of India vs. Mustafa & Najibai Trading Co.).***

16. Therefore in Clause 7, the provision of opportunity of hearing being afforded to a person concerned against

whom an order is proposed to be passed the same inconformity with the requirement of principle of natural justice. Clause 7 does not exclude the applicability of principle of natural justice. The contention raised on behalf of the petitioner that no notice/opportunity of hearing is required to be afforded to a person, whose appointment of Fair Price Shop Agent is to be cancelled merely because a resolution by the Gaon Sabha has been passed on certain irregularities, cannot be legally accepted.

17. In view of the aforesaid the order passed by the Commissioner dated 3rd March, 2004 calls for no interference under Article 226 of the Constitution of India. The writ petition is devoid of merits and is accordingly dismissed with no order as to cost. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.3.2005

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

Civil Misc. Review Petition No. 30419 of 2005
In
Civil Misc. Writ Petition No. 4450 of 1986

Mohan Lal Bagla ...Petitioner
Versus
Board of Revenue, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Tandon
Sri P.K. Jain
Sri R.V. Jain
Sri R.V. Gupta
Sri R.K. Jain
Sri B.D. Mandhyan

must necessarily be read, so as to make

Counsel for the Respondents:
Sri V.B. Singh
Sri T.P. Singh
Sri A.P. Tiwari
Sri V.B. Upadhyay
Sri R.P. Gupta
Sri Vivek Saran
S.C.

Code of Civil Procedure- 0.47 r. Review Petition-Petition decided on merit after hearing the senior counsel-S.L.P. also dismissed-Review before High Court through another counsel-without no objection certificate from earlier counsel-held-not maintainable-effort by placing same new averments, evidence to change the earlier view amounts to re hearing- can not be scope of review.

Held- Para 14

Effort by placing same evidence, same document and same averments for taking different view than taken at earlier stage, can never be the scope of review petition otherwise, there may not be any end of the matter as the loosing party will always try to get review petition filed and that too, may be some more eminent advocate according to his expectations for the purpose of vehement re arguments in the matter in the hope of getting some changed opinion favouring him. This cannot be the spirit of the provision as contained under Order 47 Rule 1 C.P.C.

Case law discussed:
JT 1997(i) SC 486
JT 1997 (i) SC 486
2000 (6) SCC-360
1995 (1) SCC-170
AIR 1960 –SC-137

(Delivered by Hon'ble S.K. Singh, J.)

1. These are two applications filed by Narendra Kumar and others, respondents in the writ petition.

2. By application no. 30451 of 2005, review of the judgment of this Court dated 11.8.2004 has been sought and by Application no. 29291 of 2005, six months time has been prayed for vacating the properties in question.

3. On the close of arguments, learned counsel who argued the matter from both sides, submitted that they may give brief note which may facilitate this Court in passing the order and thus, brief note/submission given has not been made part of record and that has been just perused. A brief note given by Sri Singh, learned counsel in support of review petition is clearly reiteration of various facts and details in the light of evidence which is the part of counter affidavit filed in the writ petitions and thus they are reiteration of the facts and details on which reappraisal of re hearing appears to be an effort which for the reasons indicated in this order and within limited scope of consideration may not be permissible.

4. Issue in the writ petition was about validity and propriety of the auction sale of three houses i.e. House no. 16/20, 16/20-B and 16/20-C situated in Civil Lines, Kanpur which were auctioned for small dues of the sales tax department for a total amount of Rs.1,61,000/-. After lengthy arguments from both sides, writ petition was allowed and auction proceedings were quashed and the respondent- auction purchaser was directed to hand over possession of the properties in question within a period of six months to the petitioner and bid amount alongwith interest was directed to be returned to the auction-purchaser, within a period of six weeks from the date of moving application as indicated in the judgment. The judgment of this Court was challenged by respondent-auction purchaser by filing Special Leave Petition before the Apex Court through S.L.P. No. 27062-27063 of 2004 which were dismissed by the Apex Court by judgment dated 24.1.2005. It is thereafter, these applications have been filed by the respondents in the writ petition.

5. Sri V.B. Singh, learned Senior Advocate assisted by Sri Vivek Saran, learned advocate has been heard in support of these applications and Sri Ravi Kiran Jain and Sri B.D. Mandhyan, learned Senior Advocate assisted by their colleagues have been heard in opposition thereof.

6. At the start of arguments, besides other preliminary objection that after dismissal of S.L.P. by the Apex Court, these applications are not maintainable, it was also vehemently pressed by Sri B.D. Mandhyan, learned Senior Advocate that filing of review petition by another advocate who was not counsel at the time of hearing of writ petition, is neither permissible in law nor otherwise it can be said to be proper. Submission is that new counsel cannot be in a position by keeping in mind that in fact what was argued before writ court and what transpired during course of argument and thus submission is that review application is to be rejected on this short ground. After dismissal of S.L.P. by Apex Court, any change in the judgment of this Court by review petition was also objected.

7. Sri Singh, learned senior advocate who was not a counsel in the writ petition, in response to the aforesaid objection submits that although, he was not counsel when writ petition was heard but on the basis of materials as exists and in the light of finding so given by writ court, he can file and argue review petition and otherwise review petition has been filed on valid grounds.

8. In respect to the question that whether a new counsel can file and argue review petition, learned advocates from both sides placed reliance on the decision given by the Apex Court in the case of **Tamil Nadu Electricity Board vs. N. Raj Reddiar JT 1997 (1) SC 486**.

In view of aforesaid rival contention, this Court has examined the matter in issue.

9. So far the propriety of filing review petition and arguments on it by new counsel who never appeared in earlier proceedings and hearing of case, the Apex Court has already decided the issue in the case of **Tamil Nadu Electricity Board vs. N. Raju Reddiar JT 1997 (1) SC 486**. The observation of the Apex Court in this regard as quoted in the Tamil Nadu Electricity Board (supra) is quoted.

"The record of appeal indicates that Sri Sudarsh Menon was the Advocate on Record when appeal was heard and decided don merits. The Review petition has been filed by Sri Prabir Chowdhury who was neither an arguing counsel when the appeal was heard nor was he present at the time of arguments. It is unknown on what basis he has written the grounds in the Review Petition as it is a rehearing of an appeal against our order. He did not confine to the scope of review. It would be not in the interest of the profession to permit such practice. That apart, he has not obtained "No objection certificate' from the Advocate-on-Record in the appeal, in spite of the fact that Registry had informed him of the requirement for doing so. Filling of the 'No objection certificate' would be the basis for him to come on record. Otherwise, the Advocate-on-Record is answerable to the Court. The failure to obtain the 'No objection certificate' from the erstwhile counsel has disentitled him to file the Review Petition. Even otherwise, the Review Petition has no merits. It is an attempt to reargue the matter on merits."

10. Otherwise also for a new counsel it may not be proper to move for the reasons as indicated below. In respect to question involved and to the argument which were advanced by learned counsel appearing for the party and in respect to queries which were made by the Court whether were satisfactory replied or not, it can not be possibly in the knowledge of another counsel who was not appearing at the time of first hearing of case. Take a case that a question was put to a counsel but he was not in a position to answer it, a particular document in support of claim was asked to be placed but learned advocate is not in a position to show and refer to the relevant document, and on a particular aspect, he might have virtually surrendered for the reason that he probably had no valid reply and thereafter, judgment comes, dealing with all the aspects. Now review petition is filed on the ground that something was not considered which was argued or there is wrong observation about certain facts or on a like ground then it has to be said

that a new counsel is debarred from raising all these objections or objection of a like nature. The review petition appears to have been filed by new counsel mainly on the ground that some letters written by Mohan Lal Bagla to the Deputy Collector, sales Tax and to the Commissioner have not been taken note and bid sheet has not been considered by this Court in respect to which suffice it to say that it cannot be said by Sri Singh, who is new counsel for the purpose of arguing review petition that whether the aforesaid letters were referred in the argument and they were relied by the then counsel and whether any effort was made by learned advocate to lay emphasis on those documents as they have any relevance in the matter in issue and thus the question touching with the proceedings of the Court and discussion during course of argument by a new counsel who was neither arguing counsel nor assisting counsel at the initial stage, cannot be permitted. To argue same details as a question of fact in second inning f the matter cannot be permitted. It is under very exceptional circumstances where it can b4e demonstrated that on the finding and reasoning so given, there is error apparent on the face of record which can be termed to be a mistake within the meaning of error apparent as that can be discovered without any argument, it may be filed by a new advocate but that too after obtaining no objection from earlier counsel. If a case is to be argued on the same set of facts by change of counsel, at several occasion, it may be possible that with imminence of the counsel, a new dimension to the argument may come on same set of facts. Skill in the argument and advocacy is to vary always from counsel to counsel. Although earlier two senior advocates of this Court namely Sri R.N. Singh and Sri V.B. Upadhyaya argued the matters on behalf of applicant at length with full vehemence at their command but now Sri V.B. Singh, learned senior advocate wants to argue the matter in his own way by placing the same record and same pleadings. On the facts of present case, this Court is of the view that filing of review petition on the ground so taken in the application cannot be said to be just and proper so as to entitle Sri Saran, learned advocate and Sri Singh learned senior advocate to file and argue this review petition.

11. Be as it may, as the matter has come before this Court by way of this review petition and there is an issue between the parties that whether after dismissal of S.L.P. by the Apex Court against the judgment of this Court, this review petition can be entertained or not, Court feels inclined to decide this issue also. About the right of party to file a review petition, this Court is just to refer the law as the Apex Court has already declared in the decision given in the case of **Kunhayammed v. State of Kerala (2000) 6 SCC 360**. The observation of Apex Court in the case of **Kunhayammed** (supra) as made in para 40 will be useful to be quoted here as under:-

"A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (i) as barred by time, or (ii) being defective presentation (iii) the petitioner having no locus standi to file the petitioner, (iv) the conduct of petitioner disentitling him to any indulgence by the Court, (v) the question raised by the petitioner for consideration by this Court being not fit consideration or deserving being deal with by the Apex Court of the

country and so on. The expression often employed by this Court while disposing of such petitions are-'heard and dismissed', 'dismissed', 'dismissed as barred by time' and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petitioner The Court may apply its mind to the merit worthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say ' dismissed on merits'. Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the Court, tribunal or forum whose order forms the subject matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However, this would be so not by reference to the doctrine of merger."

12. At the same time, observation of the Apex Court in the judgment referred above as made in paragraphs 33 and 34 will also be useful to be quoted here as under:

"**Doctrine of merger and review**

Para 33: This question directly arises in the case before us.

Para 34. The docrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or

otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not possible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed- there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court if it exercises a power of review or deals with a review application on merits-in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave- the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it."

13. At this Court is informed that the S.L.P. was dismissed before grant of leave, doctrine of merger may not be applied and review petition if it is otherwise maintainable can be said to be maintainable if grounds are covered within the scope of order 47 Rule 1 Code of Civil Procedure. At this stage, it will be useful to quote order 47 Rule 1 C.P.C. which reads as under:

"1. Application for review of judgment –(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred.
(b) by a decree or order from which no appeal is allowed .
(c) by a decision on a reference from a Court of Small Causes.

and who from the discovery of new and important matter or evidence, which , after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

14. A reading of the aforesaid makes it clear that review petition can be filed if from the discovery of new materials which after exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or on account of some mistake or error apparent on the face of record, or for any other sufficient reason. Here is not the case where review petition has been filed by discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge or party or could not be produced at the time when the judgment was given. Here is the case where the applicant wants review of the order on the ground that on the facts and evidence, conclusion arrived at by this Court is wrong. Exactly on the same ground that on the facts and evidence which exists on record, conclusion arrived at by this Court is wrong, applicant approached the Apex Court but S.L.P. was dismissed. Permission to entertain the review petition and permission to argue on that cannot mean that the Court is to provide re-hearing in the matter just like

the hearing at the first instance. Effort by placing same evidence, same document and same averments for taking different view than taken at earlier stage, can never be the scope of review petition otherwise, there may not be any end of the matter as the loosing party will always try to get review petition filed and that too, may be some more eminent advocate according to his expectations for the purpose of vehement re arguments in the matter in the hope of getting some changed opinion favouring him. This cannot be the spirit of the provision as contained under Order 47 Rule 1 C.P.C.

15. The scope of review petition has already been explained by the Apex Court besides this Court in several decision. In the decision given by Apex Court in the case of **Meera Bhanja (Smt.) Vs. Nirmala Kumar Chaudhury (Smt.) reported in (1995) 1 SCC 170**, scope of review has been explained. The observation of this Court as made in para 8 of the judgment of the Apex Court can be quoted here.

"It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, Rule 1 CPC. In connection with the limitation of the powers of the Court under Order 47, Rule 1 while dealing with similar jurisdiction available to the High Court while seeking review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma Vs. Aribam Pishak Sharma, speaking through Chinnappa Reddy, J., has made the following pertinent observations (SCC p. 390, para 3)

"It is true as observed by this Court in Shivdeo Singh Vs. State of Punjab, there is nothing in Article 226 of the Constitution of preclude the High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found, that may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court."

16. In respect to error apparent in the judgment of Apex Court in the case of **Satyanarain Laxminarain Hegde vs. Mallikarun Bhavanappa Tirumale, reported in AIR 1960 SC 137**, following observation was made:

"An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has

to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

17. Therefore, it is clear that error apparent on the face of record, has to be such an error which must strike on mere looking at the record and would not require any long drawn process of reasoning on the point whether they may conceivably two opinion. The power of review is not to be confused with the power of appeal. It cannot exercise on the ground that decision is erroneous on merits as that would be in the province of Court of appeal who can be in a position to correct the errors committed by subordinate courts.

18. On the facts, there is no dispute that when the writ petition was argued before this Court, lengthy arguments and hearing took place on number of dates and both sides had ample opportunity and time to meet to each others contention, pleadings and evidence as existed on record. On behalf of petitioners, two learned senior advocates appeared and on behalf of respondents who are applicants in these review petition, Sri R.N. Singh, learned senior advocate and Sri V.B. Upadhdyaya, learned senior advocate appeared and argued the matter at full length, upon which considered judgment by this Court has come against which S.L.P. has also been dismissed by the Apex Court. Entire effort by these review applications is to get re-hearing in the matter, in the light of same set of evidence, same pleadings which cannot be permitted.

In view of aforesaid, this Court is of the firm view that r4eview petitions by the applicants merits dismissal.

19. At this stage, other application filed by the applicants for grant of six months further time to vacate the properties in question is also to be disposed of. This Court while allowing writ petitions on 11.8.2004 granted six months time to the applicants to hand over the possession of the properties in question. The time was not so short that the applicant can be said to be able to manage for their own place and to remove the goods. At the same time, when the matter was heard by the Apex Court and it was decided if the applicants were to seek any extension of time for any good reason, it was open for them to have requested the Apex Court for grant of some time in this respect. This Court is not aware that whether time was prayed and refused by the Apex Court or it was not prayed, but in any view of the matter, as this Court has already granted six months time for vacating the premises in question, it appears that no ground has been made out for extension of time. In the application which has been filed by the applicants in this respect, no reason whatsoever has been given for extension of time. Nothing has been said that how within a period of six months, applicants were not able to do the needful. The only averment in the application is that the applicants tried to find a building in the locality so that they may shift but to the misfortune, no suitable building could be found. No detail of making efforts has been given, therefore, the sole averment in this respect is apparently for the purposes of this application. Thus for the reasons indicated above, extension of time, as prayed can not to be allowed.

20. For the reasons indicated and the analysis as made above, both applications filed by the applicants i.e. is for review and extension of time are hereby rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 4.3.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 37178 of 2002

Abhey Pal Singh ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh
Sri B.D. Mandhyan
Sri A.P.S. Raghav

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

Payment of Salaries of the Teacher and other employees Act 1971-read with U.P. Secondary Education Service Commission Act 1983-2 (hh)-word-'vacancy'-caused as a result of death, retirement, resignation, termination, dismissal, creation of new post- on appointment/promotion of the incumbent on higher post-short term vacancy-petitioner appointed after fallowing the procedure occurred in the year 1996-due to promotion of Mr. X- Y challenged the seniority of 'x'- which has been decided only on 6.10.99 holding Mr. 'y' to be senior than 'x'-accordingly the management passed resolution on 27.2.2000-DIOS held rightly, refused the salary-petitioner can not get salary from Government Fund-However the management is responsible from his own fund.

Held–Para 10

The petitioner was appointed in the year 1996. In my opinion, no vacancy occurred in the year 1996 and, therefore, the petitioner could not have been appointed on a short term vacancy in the year 1996. The vacancy, if any, occurred only when Sukhbir Singh was promoted on 27.2.2000, on the basis of which a short term vacancy arose on the post of assistant teacher. Since the vacancy arose only in the year 2000, the procedure contemplated under U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and the directions contained by the Full Bench decision in the case of Radha Raizada reported in 1994 Vol. 3 UPLBEC-1551 was required to be followed by the committee of management.

Case law discussed:
2004 AWC-I-2070

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

1. In an educational institution known as Swami Purnanand Inter College, Chirodi, Bulandshar one Karan Singh, a lecturer retired on 30.6.1991 and after his retirement one Raghuraj was promoted on an adhoc basis on the post of a lecturer. Consequently, the post of an Assistant Teacher fell vacant and this vacancy, being a short term vacancy, could not be filled up by way of promotion. The said vacancy was duly notified to the District Inspector of Schools, Bulandhshar on 6.5.1005. It further transpires that on 24.8.1996 an advertisement was also made in the newspapers, which had a wide circulation and a selection committee met on 3.8.1996 in which the petitioner's name was recommended and subsequently, the

committee of management issued a letter of appointment dated 25.8.1996. The committee of Management, the respondent no. 3 forwarded the papers to the District Inspector of schools, Bulandshahr for approval.

2. The promotion of Raghuraj Singh on the post of lecturer on adhoc basis was objected and challenged by one Sukhbir and eventually on 6.10.1999 it was held that Sukhbir Singh was entitled to be promoted to the post of lecturer on the vacancy caused by the retirement of Sri Karan Singh. The controversy came to a rest finally and the committee of management by a resolution dated 27.2.2000 promoted Sri Sukhbir Singh as a lecturer.

3. According to the District Inspector of Schools, the papers relating the appointment of the petitioner was forwarded on 9.6.2000 after the dispute between Raghuraj Singh and Sukhbir Singh came to an end. On the other hand, according to the petitioner, the papers relating to his appointment for approval were sent much earlier and when no orders was being passed by the District Inspector of schools, the petitioner filed Civil Misc. Writ Petition No. 54722 of 1999, which was disposed of with a direction to the District Inspector of Schools to decide the matter with regard to his appointment. Based on the direction of the court, the District Inspector of schools by an order dated 19.2.2001 rejected the representation of the petitioner and refused to grant approval to the appointment of the petitioner on the ground that though the appointment of the petitioner was made on 15.8.1996, but the papers relating to the grant of approval was sent only on 19.6.2000 and that the advertisement was only made in one newspaper, which did not have a wide circulation and that it only had a circulation upto the district level.

4. The petitioner being aggrieved by the order of the District Inspector of Schools, filed Civil Misc. Writ Petition No. 8321 of 2001, which was allowed by a judgment dated 10.5.2002 was quashed. This court held, that admittedly the petitioner was appointed in the year 1996 on the basis of an alleged vacancy on account of the promotion of Sri Raghuraj Singh. This Court, in its earlier judgement, held, that the procedure with regard to the appointment was followed, namely, that the vacancy was advertised in two newspapers having a wide circulation. The Court further held that since the promotion of Raghuraj Singh was not approved and thereafter Sri Sukhbir Singh was promoted in the year 2000, the question that was required to be considered was as to when the vacancy actually came into existence, i.e., whether the vacancy came into existence in the year 1996 when Raghuraj Singh was promoted or whether the vacancy came into existence when Sukhbir Singh was promoted in the year 2000. This Court remitted the matter to the District Inspector of Schools, Bulandshahr to decide this question.

5. The District Inspector of Schools again considered the matter and by the impugned order date 1.7.2002 again refused to grant the approval of the appointment of the petitioner on the post of an Assistant Teacher. The District Inspector of Schools held that the promotion of Sri Raghuraj Singh was disapproved and thereafter, Sukbir Singh was promoted by the committee of

management by its resolution dated 27.2.2000, thereafter, no vacancy arose in the year 1996 and that a vacancy arose only in the year 2000, when Sri Sukbir Singh was promoted. The District Inspector of Schools further held that the salary on the post of Assistant Teacher was paid to Sri Sukhbir Singh till September 2000 and that no occasion arose to pay the salary of an Assistant Teacher to the petitioner. The District Inspector of Schools further held that the procedure relating to the appointment of an Assistant Teacher on a short term vacancy under the U.P. Secondary Education Services Commission (Removal of Difficulties) Second order, 1981 and the directions given in the Full Bench decision in Radha Raizada's case was not followed and, therefore, the appointment of the petitioner could not be approved. The petitioner has now again filed the present writ petition.

6. Heard Sri G.K. Singh and Sri V.K. Singh, the learned counsels for the petitioner, the learned standing counsel appearing for respondent nos. 1 and 2 and Sri S.K. Misra, the learned counsel appearing for respondent no. 3.

7. From the narration of the facts, it is clear, that on account of the promotion of Sri Raghuraj Singh, the petitioner was appointed on a short term vacancy on an adhoc basis as an assistant teacher in the year 1996. It has also come on record, that the alleged promotion of Sri Raghuraj Singh was challenged by Sri Sukhbir Singh and eventually by an order dated 6.10.1999 it was held that Sukhir Singh being the senior most teacher was entitled to be promoted on the basis of which, the Committee of Management passed a resolution on 27.2.2000 promoting Sri Sukhbir Singh as a lecturer.

8. The question which now arises for consideration is, when did the vacancy occur? Whether the vacancy occurred in the year 1996 when Raghuraj Singh was promoted or whether the vacancy occurred when Sukhbir Singh was promoted in the year 2000. The word 'vacancy 'has not been defined either under the Intermediate Education Act or under U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981. The word 'vacancy' has, however, been defined in Rule 2 (hh) of the U.P. Secondary Education Service Commission Rules 1983, which reads as follows:

"**2. (hh)** 'Vacancy' means a Vacancy arising out as a result of death, retirement, resignation, termination, dismissal, creation of new post or appointment/promotion of the incumbent to any higher post in a substantive vacancy."

9. From the aforesaid, it is clear that a vacancy arises when one of the aforesaid conditions occur, namely, death, retirement, etc., etc. or where a promotion is made to a higher post in a substantive capacity. In the present case, the alleged promotion of Sri Raghuraj Singh disputed and, eventually the dispute was decided by an order dated 6.10.1999 in which it was held that Sukhbir Singh was entitled for the promotion. Based on this decision, the committee of Management passed a resolution dated 27.2.2000 promoting Sri Sukhbir Singh as a lecturer. It was at this stage that a vacancy arose on the post of assistant teacher, which was required to be filled up in the procedure prescribed

under the U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981.

10. The petitioner was appointed in the year 1996. In my opinion, no vacancy occurred in the year 1996 and, therefore, the petitioner could not have been appointed on a short term vacancy in the year 1996. The vacancy, if any, occurred only when Sukhbir Singh was promoted on 27.2.2000, on the basis of which a short term vacancy arose on the post of assistant teacher. Since the vacancy arose only in the year 2000, the procedure contemplated under U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order, 1981 and the directions contained by the Full Bench decision in the case of Radha Raizada reported in 1994 Vol. 3 UPLBEC-1551 was required to be followed by the committee of management.

11. Paragraph–2 of the U.P. Secondary Education Services Commission (Removal of Difficulties) (Second) Order 1981 reads as follows:

"2. Procedure for filling up short term vacancies-

(1) If short term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise , shall be filled by the management of the institution, by promotion of the permanent senior most teacher of the institution, in the next lower grade. The Management shall immediately inform the District Inspector of schools of such promotion alongwith the particulars of the teacher so promoted.

(2) Where any vacancy referred to in clause (1) cannot be filled by promotion, due to non-availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3).

(3) (i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the manager of the institution alongwith the particulars given in Appendix 'B' to this order. The selection shall be made on the basis of quality point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981, issued with notification no Ma-1993/XV-7-1 (79)-1981, dated July 31, 1981, hereinafter to be referred to as the first Removal Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the head of institution.

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of schools shall communicate his decision within seven days of the date of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or as the case may be, on his failure, to communicate his decision within seven days of the receipt of papers by him from the Manager, the management shall

appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager.

Explanation- For the purpose of this paragraph-

(i) the expression 'senior-most teacher' means the teacher having longest continues service in the institution in the Lecturer's grade or the Trained graduate (LT) grade, or Trained Under-graduate (CT) grade or JTC pr BTC grade, as the case may be.

(ii) in relation to institution imparting instructions, to women, the expression ' District Inspector of schools' shall mean the Regional Inspector of Girls Schools.'

(iii) short term vacancy which is not substantive and is of a limited duration.

12. Paragraph-2 of the aforesaid order provides that a short term vacancy can be filled by direct recruitment in the manner laid down in Sub paragraph (3) of paragraph-2 of the order if the said vacancy cannot be filled up by way of promotion. Sub paragraph (3) of Paragraph 2 also provides that the management shall intimate the vacancy to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution. As per the Full Bench decision in Radha Raizada's case (supra), the committee of management after intimating the vacancy to the District Inspector of Schools was required to make an advertisement in at least two newspapers having an adequate circulation in U.P. in addition to notifying the said vacancy on the notice board of the institution and further the applications were also required to be called from the local employment exchange and, thereafter, the procedure contemplated in sub paragraph (3) (i), (ii), (iii) and (iv) of Paragraph 2 of the U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 was required to be followed.

13. Admittedly, in the present case, no such procedure was followed nor any intimation of the vacancy was given by the committee of management to the District Inspector of Schools, Bulandshahr after promoting Sukhbir Singh in the year 2000. Consequently, the District Inspector of Schools was justified in not approving the appointment of the petitioner on the post of an Assistant Teacher.

14. The Full Bench decision in Radha Raizada's case (supra) has categorically held that if the appointment was not valid and had not been made in accordance with law, the District Inspector of Schools, was empowered not to make the payment of the salary under the U.P. High School and Intermediate Colleges (Payment of salaries of Teacher and other employees (Act 1971 to the person so appointed.

15. The learned counsel for the petitioner submitted that since the appointment of the petitioner was made after complying with the procedure contemplated under the U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981, and the directions given in Radha Raizada's case (supra) was also forwarded, therefore, the appointment of the petitioner may be considered for approval on the vacancy caused by the promotion of Sri Sukhbir

Singh in the year 2000. In my view, since the petitioner was not appointed on a vacancy and no intimation was sent by the committee of management to the District Inspector of schools when the said vacancy was created in the year 2000, it is not possible for this Court to absorb or regularize the appointment of the petitioner on a vacancy which came into existence in the year 2000. No doubt, the petitioner has been appointed after observance of the requisite procedure contemplated under U.P. Secondary Education (Removal of Difficulties) (Second) Order 1981 and the directions given in the Full Bench decision, but it does not give a right to the petitioner or for the committee of management to ask for the salary under the Payment of Salaries Act 1971 from the State Government. The District Inspector of Schools, Bulandshahr, has an implied power under the Payment of Salaries Act, to examine as to whether the appointment of the petitioner whose salary is called upon to pay, had been made in accordance with law and that the appointment was valid. In the event, the District Inspector of Schools, Bulandshahr, finds that the appointment was not made fairly, he can refuse to grant the payment of the salary, 1987 UPLBEC-553, a Division Bench of this Court held that if the appointment of a person was not made in accordance with law, in that event, the District Inspector of Schools was justified in refusing to grant the financial approval and was justified in stopping the payment of the salary to the teachers under the Payment of Salary Act 1971. The said decision is fully applicable to the present case.

16. The committee of management of an educational institution has a right to engage a teacher in excess of the sanctioned strength. In the present case, the committee of management appointed the petitioner on a short term vacancy in the year 1996, when in fact, no such vacancy existed at that time. In such a situation, when the management appointed the petitioner after following the procedure on a non-existent vacancy, the responsibility of payment of salary to the petitioner was wholly upon the committee of management, respondent no. 3. **In committee of Management, Kanhaiya Lal Inter College, v. the Presiding Officer, Labour court and others, 2004 AWC Vol. 2070** it was held that where an employee was engaged in excess of the sanctioned staff, in such a situation, the liability to make the payment of the salary was upon the committee of management from its own resources. In the present case, the petitioner is not at fault. The fault lies with the committee of management, and therefore, the committee of management has to pay the salary to the petitioner from its own resources.

17. In view of the aforesaid, I do not find any infirmity in the impugned order dated 1.7.2002 passed by the District Inspector of schools, Bulandshahr. The District Inspector of Schools, Bulandshahr was justified in not granting the financial approval of the appointment of the petitioner in the short term vacancy on the post of an assistant teacher. Consequently, the writ petition fails and is dismissed. However, in the circumstances of the case, the petitioner is entitled for the payment of the salary from the committee of management, respondent no. 3, who shall pay the same through its own resources. In the circumstances of the case, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD: 29.3.2005

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No. 48 of 2005

Naeem Ahmad ...Petitioner
Versus
Abdul Majeed ...Respondent

Counsel for the Petitioner:
Sri Deoraj

Counsel for the Respondent:
Sri K.M. Garg

U.P. Urban Building (Regulation of letting Rent and Eviction) Act 1972- S-21 (c)(b)- Release application by land lord-on the ground that the shop in question is in dilapidated condition which requires demolition and reconstruction-after the expiry of 3 years of purchase-and after 6 month of earlier application-land lord filed another application u/s 21(i)(a)-on the ground after reconstruction he will settle his unemployed son- whether both applications are maintainable. held-'yes'.

Held–Para 8

On the question of buildings' being dilapidated which requires reconstruction after demolition, the findings arrived at by the prescribed authority and affirmed by the appellate authority, in my opinion, do not suffer from any error much less manifest error of law so as to warrant interference by this Court under Article 226 of the Constitution of India. Learned counsel for the petitioner tries to demonstrate that the findings are perverse by citing one sentence from one affidavit and another sentence from another affidavit but in view of law laid down by the Apex Court in the case of Ranjeet Singh Vs. Ravi Prakash, (2004) 3 SCC 682, this Court cannot sit in appeal to re-appraise the evidence on the record in exercise of powers under Article 226 of the Constitution of India when the findings recorded by the prescribed authority and affirmed by the appellate authority do not suffer from error of law.
2001 (i) ARC –242
2004 (3) SCC-682

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

1. The brief facts leading to filing of the present writ petition under Article 226 of the Constitution of India are that the petitioner is the tenant of the shop in dispute which is situated in a building which is purchased by the respondent-landlord on 1st December 1993 from its erstwhile owner. The land lord immediately after purchase of the aforesaid building issued a notice to the petitioner that since he has purchased the building, in which the shop in dispute is situated, the rent shall be paid by the petitioner-tenant to the respondent-landlord. The petitioner on receipt of the notice sent the rent for the month of December 1993, January and February 1994 which not accepted by the land lord. Therefore, the tenant started depositing the rent under Section 30 of U.P. Act No. 13 of 1972 (hereinafter referred to as the Act). On 30th May 1995 the land lord filed an application purporting to be an application under Section 21 (1)(b) of the Act for release of accommodation on the ground that the building in which the shop is situated is in a dilapidated condition and requires demolition and reconstruction, therefore, the same should

be released in favour of the land lord. During the pendency of the aforesaid application an offer was made by the land lord that after reconstruction of the building the petitioner-tenant will be put back into possession of a shop of the same dimension on the same rent which he is paying today that is on the date when the offer was made. This offer was accepted by the petitioner-tenant. During the pendency of the application referred to above which has been registered as P.A. Case No. 5 of 1995. The land lord filed another application under Section 21 (1)(a) of the Act after expiry of three years period from the purchase of the building by the land lord which was purchased on 1st December 1993 which has been registered as P.A. Case No. 1 of 1997 for release of the shop in dispute on the ground that the land lord requires the shop in dispute and same be released in his favour as he will demolish the building in dispute and reconstruct the shop for setting down his sons in business who are still unemployed. It is further stated by the land lord that the tenant is carrying on business of repairing radios etc. in the shop in dispute and that his residential accommodation is situated in the same locality wherein a shop is available in the residential building of the tenant where he can shift his business of repairing radios etc. without any hardship

2. Both the applications were contested by the tenant. Parties exchanged their pleadings and evidence before the prescribed authority. Before the prescribed authority the tenant, with regard to application under Section 21 (i)(b) has stated that the building is neither in dilapidated condition nor requires demolition and reconstruction as alleged by the landlord and that the land lord has not demonstrated that he has complied with the provision of Rule 17 of the Rules framed under the provisions of U.P. Act No. 13 of 1972. Thirdly the land lord has not demonstrated that his financial condition is such that he can go with the proposed construction. Therefore, the application under Section 21 (1) (b) is liable to be dismissed. The prescribed authority on the question of non-compliance of sub-rule (4) of Rule 17, namely financial capacity of the land lord, has held after relying upon the decision of this Court in Kailash Devi Vs. III Additional District Judge, Kanpur, ARC 392, wherein this Court has laid down that it is not necessary for the land lord that he should demonstrate that he has collected money or that he has the ready money for the proposed construction. Therefore, the allegation of the tenant that sub rule (4) of Rule 17 has not been complied with by the land lord, is not attracted in the present case. As far as question of other sub rules are concerned the land lord has filed evidence that he has got sanctioned plan from the concerned local authority and has also got permission to demolish and reconstruct the building from the local authority concerned. Therefore, this pleas is also not available to the petitioner-tenant

3. On the question of building's being in dilapidated condition the tenant has argued that there is no material on the record on the basis of which any reasonable person can come to the conclusion that the building in dispute is in dilapidated condition and requires demolition and reconstruction. The prescribed authority relied upon the report of the Amin Commissioner who has given report that the building is in dilapidated condition and requires demolition. As

against this the tenant has filed affidavits of two witnesses who are neither expert on the subject nor are recognized by any authority to submit report regarding the condition of the building being dilapidated or that building requires demolition and reconstruction. In this view of the matter the prescribed authority after considering the evidence of both the sides has arrived at a conclusion that the building is in dilapidated condition and requires reconstruction after demolition.

4. The tenant has also submitted that two applications, one under Section 21 (1)(a) and another under Section 21 (1)(b) of the Act, are not maintainable in the eyes of law. This argument has been considered by the prescribed authority and the prescribed authority relied upon the decision of this Court reported in 2001 (1) ARC 242, Ravi Prakash vs. IV Additional District Judge, Saharanpur and others, wherein this Court held that this argument is not acceptable. It is open even for an applicant to seek relief in the alternative and the application cannot be said to be not maintainable on this ground that two applications have been filed, one under Section 21 (1)(a) and another under Section 21 (1)(b) of the Act. Thus application under Section 21 (1) (b) was allowed. While considering the application under Section 21 (1)(a) of the Act, the prescribed authority has arrived at the conclusion that the need to settle unemployed sons has been held to be bona fide by series of decisions of this Court, therefore, the need set up by land lord was held to be bona fide. On the question of comparative hardship the prescribed authority relied upon the undertaking given by the land lord in case no. 5 of 1995 which is application under Section 21 (1)(b) wherein the land lord has given undertaking that after reconstruction he will hand over a shop of the same dimension to the petitioner-tenant. Thus the prescribed authority allowed the application under Section 21 (1)(a) also and directed release of the accommodation in question in favour of the land lord. Both the applications have been allowed by the prescribed authority by the common judgment dated 3rd September 2002.

5. Aggrieved thereby the petitioner-tenant preferred an appeal under Section 22 of the Act before the appellate authority. Before the appellate authority the same arguments were advanced as were advanced before the prescribed authority. The appellate authority after considering the arguments advanced on behalf of the appellant –tenant has found that the applications under Section 21 (1)(a) and 21 (1)(b) are maintainable and the appellate authority relying upon the evidence adduced by the parties in P.A Case No. 5 of 1995 which was leading case before the appellate authority affirmed the findings arrived at by the prescribed authority. On the question of compliance of Rule 17 of the rules the Appellate authority maintained the order passed by the prescribed authority. Thus the appeal, so far as it relates to the order passed on the application under Section 21 (1)(b) of the Act by the prescribed authority, has been dismissed. On the question of application under Section 21 (1) (a) the appellate authority maintained the findings regarding the need being bona fide which was for setting down the unemployed sons. Thus the appellate authority maintained the order passed by the prescribed authority so far as the bona fide need is concerned. On the question of

comparative hardship the appellate authority again maintained the order passed by the prescribed authority, particularly relying upon the undertaking given by the land lord in the case relating to application under Section 21 (1)(b) and held that in view of the provision of Section 24 of the Act, which is reproduced below, it is clear that question of comparative hardship will not come in the way of land lord in allowing the application once the need is found to be bona fide. Thus the appeal is dismissed by the appellate authority.

"24. Option of re-entry by tenant– (1) Where a building is released in favour of the land lord and the tenant is evicted under Section 21 or on appeal under section 22, and the land lord either puts or causes to be, put into occupation thereof any person different from the person for whose occupation according to the land lord's representation, the building was required, or permits any such person to occupy it, or otherwise puts it to any use other than the one for which it was released, or as the case may be, omits to occupy it within one month of such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession or, in the case a building which was proposed to be occupied after some construction or reconstruction, from the date of completion thereof, or in the case of a building which was proposed to be demolished, omits to demolish it within two months or such extended period as the prescribed authority may for sufficient cause allow from the date of his obtaining possession, then the prescribed authority or, as the case may be, the District Judge, may, on an application in that behalf within three months from the date of such act or omission, order the land lord to place the evicted tenant in occupation of the building on the original terms and conditions, and on such order being made, the land lord and any person who may be in occupation thereof shall give vacant possession of the building to the said tenant, falling which the prescribed authority shall put him into possession and may for that purpose use or cause to be used such force as may be necessary.

(2) Where the land lord after obtaining a release order under clause (b) of sub-section (1) of Section 21 demolishes a building and constructs a new building or buildings on its site , then the District Magistrate may, on an occupation being made in that behalf by the original tenant within such time as may be prescribed, allot to him the new building or such one of them as the District Magistrate after considering his requirements thinks fit, and thereupon that tenant shall be liable to pay as rent for such building an amount equivalent to one per cent per month of the cost of construction thereof (including the cost of demolition of the old building but not including the value of the land) and the building shall, subject to the tenant's liability to pay rent as aforesaid be subject to the provisions of this Act, and where the tenant makes no such application or refuses or fails to take that building on lease within the time allowed by the District Magistrate, or subsequently ceases to occupy it or otherwise vacates it, that building shall also be exempt from the operation of this Act for the period or the remaining period, as the case may be, specified in sub section (2) of Section 2".

6. Before this Court also the same arguments were advanced by the learned

counsel for the petitioner and much emphasis has been laid by the learned counsel for the petitioner that two applications by the same land lord with regard to same accommodation, one under Section 21 (1) (a) and another under Section 21 (1) (b) of the Act are not maintainable. A perusal of Section 21 (a) and Section 21(1) (b), which are reproduced below, clearly demonstrates that there is no such bar that both the applications cannot be filed or they are not maintainable.

"21. Proceedings for release of building under occupation of tenant–(1) The Prescribed Authority may, on an application of the land lord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists, namely –

(a) that the building is bonafide required either in its existing form or after demolition and new construction by the land lord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purpose or for purposes of any profession, trade or calling, or where the land lord is the trustee of a public charitable trust, for the objects of the trust.

(b) that the building is dilapidated condition and is required for purposes of demolition and new construction.

Provided that where the building was in the occupation of a tenant.

7. Since before its purchase by the land lord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds mentioned in clause (a), unless a period of three years has elapsed since the date of such acquisition and the land lord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before expiration of the aforesaid period of three years.

Provided further that if any application under clause (a) is made in respect of any building let out exclusively for non-residential purpose the prescribed authority while making the order of eviction shall after considering all relevant facts of the case, award against the land lord to the tenant an amount not exceeding two years' rent as compensation and may, subject to rules, impose such other conditions as he thinks fit.:

Provided also that no application under clause (a) shall be entertained-
for the purpose of a charitable trust, the objects of which provide for discrimination in respect of its beneficiaries on the ground of religion, caste or place of birth;
in the case of any residential building, for occupation for business purposes;
in the case of any residential building against any tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925) has issued a certificate that he is serving under special conditions within the meaning of Section 3 of that Act, or where he has died by enemy action while so serving then against his heirs;

Provided also that the prescribed authority shall, except in cases provided for in the Explanation, take into account the likely hardship to the tenant from the grant of the application as against the likely hardship to the land lord from the refusal of the application and for that purpose shall have regard to such factors as may be prescribed.

Explanation- In the case of a residential building-

(i) where the tenant or any member of his family who has been normally residing with him or is wholly dependent on him has build or has otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this sub section shall be entertained.

Note- For the purposes of this clause a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purposes as a tenant, allottee or licensee.

(ii)……..

(iii) where the land lord of any building is-

(1) a serving or retired Indian Soldier as defined in the Indian Soldiers (Litigation) Act, 1925 (IV of 1925) and such building was let out at any time before his retirement, or

(2) a widow of such a soldier and such building was let out at any time before the retirement of death of her husband, whichever, occurred earlier and such land lord needs such building for occupation by himself or the members of his family for residential purposes. Then his representation that he needs the building for residential purposes of clause (a) and where such land lord owns more than one building his provision shall apply in respect of one building only.

(iv)…….

7. In this view of the matter the argument that two applications under Section 21 (1) (a) and 21 (1)(b) are not maintainable cannot be acceptable and deserves to be rejected.

8. On the question of buildings' being dilapidated which requires reconstruction after demolition, the findings arrived at by the prescribed authority and affirmed by the appellate authority, in my opinion, do not suffer from any error much less manifest error of law so as to warrant interference by this Court under Article 226 of the Constitution of India. Learned counsel for the petitioner tries to demonstrate that the findings are perverse by citing one sentence from one affidavit and another sentence from another affidavit but in view of law laid down by the Apex Court in the case of ***Ranjeet Singh Vs. Ravi Prakash, (2004) 3 SCC 682***, this Court cannot sit in appeal to re-appraise the evidence on the record in exercise of powers under Article 226 of the Constitution of India when the findings recorded by the prescribed authority and affirmed by the appellate authority do not suffer from error of law.

9. In view of what has been stated above, this writ petition lacks merit and deserves to be dismissed.

10. Lastly it is submitted by learned counsel for the petitioner that the petitioner is carrying on business from the shop in dispute, therefore, he may be granted some reasonable time to vacate the accommodation in dispute.

Considering the facts and circumstances and in the interest of justice I direct that the order of eviction shall not be executed authority within as period of one month from today that he will hand over peaceful vacant possession of the accommodation in dispute to the land lord on or before 31st August 2005 provided further that the petitioner-tenant pays, if not already paid, the entire rent and damages at the rate of rent to the land lord within the same period of one month and keeps on paying the same by the first week of succeeding month so long the petitioner remains in possession or till 31st August, 2005 whichever is earlier. In the event of default of any of the conditions, it will be open to the land lord to get the order of eviction executed.

With the aforesaid observations this writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 29149 of 2005

Rajeev Kumar and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri V.D. Shukla

Counsel for the Respondents:
Sri Anuj Kumar, Addl. S.C.
S.C.

Constitution of India, Art.-226-Service law-Appointment-"Shiksha Mitra"-with the collusion of village education against the petitioner till 31st August, 2005 provided the petitioner furnishes an undertaking before the prescribed **committee-the petitioner got appointment on the basis of approval order-based on fraud-on the representation made by private respondent-the District Magistrate cancelled the appointment-held-petitions have no right-the candidate having better quality point marks-can not be ignored-The D.M. advances the substantial justice-court declined to interfere.**

Held-Para 8

The findings of fact recorded by the District Magistrate that Gram Shiksha Samiti has recommended the names of the petitioners has obtained appointments in collusion with the Gram Shiksha Samiti. The selection process was only an eye wash and fraud. It is settled law that fraud vitiates every action and does not vest the petitioner with any legal right. The order passed by the District Magistrate advances the cause of substantial justice.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. Heard Sri Ashok Khare, Senior counsel appearing for the petitioners and the standing counsel appearing for the respondents and perused the record.

2. This writ petition has been filed for quashing of the order dated 17.3.2005 passed by the District Magistrate, Moradabad, which has also been sought commanding the respondents not to take any action on the basis of the aforesaid impugned order.

3. The facts in brief are that Gram Siksha Samiti Vichpuri Vikas Khand Panwasa invited applications for consideration of appointment of Shiksha

Mitra in Primary Schools falling under its jurisdiction. According to the merit list prepared by the Basic Shiksha Adhikari, Moradabad Rajeev Kumar son of Sri Ram Phal Singh was appointed at Primary School, Bichpuri and Khetal Singh son of Sri Dhirendra Singh was appointed at Primary School Laharsheesh as Shiksha Mitra under the Shiksha Mitra Yojna.

4. It appears that respondent nos. 7 and 8 Chauhan Singh son of Basant Ram Singh and Nihal Singh son of Dhanpal Singh had also applied for appointment as Shiksha Mitra along with the petitioners but their names were not considered by the Basic Shiksha Adhikari, Moradabad and a resolution dated 16.1.2004 was sent for approval showing that only two applications had been received i.e. of the petitioners Rajeev Kumar and Khetal Singh. The Basic Shiksha Adhikari, the District Magistrate, Moradabad and other concerned authorities accorded approval for their appointments in good faith and bonafide belief that only two persons had applied for appointment as Shiksha Mitra. Consequently the petitioners were sent for 30 days training at the District Institute of Education and Training, Kanth District Moradabad. They undergone training w.e.f. 13.10.2004 to 31.10.2004. It appears that in the mean time, respondent nos. 7 and 8 had made a complaint on 1.11.2004 against the petitioners to the Basic Shiksha Adhikari whereupon an order was issued by the District Basic Shiksha Adhikari, Moradabad canceling the training of the petitioners.

5. Aggrieved by the aforesaid order dated 1.11.2004 the petitioners filed separate writ petition nos. 50384 of 2004 and 50385 of 2004. In the mean time, District Basic Shiksha Adhikari by order dated 16.1.2004 issued a notice addressed to the Chairman and the Secretary of the Gram Shiksha Samiti intimating that an enquiry had been instituted at the level of the Deputy District Magistrate, Sambhal and called upon them to be present in the office of the Deputy District Magistrate, Moradabad for the purpose of the enquiry on the date fixed.

6. It appears from the record that respondent nos. 7 and 8 Chauhan Singh and Nihal Singh had also filed writ petition nos. 45907 of 2004 and 47265 of 2004 in which directions were issued directing the respondents to consider their representations.

7. It also appears from a perusal of the impugned order dated 9.2.2004 passed by the District Magistrate, Moradabad that the Gram Shiksha Samiti had produced original records of meeting and the resolution dated 16.1.2004 showing tat only two applications were received that of petitioners Rajeev Kumar and Khetal Singh. It further appears from the record that Chauhan Singh and Nihal Singh filed representations in pursuance of the orders of this Court for reconsideration of the matter. They also produced original receipts before the authorities showing that they had submitted applications before the Gram Shiksha Samiti for consideration of their appointments as Shiksha Mitra but they were not considered.

8. In view of the fact that complainants Chauhan Singh and Nihal Singh had submitted their applications for appointment as Shiksha Mitra before the Gram Shiksha Samiti but their names were not placed on record in the meeting dated 16.1.2004, the District Magistrate

found their complaints to be correct, that the petitioners and the Gram Shiksha Samiti had colluded and had deliberately Singh who had less quality point marks than respondent nos. 7 and 8. The District Magistrate, in the circumstances reviewed his earlier order dated 9.2.2005 vide order dated 17.03.2005 cancelling the selections of the petitioners holding that the petitioners had less quality point marks than respondent nos. 7 and 8 and were not entitled for appointment. The findings of fact recorded by the District Magistrate that Gram Shiksha Samiti has recommended the names of the petitioners has obtained appointments in collusion with the Gram Shiksha Samiti. The selection process was only an eye wash and fraud. It is settled law that fraud vitiates every action and does not vest the petitioner with any legal right. The order passed by the District Magistrate advances the cause of substantial justice.

9. In the circumstances of the case I do not find any ground for interference with the impugned order under Article 226 of the Constitution of India.

For the reasons stated above, the writ petition is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2005

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

Civil Misc. Writ Petition No. 38910 of 2003

Iqbal Ahmad and others ...Petitioners
Versus
Deputy Director of Consolidation, Deoria and others ...Respondents

prepared the resolution suppressing their candidature and recommending the names of petitioners Rajeev Kumar and Khetal

Counsel for the Petitioners:
Sri S.A. Lari
Sri L.K. Tripathi

Counsel for the Respondents:
Sri V.K. Singh
S.C.

U.P. Zamindari abolution and Land Reforms, Act 1951-Section-132 read with U.P. Consolidation of Holding Act 1963-Section 3 (2)-Land-as defined under section 3 (2) of the Consolidation Act-shall be included in Consolidation Scheme-as mentioned under 132 of the U.P.Z.A. & L.R. Act-Land covered by water-recorded as 'Garhi' in revenue record-can not be part of consolidation Scheme-general mandamus issued to the State Government to constituted a special investigation team to locate the plots recorded as Tank, Pakhari water channel etc. as recorded on 1.6.02 in the revenue record.-and to take appropriate steps for compliance of the Apex Court's direction in Hinch Lal Tiwari case.

Held- Para 13 & 14

In these circumstances, I am of the view that the State Government may be directed to constitute a special investigation Team to locate the plots recorded as Tank, Pokhari, Water Channels and riverbed etc. on the date of vesting in every village throughout the State of Uttar Pradesh and in case it is found that anyone is in unauthorized possession of such land mentioned under Section 132 of the U.P.Z.A. & L.R. Act and is using these land for any other purpose other than mentioned under Section 132 of U.P.Z.A. & L.R. Act State Government shall take appropriate action forthwith and restore the same to Gaon Sabha to maintain the same in the same position as on 1st July, 1952.

Recently, some reports were published that in future we may face acute problem of water. Water strata in different parts of our country is also going down which is a cause of worry for entire nation.

Case law discussed:

A.C.J. 2001 1604

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

1. This writ petition is directed against the order dated 9.5.2003, passed by the Deputy Director of Consolidation, Deoria allowing the revision of Gaon Sabha setting aside orders of allotment made by subordinate Consolidation Authorities in respect of Plot No. 757 and further quashing order determining valuation and inclusion of Plot No. 757 in petitioners' Chak no. 15.

2. It is borne out from the record that Plot no. 757 area 13 Acre was recorded as Garhi in the Khata of Gaon Sabha and was not included in the consolidation scheme, but subsequently by an order of correction passed by Consolidation Officer this plot was included in the consolidation scheme by determining valuation of eight Anna and it was allotted in the chak of petitioners. An appeal preferred by Gaon Sabha against the said order was dismissed vide order dated 13.4.1998 but revision preferred against appellate order was allowed and the plot in question was restored to Gaon Sabha.

Heard learned counsel for the petitioners and perused the record.

3. Learned counsel for the petitioners urged that there is no prohibition in U.P. Consolidation of Holding Act (hereinafter in short referred to as the U.P.C.H. Act) for allotment of Gaon Sabha property recorded as Garhi (land mentioned in revenue record as covered by water) and order for inclusion of Plot No. 757 recorded as Garhi in petitioners' chak was rightly passed in accordance with law. He further urged that as the impugned order was passed by the Deputy Director of Consolidation after notification under Section 52 of the U.P.C.H. Act as such the Deputy Director of Consolidation acted illegally and without jurisdiction in passing the impugned order, the same is liable to be quashed.

4. I duly considered arguments of learned counsel for the petitioners and I am of the view that none of the arguments pressed by the learned counsel for the petitioners could be sustained in law. Under the U.P.C.H. Act 'consolidation' is defined under Section 3 (2). Explanation (iii) of Section 3 (2) of the U.P.C.H. Act makes it clear that land mentioned under Section 132 of U.P. Zamindari Abolition & Land Reforms Act (in short hereinafter referred to as the U.P.Z.A. & L.R. Act) shall not be included in consolidation Scheme.

5. Section 132 of U.P.Z.A. & L.R. Act and Section 3 (2), Explanation (iii) are being reproduced below for ready reference:-

Section 132 of the U.P.Z.A. & L.R. Act

"132 Land to which (bhumidhari) rights shall not accrue-Notwithstanding to the provisions of Section 19 (bhumidhari) rights shall not accrue-

(a) Pasture lands or lands covered by water and used for the purpose of growing Singhara or other produce of land in the

bed of a river and used for casual or occasional cultivation:

X X X

Section 3 (2) of the U.P.C.H. Act

"3 (2) 'Consolidation' means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holding more compact;

Explanation-For the purpose of this clause, holding shall not include the following:

X X X

(iii) Land mentioned in Section 132 of the U.P. Zamindari Abolition & Land Reforms Act, 1950;

X X X

6. From perusal of the above provisions, it is clear that if any land is mentioned under Section 132 of the U.P.Z.A. & L.R. Act it shall not be included in the consolidation scheme for the purposes of consolidation.

7. Section 132 of the U.P.Z.A. & L.R. Act makes it clear that notwithstanding any thing contained in this Section, but without prejudice to Section 19 of the U.P.Z.A. & L.R. Act, Bhumidhari rights shall not accrue to any land covered by water. As plot in question is Garhi it cannot be part of consolidation scheme for allotment proceeding in the unit and as such it was rightly excluded by the Deputy Director of Consolidation from the consolidation scheme.

8. From the material on record it transpires that the land in dispute was recorded as Gaon Sabha property, as mentioned under Section 132 of the U.P.Z.A. & L.R. Act and as such at the time of revision of Field Book, Determination of valuation etc. and preparation of Statement of Principles, as required under Section 8 and 8-A of the U.P.C.H. Act on the date of publication of the record under Section-9 of the U.P.C.H. Act in the unit, this land was not included in the consolidation scheme and that is why valuation of this land was not determined with the result the matter relating to valuation of the plot became final under Section-11-A of the U.P.C.H. Act, which runs as follows:-

"**11-A. Bar on objection.-** No question in respect of-

(i) claims to land,
(ii) partition of joint holdings, and
(iii) valuation of plots, trees, wells and other improvements, where the question is sought to be raised by a tenure-holder of the plot or the owner of the tree, well or other improvements recorded in the annual registrar under Section 10,
relating to the consolidation area, (which has been raised under Section 9 or which might or ought to have been raised under that section), but has not been so raised, shall be raised or heard at any subsequent stage of the consolidation proceedings."

9. From perusal of record it is also clear that in correction proceeding, the valuation of the plot in dispute was determined and was illegally included in the consolidation scheme and allotted in the petitioners' Chak. The Deputy Director of Consolidation rightly passed the impugned order in accordance with law. There is no illegality in the order of the Deputy Director of Consolidation and does not call for any interference.

10. The matter relating to Pond and Tank etc. in villages came up for

consideration before the Apex Court in Hinchlal Tiwari Vs. Kamla Devi and others[1]. The Apex Court in paragraph-13 of the judgment has considered this aspect, same is being reproduced below:

"13. It is important to notice that the material resources of the community like forests, tanks, ponds, hillock, mountain etc. are nature's bounty. They maintain delicate ecological balance. They need to be protected for a proper and healthy environment which enables people to enjoy a quality life which is the essence of the guaranteed right under Article 21 of the Constitution. The Government, including the Revenue Authorities i.e. Respondents 11 to 13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of the public at large. Such vigil is best protection against knavish attempts to seek allotment in non-abadi sites"

11. In the aforesaid judgment, Apex Court laid down that as the Tank, Garhi (land covered by water), pond and forest etc. are nature's bounty they need be protected for proper and health environment which enables people to enjoy a quality life which is essence of guaranteed rights under Article 21 of the Constitution of India.

12. The Legislature, while enacting U.P.Z.S. & L.T. Act as well as U.P.C.H. Act, has also taken a special care for Tanks, Garhi, Ponds, water channels and riverbed etc. to ensure protection in order to give proper and healthy environment to enjoy the people a qualitative life and to prevent ecological disaster.

13. In these circumstances, I am of the view that the State Government may be directed to constitute a special investigation Team to locate the plots recorded as Tank, Pokhari, Water Channels and riverbed etc. on the date of vesting in every village throughout the State of Uttar Pradesh and in case it is found that anyone is in unauthorized possession of such land mentioned under Section 132 of the U.P.Z.A. & L.R. Act and is using these land for any other purpose other than mentioned under Section 132 of U.P.Z.A. & L.R. Act State Government shall take appropriate action forthwith and restore the same to Gaon Sabha to maintain the same in the same position as on 1st July, 1952.

14. Recently, some reports were published that in future we may face acute problem of water. Water strata in different parts of our country is also going down which is a cause of worry for entire nation.

15. In these circumstances, the direction of the Apex Court in Hinch Lal Tiwari Vs. Kamla Devi and others (Supra) to maintain Ponds, Water Channels, Pokhras, Garhi (land covered by water) etc. recorded in the revenue records on the date of vesting as covered by under Section 132 of the U.P.Z.A. & L.R. Act be complied forthwith and land covered by water be restored and maintained in the interest of the public in order to maintain ecological balance and protecting environment. For this purpose special measures needs to be taken at the grass route level so that directions of the Apex Court be complied with.

[1] All C.J. 2001 1604

16. Accordingly, State Government is directed to make a thorough investigation of each village of each District throughout State of Uttar Pradesh in respect of Forests, tanks, ponds and Garhi, water channel and riverbed etc. on the basis of the revenue records of the date of vesting, i.e., 1st July, 1952 by constituting a special investigation team consisting of Revenue authorities and other concerned officials and Environmentalists and take appropriate steps for compliance of the Apex Court's directions in Hinchlal Tiwari Vs. Kamla Devi and others (Supra). The State Government of Uttar Pradesh is also directed to make compliance of this order within one year from the date of service of this order to Standing Counsel/Chief Secretary of Government of Uttar Pradesh to be circulated to all the District Magistrates and Consolidation Authorities of the State of Uttar Pradesh.

List after a year on 6th March, 2006.
