ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.36758 of 2006

Krishna Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vinod Singh
Sri S.P. Singh

Counsel for the Respondents:
Sri Ashok Khare
Sri Mohd. Arif
S.C.

U.P. Secondary Education Service Selection Board Act 1982-Section-18 (2)-readwith Inter Mediate Education Act-1921-Chapter-II, Regulation-3 (r)-Ad-hoc appointment on the post of Principal-management passed resolution appointing the petitioner-papers send before D.I.O.S. who refused to attest the signature on the ground that private respondent is senior to petitioner-held-order passed by D.I.O.S. without jurisdiction-However liberty given to the parties to approach before Joint Director-with regards to claim of seniority if any-the same shall be decided in accordance with law.

Held: Para 6

In view of the aforesaid, this Court is of the opinion that the District Inspector of Schools had no jurisdiction to pass such an order. The impugned order dated 6.7.2006 is quashed and the writ petition is allowed. Since there is a dispute with regard to the seniority between the petitioner and the respondent no. 5, this Court directs the petitioner as well as the respondent no. 5 to file their respective claim before the Joint Director of Education under Chapter II Regulation 3 (f) of the Regulations framed under the Intermediate Education Act 1921 within two weeks from the date of the production of a certified copy of this order. Upon receipt of the claim, the Joint Director of Education shall hear the parties including the Committee of Management and shall pass a reasoned and speaking order within a period of one month from the receipt of the claim.

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

1. Heard Sri Vinod Sinha, the learned counsel for the petitioner and Sri Ashok Khare, the learned Senior Counsel appearing for the respondent no. 5. As agreed between the parties, the writ petition is disposed of at the admission stage itself without calling for a counter affidavit.

2. The Committee of Management by a resolution dated 30.6.2006 resolved to appoint the petitioner as the adhoc Principal in the institution. The papers were forwarded to the District Inspector of Schools for attestation of the signatures of the petitioner as the adhoc Principal of the institution. The District Inspector of Schools by an order dated 6.7.2006 refused to attest the signatures of the petitioner on the ground that the respondent no. 5 was senior to the petitioner. The District Inspector of Schools held that the petitioner was wrongly shown as senior to respondent no. 5 in the seniority list and that the seniority of the petitioner had wrongly been calculated.

3. In the opinion of the Court, the District Inspector of Schools, Saharanpur had no jurisdiction to pass the impugned order or decide the question of seniority

interse between the petitioner and the respondent no. 5.

4. Sri Ashok Khare, the learned Senior counsel for the respondent no. 5 urged that the District Inspector of Schools, Saharanpur has the power to consider the question of seniority while attesting the signatures of the Principal under the provisions of Section 18 (2) of the U.P. Secondary Education Services Selection Board Act 1982 read with section 19-A of the General Clauses Act. Section 18 (2) of the Act is quoted hereunder:

"18 (2) Where the management fails to promote the senior most teacher under sub-section (1) the inspector shall himself issue the order of promotion of such teacher and the teacher concerned shall be entitled to get his salary as the Principal or the Headmaster, as the case may be, from the date he joins post in pursuance of such order of promotion."

5. In my opinion, the said provision is not applicable, inasmuch as Sub clause (2) of Section 18 would only be applicable at a stage where the Committee of Management fails to promote a teacher on the post of adhoc Principal or the Head Master as the case may be. In the present case, the Committee of Management had issued a resolution dated 30.6.2006 resolving to appoint the petitioner as an adhoc Principal. This order was passed in consonance with the provisions of section 18 (1) of the Act of 1982. Once an order under sub section (1) is passed, the question of considering the seniority under section 18 (2) of the said Act by the District Inspector of Schools does not arise. Consequently, if any dispute arises with regard to the seniority between the petitioner and the respondent no. 5 or with any other teaching staff of the institution, the adjudication of such dispute would fall under Chapter II Regulation (3) of the Regulations framed under the Intermediate Education Act 1921.

6. In view of the aforesaid, this Court is of the opinion that the District Inspector of Schools had no jurisdiction to pass such an order. The impugned order dated 6.7.2006 is quashed and the writ petition is allowed. Since there is a dispute with regard to the seniority between the petitioner and the respondent no. 5, this Court directs the petitioner as well as the respondent no. 5 to file their respective claim before the Joint Director of Education under Chapter II Regulation 3 (f) of the Regulations framed under the Intermediate Education Act 1921 within two weeks from the date of the production of a certified copy of this order. Upon receipt of the claim, the Joint Director of Education shall hear the parties including the Committee of Management and shall pass a reasoned and speaking order within a period of one month from the receipt of the claim. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Contempt Petition No. 313 of 1993

Chandra Kishore and another ...Applicants
Versus
Ram Babu and another...Opposite parties

Counsel for the Applicants:
Sri S.K. Jauhari
Sri K. Shailendra

Counsel for the Opposite Parties:
Sri D. Pathak
Sri Rakesh Pathak
Sri Dinesh Pathak
Sri Shyam Narain
Sri Sudhanshu Narain

Contempt of Court, Act. S.12-Interim Order-passed by writ court-stay vacation pending-writ court restrained both parties from raising any construction-commissioner report dated 2.9.92-found land in question to be a vacant land-construction of six shops-court held-willful and deliberate violation of interim order-liable to be punished.

Held: Para 14

For the reasons stated above, both the opposite parties are found guilty of wilful and deliberate violation of the interim injunction dated 10.11.1992 passed in Writ Petition No.40493 of 1992.

Case law discussed:
AIR 1971 SC-1132
AIR 1991 Alld.-114
AIR 1997 SC-1240
2006 (4) ADJ-507
1994 (Supp) II SCC-641
1999 (35) ALR 504 (SC)
J.T. 2001 (1) SC-123
2004 (54) ALR-669
1998 (8) SCC-640

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

This contempt petition has been filed with the allegation that in spite of the order dated 10.11.1992 in Writ Petition No.40493 of 1992 the opposite parties have made constructions over the disputed land.

2. The applicants preferred Suit No.88 of 1992 against the opposite parties for permanent injunction restraining them from raising any construction over the passage and road existing towards north of the applicants "Bazar." An application for interim injunction was also made. An interim injunction was granted on 28.5.1992 and Commissioner's report was also called upon who vide report dated 2.9.1992 found that the disputed land was vacant and was being used by the applicant and also by his tenants and shopper for ingress and egress to his "Bazar". However, the trial court rejected the injunction which was subjected to challenged in a Civil Appeal where also interim injunction was granted and continued till the appeal was dismissed on 6.11.1992. Against both the orders, the aforesaid writ petition was filed and both the opposite parties were restrained from making any construction over the disputed land vide the order dated 10.11.1992. It is stated that in spite of the aforesaid order the opposite parties refused service and started constructions and in spite of telegrams being sent to him he did not stop. Telegrams were also sent to the District Magistrate and the Senior Superintendent of Police on 12.11.1992 and in fact the applicant also met them when on the direction of the Senior Superintendent of Police, the Station Officer elicited a promise from the opposite parties to stop constructions but the constructions of about six shops continued after the Station Officer was won over. Thus, the applicant made an application dated 16.11.1992 before the trial court where the opposite party filed his reply on 17.11.1992 stating that he did not know about the High Court's injunction and he had already completed the construction work uptil 10th November, 1992. Since the constructions were still going, two commissions were

issued which submitted reports dated 6.1.1993 and 30.1.1993 which stated that six shops have been newly constructed. Even during the execution of the commission, plastering, white washing and setting up shutters were going on. All the six shops were constructed by using bricks and cement with a lintalled roof. As the constructions and improvements were going on without even bothering to file any stay vacating application or a counter affidavit, the applicant preferred this contempt petition on 8th February, 1993.

3. Upon issuance of notice, a counter affidavit on behalf of the opposite party was filed denying the substantial averments and stating clearly in paragraph 17 that the six shops were constructed between 7th November, 1992 to 10th. November, 1992. Admittedly, till the filing of the present contempt petition on 8.2.1993 no stay vacation application or counter affidavit was filed by the opposite parties in the writ petition.

4. When the matter was taken up by this Court on 8th March, 2006, the opposite parties were directed to indicate the size of the shops constructed by them between 7th November 1992 to 10th November, 1992. In response thereof a supplementary counter affidavit was filed on 13th April, 2006 giving the dimensions of the shop constructed by them. In an earlier supplementary counter affidavit filed on 24th February,2006, it was stated that the opposite parties have filed objections dated 15.12.1993 against the Commissioner's report dated 6.1.1993 and 30.1.1993 which is pending and has further reiterated that the construction work was completed by the evening of 10th November, 1992 and the shops were constructed working day and night and they have never flouted the injunction order. In the supplementary rejoinder the substantial allegations have been denied.

5. It is not denied on behalf of the opposite parties that the constructions were made but it is stated that six shops were constructed between 7th November, 1992 and 10th November,1992 when no injunction was in force. The dimensions of the shop have been given by the opposite parties themselves in the supplementary affidavit filed on 13th. April, 2006. The shop no.1 is 160 sq. ft.; shop no.2 is 208 sq. ft.; shop no.3 is 165 sq. ft.; shop no.4 is 140 sq. ft; while shop no.5 is 238 sq. ft. It is not denied that the shops have been made by using bricks and cement and have also been cement plastered and painted and their lintelled roof was also laid.

6. B.N. Dutta, in his authoritative book "Estimating and Costing - in Civil Engineering - Theory and Practical" has given the different stages of construction and the minimum time consumed at different stages. For new constructions, apart from settling the design etc., according to him there are different stages. It starts with foundation digging at least upto a depth of 2 ½ ft. for lintalled roof height of 6 ft. or less. Laying of the foundation walls and the D.P.C. (optional) and then starts the construction of walls. Lintall has to be given for any window and door opening. This part can be done while raising the wall, but if girders or stone stills are to be used, one will have to wait for 3 to 4 days before fixing the girders etc., so that the wall becomes sufficiently strong and stable to bear its weight. After reaching the roof height, shuttering has to be erected to lay the roof

and thereafter steel or iron bars (saria) are to be laid (where span of any lintall is more than 5 ft.) and then the bricks are laid and only then the gaps are filled by cement and mortar. This has to be treated by water curing for at least two weeks (in case the span is more than 5 ft.) and then the roof is plastered. During this period of curing, the floor cannot be completed as the place is occupied by support of the shuttering and roof. Apart from this, water curing of walls, plastered walls and the floor has also to be done before it becomes safe for habitation.

7. Admittedly, all the shops have pucca cemented brick roof and the area of only the roof comes to about 920 sq. ft. apart from the cemented floor of at least 920 sq. ft., excluding the Apron. Leaving aside the time consumed for foundation, raising walls and for shuttering, only the roof and the floor could not have been built in four days even working day and night.

8. In the Commissioner's report it is clearly given out that the shops were newly made within a period of one month. Even in the second Commissioner's report dated 30th January, 1993 it has been stated that the shops are newly constructed and plaster on the wall is new and soft and some portions were not even plastered at the time of inspection, while white washing was going on and the paints on the shutters was wet. The Commissioner also found that tenants were in process of taking over possession of the shops and the disputed constructions stops the ingress and egress to the "bazar" of the applicant. No doubt objections to the inspection report dated 6th January, 1993 and 30th. January, 1993 was filed on 15th December, 1993 which are on record. The objections to the reports of the Commissioner are extremely vague. It questions as to how could they come to the conclusion that the constructions were new. In fact the Commissioner found the construction to be fresh. No expertise is needed in Civil Engineering to ascertain whether the constructions are fresh. The opposite party was approached by the Commissioner for signing the report, but he refused, but they have not denied their presence during the inspection. If the report is examined in the back drop of the stages and the time consumed in such constructions as shown in B.N. Dutta's book, the report appears to be true and correct. To put it mildly, in those four days and night, as the contemnor says, he could not have even lay the roof within that period and roof cannot be laid over thin air without the support of walls.

9. At this stage, learned counsel for the opposite party raises an issue that the Court cannot proceed further without first framing formal charges as it is a quasi judicial proceedings and charges ought to be framed.

10. In the opinion of the Court, on the facts of this case, it is not necessary to frame formal charges. Where the charge is simple and clear from the petition, it would not be necessary to frame formal charges. Though, normally, this Court frames charges but there is no such procedure provided under the Contempt of Courts Act. However, it goes without saying that the procedure should be fair and reasonable opportunity should be given to the contemnor to defend himself. In the present case, while issuing notices on 9.2.1993 the contemnor was made aware of the nature of the charge against

him and in pursuance thereof he has entered his reply which is in the nature of a defence and he has not raised any plea of vagueness as to what sort of commission or omission is required off him. It is apparent from the counter affidavit and the two supplementary counter affidavits that the contemnor has understood why he has been noticed. He is unable to point out any prejudice, which has been or can be, caused by non-framing of charges. Therefore, considering the ratio of the Apex Court in the case of C.K. Daftari v. O.P. Gupta [A.I.R. 1971 S.C. 1132] it is not necessary in the present case to frame charges. Therefore, the contention of the learned counsel for the opposite party is rejected.

11. It is then urged on his behalf that since the writ petition was against private individuals no mandamus including an interim injunction could be issued in view of a Full Bench decision of this Court rendered in the case of **Ganga Saran v. Civil Judge and others** [A.I.R.1991 Allahabad 114]; on this premise, it is urged, that since the order is void, it cannot be taken note of in these contempt proceedings. The argument is merely stated to be rejected. This issue is no longer res-integra. This court, scores years ago in Ratan Shukla's case (AIR 1956 Alld. 258) had held that violation of an order even without jurisdiction would be contempt. This ratio was approved by the Apex Court in **Tayyabbhai M. Bagarwalla** [A.I.R. 1997 S.C.1240]. If such a defence or a right is given to a party to sit in appeal over an order, it would lead to disastrous result and seemingly would erode the rule of law. The order of a Court may be illegal or void but until and unless it is set aside or discharged, no party will have any right to flout it. Therefore, this argument also cannot be accepted.

12. Lastly, it is urged that since a stay vacation application is pending in the writ petition, the Court should not proceed further before decision of the stay vacation application. He has relied upon a Division Bench decision of our Court rendered in the case of **Shiv Lal v. Ram Babu Dwivedi** [2006 (4) A.D.J. 507). In the opinion of the Court, the ratio in the said decision is not applicable in the present case. In the case of **Ravi S. Naik v. Union of India** [1994 (Suppl. II) S.C.C.641, the Apex Court has held that even interim order is binding till it is set aside by a competent court and it cannot be ignored. In the case of **K.S. Villasa v. M/s Ladies Corner and another** [1999 (35) A. L. R. 504 (S.C.)] and in the case of **Madan Lal Gupta v. Ravindra Kumar** [J.T. 2001 (1) S.C. 123], the Supreme Court has held that if an interim order is intentionally violated or disobeyed action for contempt can be taken. The Supreme Court went on to the extent of holding that a person can be punished for violation of an interim order even though subsequently the petition is dismissed. It all depends on the facts of each case. Can it be said that a building can be demolished, or a occupant or a tenant be evicted irrespective of an injunction merely because a stay vacation application is pending? Or, like in this case, constructions can be made? How can it be remedied later? In the case of **Tayabhai M. Bagasarwalla and another v. Hind Rubber Industries Pvt. Ltd**. (supra) the Apex Court has propounded that a person has to pay the price of disobedience of an interim order even if the case was subsequently dismissed. It held "*We are of the opinion that in such a*

case the defendants cannot escape the consequence of their disobedience and violation of the interim injunction committed by them prior to the High Courts' decision on the question of jurisdiction." Similar view has been reiterated by a learned Single Judge of this Court in the case of **Naresh Chandra Kapoor v. O.P.S. Malik** [2004 (54) A.L.R. 669].

13. The Apex Court in the Case of **Dr. H. Phunindre Singh and others v. K.K. Sethi and another** [(1998) 8 S.C.C. 640], has also held that *enforceability of a courts' interim order cannot be diluted only because an appeal is pending.* The Division Bench in Shiv Lal's case was confronting an entirely different situation. In that case an interim order staying a suspension order was enforced through contempt proceedings even though stay vacation application was pending. In that case the Court found that genuineness and bonafide of the action of the contemnor in moving the said application had to be considered, and in any event the party could be evenly placed even after the decision. The facts of this case are entirely different.

No other point has been urged.

14. For the reasons stated above, both the opposite parties are found guilty of wilful and deliberate violation of the interim injunction dated 10.11.1992 passed in Writ Petition No.40493 of 1992.

15. Before the Court proceeds further to hear the contemnors on the question of sentence, it appears appropriate, in the facts of this case, to give a reasonable opportunity to them to purge the contempt.

16. The contemnors, before being heard on the question of sentence, are given a months time to purge the contempt by demolishing the said six shops and restore the disputed land as vacant piece of land as was found by the Commissioners in its report dated 2.9.1992 and file an affidavit to that effect by the next date when they will also appear.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2005

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

Special Appeal No. 532 of 2005

Smt. Ram Devi ...Appellant/petitioner
Versus
Director Bal Vikas Sewa Avam Pushtahar Uttar Pradesh, Lucknow and others ...Respondents

Counsel for the Appellants:
Sri Manoj Kumar Mishra
Sri L.N. Shukla

Counsel for the Respondents:
S.C.

(A) Constitution of India, Art. 226-Writ Petition-maintainability-petitioner/ Appellant challenging the order-passed by statutory authority-rejecting the claim for promotion on the post of Mukhya Sevika-Direction exercised power as public functionary-given under G.O.-rejection of claim for promotion on arbitrary and unreasonable ground-held-petition maintainable.

Held: Para 10 & 11

The ground on which the appellant was non suited for promotion is clearly

erroneous ground as held by us in earlier part of the judgment. The promotion has been denied to the appellant by a decision taken by the Director,Bal Vikas Sewa Avam Pustahar who is an officer of the State Government. An order has been passed by the Director, Bal Vikash Sewa Avam Pustahar rejecting the claim of the appellant for promotion. In the writ petition the appellant had challenged the order of an Officer of the Government that is the Director, Bal Vikas Sewa Avam Pustahar. In above view the proposition laid down in the case of Smt. Sunaina Singh (supra) were not attracted in the present case and the writ petition of the appellant challenging her non promotion cannot be dismissed on the proposition as laid down in the case of Smt. Sunaina Singh (supra).

Further the Writ Petition filed by the appellant challenging the order of the Director, Bal Vikas Sewa Avam Pustahar was fully maintainable. The Director passed the impugned order as a public functionary exercising the powers given to Director under the Government Orders regulating the promotion on the post of Mukhya Sewika. As the Director has refused the promotion on arbitrary and unreasonable ground there is violation of the constitutional provisions of Articles 14 and 16 of the Constitution of India. The decision of a Government Officer i.e the public functionary which is arbitrary can be challenged by the appellant by means of a Writ Petition under Article 226 of the Constitution of India.

(B) Constitution of India, Art. 226- Service Law-Promotion-petitioner possessing 18 years working experience as Angan Bari Kary Katri-claim non suited on the ground-at the initial engagement she was less than 18 years age-at the time of consideration of promotion-not open for the respondent to raise this issue on such belated stage-held-promotion can not be denied.

Held: Para 8 & 9

The only reason given by the Selection Committee for non suiting appellant was that she was less then 18 years of age at the time of initial engagement as Angan Bari Karyakatri. After the initial engagement of the appellant in the year 1980 she has been continuously working and discharging her duties as Angan Bari Karyakatri for about eighteen years when she was called by the Selection Committee. For promotion to a post a candidate has to fulfil the criteria as applicable on the date when he is being considered for promotion or on any other relevant date as required by Rules. It is not the case of the respondent that the appellant lacks any qualification for promotion. The appellant has gained experience on the post of Angan Bari Karyakatri of more than eighteen years. At the time when the appellant is being considered for promotion she cannot be non suited on the ground that at the time of her initial engagement as Angan Bari Karyakatri she was less then eighteen years of age when no action was taken against her for the last eighteen years and she was working on the post without any objection. It is not the case of the respondents that due to her being less then eighteen years of age at the time of engagement her services were terminated or any other action was taken. We are of the view that at the time of consideration of promotion in the year 1998 i.e. more than 18 years after her initial engagement it is not open for the respondents to non suit her on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980.

The appellant was not liable to be unsuited on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980. The Director in his order dated 1.5.1999 has clearly held that the marks allocated to the appellant by the Selection Committee were more than the candidate selected and we hold that the appellant was fully entitled to be

promoted and her non promotion was illegal.

Case law discussed:

1971 ALJ 893
AIR 1967 SC-1910
AIR 1990 SC 371
AIR 1984 SC-1621

(Delivered by Hon'ble Ajoy Nath Ray, C.J.)

1. Heard counsel for the appellant and learned standing counsel appearing for the respondents.

2. This appeal has been filed against the judgement and order dated 1.7.2005 passed by the learned Single Judge dismissing the writ petition filed by the appellant challenging the order dated 1,.5.1999 passed by the Director, Bal Vikas Sewa Avam Pustahar holding the petitioner not entitled for promotion on the post of Mukhya Sewika.

Brief facts necessary to be noted for deciding this appeal are;

3. The petitioner was engaged as Angvar Bari Karyakatri on 2.6.1980. The petitioner since her engagement as Angar Bari Karyakatri continued to work and discharged her duties. The appellant applied for being considered for promotion on the post of Mukhya Sewika. The appellant was called to appear before the Selection Committee vide letter dated 7.8.1998. The appellant appeared before the Selection Committee and was considered. The result of promotion was declared in which list the name of the appellant was not included. The appellant had earlier filed writ petition No. 6354 of 1999 along with three others Angan Bari Karyakatri claiming that the petitioners were entitled for promotion. This Court dismissed the writ petition as premature since no adverse orders were passed against the appellant at that time. This Court while dismissing the writ petition vide its order dated 9.3.1999 however, observed that the petitioners may raise their grievance before the respondents who may consider the case of the petitioners and pass appropriate order. After the judgement of this Court dated 9.3.1999 the representation was submitted by the appellant along with two other persons which were considered and rejected by the order dated 1.5.1999 of the Director, Bal Viokas Sewa Avam Pustahar. The Director in the order rejecting the representation observed that although according to the recommendation of the Selection Committee the appellant has secured more marks then the last selected candidate but since at the time of initial engagement of the appellant as Angan Bari Karyakatri her age was less then 18 years, she is not entitled to be considered for promotion. The Director also noted that vide Government order dated 3.12.1997 the minimum age of Angan Bari Karyakatri has been raised from 18 years to 21 years. The Writ Petition was filed by the appellant along with two others challenging the order dated 1.5.1999. The writ petition has been dismissed by the learned Single Judge vide its judgement dated 1.7.2005 against which judgment this Special Appeal has been filed. The learned Single Judge relying on two judgements of this Court namely 2003 (4) Education Service Cases 2039 **Smt. Sunaina Singh Versus District Maginstrate, Mau and another** 1971 A.L.J. 983 **Arya Kanya Pathshala and another Versus Smt. Manorama Devi Agnihotri and others** dismissed the writ petition. It was observed by the learned Single Judge that the petitioners

did not have any right for appointment therefore the order refusing to promote them cannot be challenged.

4. Learned counsel for the appellant in support of the appeal raised following submissions:-

(i) The appellant was entitled for promotion as Mukhya Sewika since she was found to have secured more marks than the candidates selected. The fact that at the time of initial engagement as Angan Bari Karyakatri in the year 1980 the appellant was less than 18 years of age, was not a relevant fact for denying the promotion.

(ii) Two Division Bench judgements raised by the learned single Judge namely **Smt. Sunaina Singh (supra) and Arya Kanya Pathshala and another** (supra) are not attracted in the present case.

5. The learned standing counsel refuting the submissions of counsel for the appellant submitted that the appellant was engaged as Angan Bari Karyakatri which is not a service and is not governed by any statutory service rules hence the writ petition filed by the appellant was not maintainable. He further contended that the engagement as Angan Bari Karyakatri is only ad hoc and temporary and does not give any right to the appellant. Further, the engagement of the appellant was under the World Bank Scheme.

6. Before proceeding to consider the submissions raised by the counsel for the appellant the submission of the learned standing counsel; that no statutory service rules have been framed for Angan Bari Karyakatri hence the Writ Petition is not maintainable, needs to be considered first. In the present case, the appointment and functioning of the appellant as Angan Bari Karyakatri is not in question. The question before the Court was the denial of promotion to the appellant on the post of Mukhya Sewika in which selection the appellant was allowed to participate. From the order dated 1.5.1999 passed by the Director it is clear that the service conditions of Angan Bari Karyakatri are governed by the Government Orders issued from time to time. In the event no statutory rules have been framed for governing the service conditions of any employee it is open for the State to regulate the services conditions by Government Orders issued in exercise of executive power of the State under Article 162 of the Constitution of India. The Apex Court in A.I.R. 1967 S.C. 1910 Sant Ram Sharma Versus State of Rajashthan and others laid down the above proposition. Paragraph-7 of the judgement which is relevant for the present case is extracted below:

(7) We proceed to consider the next contention of Mr.N.C.Chatterjee that in the absence of any statutory rules governing promotions of selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restriction not found in the rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provisions in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotion of the officers considered to selection grade

posts. It is true that Government cannot amend or supersede statutory Rules and administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not consistent with the rules already framed."

7. In view of above the submission of the learned standing counsel that since no statutory rules have been framed governing the promotion on the post of Mukhya Sewika the writ petition is not maintainable, cannot be accepted.

8. Now the submission raised by the counsel of the appellant needs to be considered. There is no dispute that the appellant was engaged in the year 1980 as Angan Bari Karyakatri and has been working since then. The appellant was called for selection for promotion on the post of Mukhya Sewika and was considered by the Selection Committee. From the order dated 1.5.1999 passed by the Director it is clear that the appellant was awarded more marks by the Selection Committee then the candidates who were selected. The only reason given by the Selection Committee for non suiting appellant was that she was less then 18 years of age at the time of initial engagement as Angan Bari Karyakatri. After the initial engagement of the appellant in the year 1980 she has been continuously working and discharging her duties as Angan Bari Karyakatri for about eighteen years when she was called by the Selection Committee. For promotion to a post a candidate has to fulfil the criteria as applicable on the date when he is being considered for promotion or on any other relevant date as required by Rules. It is not the case of the respondent that the appellant lacks any qualification for promotion. The appellant has gained experience on the post of Angan Bari Karyakatri of more than eighteen years. At the time when the appellant is being considered for promotion she cannot be non suited on the ground that at the time of her initial engagement as Angan Bari Karyakatri she was less then eighteen years of age when no action was taken against her for the last eighteen years and she was working on the post without any objection. It is not the case of the respondents that due to her being less then eighteen years of age at the time of engagement her services were terminated or any other action was taken. We are of the view that at the time of consideration of promotion in the year 1998 i.e. more than 18 years after her initial engagement it is not open for the respondents to non suit her on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980. The view which we are taking finds support from the observations of the apex Court while considering the question of confirmation in AIR 1990 Supreme Court 371 **Bhagwati Prasad** Versus **Delhi State Mineral Development corporation**. Paragraph 6 of the above judgment is extracted below:-

"6. The main controversy centres round the question whether some petitioners are possessed of the requisite qualifications to hold the post so as to entitle them to be confirmed in the respective posts held by them. The indisputable facts are that the period 1983 and 1986 and ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always and

the person to effectively discharge the duties and is a sure guide of assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard had harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications."

9. The appellant was not liable to be unsuited on the ground that she was less than eighteen years of age at the time of her initial engagement in the year 1980. The Director in his order dated 1.5.1999 has clearly held that the marks allocated to the appellant by the Selection Committee were more than the candidate selected and we hold that the appellant was fully entitled to be promoted and her non promotion was illegal.

10. Two judgements relied by the learned Single Judge for dismissing the writ petition of the appellant also require to be considered. The first decision relied by the learned Single Judge is of the case of **Smt Sunaina Singh** (supra) which was a case of termination of ad hoc and temporary engagement of Angan Bari Karyakatri. The Division Bench held that Angan Bari Karyakatri was engaged on honorarium under the World Bank Scheme and had no right to the post. The writ petition filed by Smt. Sunaina Singh challenging her termination was dismissed on the ground that she had no right to the post and she was appointed on ad hoc temporary post on honorarium. The Division Bench upheld the judgement of the learned Single Judge. The Division Bench upheld the termination of service of Angan Bari Karyakatri on the ground that the appointment was temporary ;purely on ad hoc basis on the World Bank Scheme and cannot be termed as service. The present case is not a case of termination of engagement of Angan Bari Karyakatri. The present case is a case of promotion to the post of Mukhya Sewika on the basis of working as Angan Bari Karyakatri. The promotion on the post of Mukhya Sewika is governed by the Government orders issued from time to time. The appellant has been denied promotion not on the ground that she has no right on the post of Angan Bari Karyakatri or she is not entitled to be considered but promotion was denied on the ground that she was less than eighteen years of age at the time of initial engagement. The ground on which the appellant was non suited for promotion is clearly erroneous ground as held by us in earlier part of the judgment. The promotion has been denied to the appellant by a decision taken by the Director,Bal Vikas Sewa Avam Pustahar who is an officer of the State Government . An order has been passed by the Director, Bal Vikash Sewa Avam Pustahar rejecting the claim of the appellant for promotion. In the writ petition the appellant had challenged the order of an Officer of the Government that is the Director, Bal Vikas Sewa Avam Pustahar. In above view the proposition laid down in the case of **Smt. Sunaina Singh** (supra) were not attracted in the present case and the writ petition of the appellant challenging her non promotion cannot be dismissed on the proposition as laid down in the case of **Smt. Sunaina Singh** (supra).

11. Further the Writ Petition filed by the appellant challenging the order of the Director, Bal Vikas Sewa Avam Pustahar was fully maintainable. The Director passed the impugned order as a public functionary exercising the powers given to Director under the Government Orders regulating the promotion on the post of Mukhya Sewika. As the Director has refused the promotion on arbitrary and unreasonable ground there is violation of the constitutional provisions of Articles 14 and 16 of the Constitution of India. The decision of a Government Officer i.e the public functionary which is arbitrary can be challenged by the appellant by means of a Writ Petition under Article 226 of the Constitution of India. The apex Court in A.I.R 1984 Supreme Court 1621 Tikaram Versus Mundikoota Shikshan Prasarak Mandal and others had considered the maintainability of the Writ Petition filed against an order of Director of Education regarding service of a teacher of a private school. The apex Court held that the Writ Petition is fully maintainable, the action of an officer of Government is always amenable to the decision of the High Court under Article 226 of the Constitution. Following was laid down in paragraph 3:-

"3. In the instant case the appellant is seeking a relief not against a private body but against an officer of Government who is always amenable to the jurisdiction of the Court. The appellant has merely sought the quashing of the impugned order dated November 26th , 1976 passed by the Director on review setting aside the order of the Deputy Director. What consequences follow from the quashing of the above said order in so far as the Management is concerned is an entirely different issue. In the circumstances, the High Court was wrong in holding that a petition under Article 226 of the Constitution did not lie against the impugned order passed by the Director. We are aware of some of the decisions in which it is observed that no teacher could enforce a right under the School Code which is non statutory in character against the management. But since this petition is principally directed against the order passed in a quasi judicial proceedings by the Director, though in a case arising under the School Code and since the Director had assumed a jurisdiction to review his own orders not conferred on him, we hold that the appellant was entitled to maintain the petition under Article 226 of the Constitution."

12. The proposition laid down by the apex Court in above case fully applies in the facts of the present case. The Writ Petition filed by the appellant is clearly maintainable.

13. Another judgment relied by the learned Single Judge in dismissing the writ petition of the appellant was the case of **Arya Kanya Pathshala and another** (supra). The learned Single Judge while referring the said judgment observed that in the above case the Division Bench held that once the initial appointment was found to be illegal and contrary to the provisions of law the incumbent cannot claim the benefit of provisions of law. In the case of **Arya Kanya Pathshala and another** (supra) Smt. Manorama Devi was appointed as Head Mistress by the committee of management. By the subsequent order of the committee of management her services were terminated. She challenged the termination order before this Court which

was allowed by the learned Single Judge . Special Appeal was filed by the College. The learned Single Judge held that the order terminating her services was made without obtaining permission of the Inspectress of Schools hence the termination was invalid. The Division Bench noted the provisions of 'Section 16F of the Intermediate Education Act, 1921 which provided that a teacher can be appointed with the approval of the Inspectress of Schools. The Regional Deputy Director of Education . The Division Bench held that the provisions of Section 16F (1) of the Act providing for approval before appointment is mandatory provision. The writ petitioner was not appointed with the approval of the education authority, hence there was no necessity for obtaining approval before termination. The Division Bench held that the provisions of Section 16G (3) of the U.P. Intermediate Education Act, 1921 is not applicable in the facts of that case. The appointment itself was not made with the approval. There cannot be any quarrel with the proposition laid down by the Division Bench in the case of **Arya Kanya Pathshala and another** (supra) . The said proposition however, is not attracted in the present case. In the present case the engagement of the appellant was made in the year 1980 and her services were never terminated on the ground that she was less than eighteen years of age at the time of her initial engagement rather the appellant was allowed to continue as Angan Bari Karyakatri and as was also allowed to participate in the selection for promotion. When no objections were taken with regard to appointment of the appellant as Angan Bari Karyakatri for last eighteen years the same could not be taken at the time of consideration for promotion on the post of Mukhya Sewika for which post all eligibilities are fulfilled by the appellant.

14. We are of the view that the proposition laid down in both the above judgements relied by the learned Single Judge are not attracted in the present case and the learned Single Judge erred in dismissing the writ petition following the aforesaid two cases.

15. The appellant has made out case for grant of relief to her. We have held that the appellant is entitled to be promoted on the post in question and her non promotion on the ground as given in the order dated 1.5.1999 was wholly erroneous. The order dated 1.5.1999 as well as the judgement of the learned Single Judge are set aside. The appellant is held fully entitled to be promoted as Mukhya Sewika. We direct the respondents to pass appropriate order for promotion of the appellant in the event a vacancy still exist and if no vacancy exist in any future vacancy on the post of Mukhya Sewika.

16. The appeal is allowed to the extent indicated above. Parties shall bear their own costs. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2005

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

Special Appeal No.1153 of 2005

Raj Kumar Jaiswal ...Petitioner/Appellant
Versus
Punjab National Bank and others
...Respondents

Counsel for the Petitioner:
Sri A.N. Srivastava

Counsel for the Respondents:
Sri Hari Ashok Kumar
S.C.

Constitution of India, Art. 14 and 16- Compassionate appointment-whether the provisions of Dying in Harness Rules are violative of Act 14 and 16 of the Constitution? Held-'No'

Held: Para 19 and 21

The conclusion is irresistible that the compassionate appointment itself cannot be held to be violative of Articles 14 and 16 of the Constitution.

In view of the foregoing discussions, with respect, we are unable to approve the observations of the learned Single Judge in *Ram Pratap Singh's* case (supra){in paragraph 69 (ii)} that the Dying in Harness Rules do not stand the test of valid classification and are hit by Articles 14 and 16 of the Constitution of India, the above observations do not lay down the correct law.

Important Note-Ram Pratap Singh Vs. State of U.P. and others reported in 2004 (4) ESC-(Alld) 2002 do not laid down the correct law.

Case law discussed:
2004 (4) ESC (Alld) 2002
1994 (4) SCC-138
1996 (5) SCC-308

(Delivered by Hon'ble Ajoy Nath Ray, CJ.)

1. Heard learned counsel for the appellant and the learned Standing Counsel.

2. This is an appeal against the judgment and order dated 17.8.2005, by which judgment the writ petition filed by the appellant praying for a mandamus commanding the respondents to appoint the writ petitioner-appellant under Dying-in-Harness Rules has been rejected.

3. The appellant's case in the writ petition is that the appellant's father was working in the Punjab National Bank on the post of Cash Peon, who died on 17.7.1996. The appellant after the death of his father, namely; Late Sri Ram Jaiswal, made an application in the year 1996 for compassionate appointment to meet out his great financial hardship, which he is facing after the death of his father. The appellant's further case is that he has passed High School and is eligible for appointment on Clerical post. The appellant's case is that he was intimated by the Punjab National Bank, Regional Office, Kanpur Nagar, vide letter dated 28.4.1997 that the request of the employment of the appellant on compassionate ground has been rejected. Learned Single Judge dismissed the writ petition taking the view that the appellant's claim for compassionate appointment was rejected by an order dated 28.4.1987, and no relief can be granted after the expiry of so many years.

4. Learned counsel for the appellant contended that the Bank has been pursuing the policy of giving compassionate appointment with regard to the employees, who died in harness. Learned counsel for the appellant submitted that although a learned Single Judge in ***Ram Pratap Singh Vs. State of U.P. & Others***, reported at (2004) 4 ESC (All.) 2002 has held that Dying-in-Harness Rules do not stand the test of valid classification and, therefore, the Rules contemplating compassionate appointment are hit by Article 14 and 16 of the Constitution of India, but the said

judgment does not lay down the correct law and do not stand in way of the appellant's claim for compassionate appointment. The learned counsel for the appellant further contended that the appointment on compassionate ground is exception to general rule of recruitment, and the said exception, has valid object and rules providing for compassionate appointment are neither arbitrary nor hit by Article 14 and 16 of the Constitution of India.

5. Learned counsel for the appellant submitted that the observations made by Hon'ble Single Judge in ***Ram Pratap Singh's case*** (Supra) are general observations with regard to constitutionality of rules relating to Dying in Harness and the said observations also cloud the entitlement of the appellant for consideration for compassionate appointment by Punjab National Bank. Learned counsel submits that in case of ***Ram Pratap Singh*** the Court apart from referring the Uttar Pradesh Government Recruitment of Dependents of Governments Dying in Harness Rules, 1974 specifically made observations against the very concept of Dying in Harness Rules. Learned counsel for the appellant lastly contended that the writ petition of the appellant has been dismissed on an incorrect assumption that the claim of the appellant having been rejected on 28.4.1987, no relief can be granted after so many years whereas the claim of the appellant was rejected not on 28.4.1987 but on 28.4.1997. The appellant had made several requests for giving copy of the order, which was not given to the appellant, which was reason for not immediately approaching this Court by filing writ petition.

6. Before we proceed to consider the correctness of judgment under appeal, it is necessary to consider the larger question raised by the counsel for the appellant as to whether the compassionate appointment is itself violative of Article 14 of the Constitution of India.

7. The rules providing for giving of compassionate appointment in the event of death of an employee have been adopted in government service as well as services in various financial institutions, local bodies and public corporations. Special rules for giving appointment to the dependent of deceased employee have been framed by different employers providing for different schemes and entitlements. The object of providing compassionate appointment is to enable the family to tide over the sudden crisis which has been caused due to death of breadearner of the family taking into consideration the service rendered by the employee.

8. The first question to be answered is as to whether the provisions/rules/schemes providing for compassionate appointment is based on any valid classification and violates the right of other eligible candidates who are entitled to claim appointment on the basis of open competition and merit. Article 14 of the Constitution forbid the State to deny equality before law or to the equal protection of the laws to any person. The right of employment or appointment to an office is a valuable right possessed by all citizens. Article 14, however, does not forbid classification provided the classification is founded on an intelligible differentia distinguishing those who are group together and the differentia must have rational nexus to the object sought to

be achieved. In ***Prabodh Verma and another vs. State of U.P. and others***, AIR 1985 SC 167, the Supreme Court considered the case of valid classification while giving appointment to teachers in the State of Uttar Pradesh. The Apex Court considered the validity of the Uttar Pradesh High School and Intermediate Colleges (reserve pool teachers) Ordinances 1978 in the aforesaid case. During the period of strike by teachers working in the recognized Higher Secondary Schools in the State, certain teachers were appointed to cope-up the teaching during the period of strike. After the strike was over the aforesaid Ordinance was issued providing for giving substantive appointment to those teachers who worked between January 9, 1978 and January 19, 1978, the validity of the said Ordinance providing for giving substantive appointment to reserve pool teachers was challenged in this Court, which was struck down by the High Court. The question as to whether while giving appointment to teachers, the classification provided for reserve pool teachers to get appointment without following normal rule of recruitment was considered. Applying the two well-known tests for finding out valid classification, the Apex Court held that there was an intelligible differentia that distinguishes teachers put in reserve pool from other applicant for the post of teachers. The Apex Court further held that the giving of substantive appointment to the reserve pool teachers had also rational nexus to the object sought to be achieved by Ordinances Nos. 10 and 22, namely, to keep the system of High School and Intermediate Education smoothly functioning. The Apex Court held that there was no question of violation of Articles 14 and 16 of the Constitution while giving substantive appointment. Repelling the attack based on Articles 14 and 16 of the Constitution, the Supreme Court laid following in paragraph 44, which is quoted below:

44."The reserve pool teachers thus formed a separate and distinct class from other applicants for the posts of teachers in recognized institutions. The differentia which distinguished the class of reserve pool teachers from the class of other applicants for the posts of teachers in recognized institutions is the service rendered by the reserve pool teachers to the State and its educational system in a time of crisis and this differentia bears a reasonable and rational nexus or relation to the object sought to be achieved by Ordinances Nos. 10 and 22 of 1978 read with the Intermediate Education Act, namely, to keep the system of High School and Intermediate Education in the State functioning smoothly without interruption so that the students may not suffer a detriment. Those two classes of persons, namely, the class of reserve pool teachers and the class of other applicants for the post of teachers in the recognized institutions, are not similarly circumstanced and, therefore, there cannot be any question of giving these two classes of persons equality of opportunity in matters relating to employment guaranteed by Article 16 (1) of the Constitution. Thus, neither Article 14 nor Article 16(1) of the Constitution was violated by the provisions of either U.P. Ordinance No. 10 of 1978 or U.P. Ordinance No. 22 of 1978."

9. As far as test of intelligible differentia is concerned, the test is clearly satisfied while considering the dependent of deceased employee dying in harness

and other applicant for the post from open market. Dependent of an employee in government employment or employment of any other organization who dies while in service falls in separate category and it cannot be said that the classification made by the relevant rules or schemes has no intelligible differentia.

10. Government employee or any other employee of public organization is governed by different service conditions as laid down from time to time by the competent authority. The facility that after the death of an employee in harness, his one of the dependants shall be considered for appointment, is one of the conditions provided for in the relevant rules or schemes and it is for the appropriate legislature or employer, as the case may be, while framing the said scheme to take into consideration all relevant facts. Object of the rules is to provide for social security and to provide for a source of livelihood to one of the dependants of the deceased employee so that sudden crisis in the family of the Government employee is met out. In most of service organizations, may be, Government or under public sectors or financial institutions, several benefits are extended to its employees and providing for employment to one of the dependants of the deceased employee is amongst one of such benefits. The benefits extended to the employees in service jurisprudence are as a measure of social security and with object to provide satisfactory condition of service. The cases are also not unknown where in some service organizations and public sector corporations, the benefit of compassionate appointment has not been provided for. In the present case, however, we are concerned with a case where the scheme do provide for compassionate appointment in event of death of an employee in harness.

11. In ***Ram Pratap Singh's case*** (supra) a learned Single Judge of this Court held that Dying in Harness Rules do not stand the test of valid classification and, therefore, the rules contemplating compassionate appointment are hit by Articles 14 and 16 of the Constitution of India. In taking the above view, the learned Single Judge in the said judgment relied on various reasons as noted in the judgement.

12. It was held that offering job to a dependant alone is not a possible solution. This sympathy cannot be allowed to override a statutory provision and/or constitutional provision. The State cannot be allowed to look after the welfare of its own employees and their families alone. Learned Judge further held that there is no justification for the Government to make compassionate appointment of a dependant of an employee dying in harness ignoring families of those waiting in open market and whose families are in still graver condition. Employment in the State or its authority must be on merit alone. The compassionate appointment in a way creates reservation within reservation. The compassionate appointment makes reservation over the permissible limit of 50%. The appointments ignoring merit in the public service are bound to affect the administrative efficiency. The learned Judge further observed that long experience of compassionate appointments in the Government establishments corporate/local bodies and educational institution, is not only bad but it has also completely belied the

expediency of such appointment in the context of "quality of service' / "quality of administration'. The learned Judge further observed that compassionate appointments in the State have become a virtual scam and some time employee colludes and it has become a source of corruption in the State. The provision of compassionate appointments under Dying in Harness Rules are being put to sheer misuse.

13. The learned Single Judge in ***Ram Pratap Singh's case*** (supra) had raised several questions with regard to compassionate appointment and made observations that there has been large scale misuse of the compassionate appointment by employers and their officers. The reasons which have given by the learned Single Judge in taking the above view are: - compassionate appointment denying opportunity to other applicants to compete on merit, the efficiency of administration is also adversely affected by giving appointment on compassionate ground to one of the dependants, in some case, the appointee neglects his family members after appointment, rules of compassionate appointment have been thoroughly misused, the conclusion of learned Single Judge has been sum up in paragraph 69 of the judgment which is extracted below:-

69:"To sum up (i) petitioner has failed on the facts of the present case, as discussed above, to prove 'distress' which could warrant compassionate appointment to mitigate hardship immediately to the family of deceased employee in question; and (ii) in the light of the discussion made above, Dying in Harness Rules do not stand the test of valid classification and, therefore, the Rules contemplating compassionate appointments are hit by Article 14 and 16, Constitution of India (iii) Respondents are directed to activate Compassionate Fund Rule and The U.P. Benevolent Fund Scheme 1997, and to make it real, purposive and effective so as to achieve solemn object for which they are framed; (iv) A copy of this judgment shall be sent to Chief Secretary for bringing the matter to the concerned and the State Government is mandated to take appropriate action in the light of the above".

14. The reason given by the learned Single Judge that the giving of compassionate appointment violates the rights of other applicants to compete for an office, needs to be first examined. The general rule of recruitment in all service is to recruit the candidate for a post giving equal opportunity to all eligible candidates. The compassionate appointments have been held to be exception of this general rule. The above exception has been accepted in all service organization and has been approved by the Apex Court in several cases. The Apex Court in ***Umesh Kumar Nagpal vs. State of Haryana and others***, 1994, 4 SCC 138 had occasion to consider the purpose and object of compassionate appointment.

15. The Apex Court noted in the above judgment that the compassionate appointment is one of the exceptions to the general rule of recruitment. Following was in paragraph 2 of the judgment:-

2."The question relates to the considerations which should guide while giving appointment in public services on compassionate ground. It appears that there has been a good deal of obfuscation

on the issue. As a rule, appointments in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interests of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family".

16. In a subsequent judgment the Apex Court again examined the object and purpose of the compassionate appointment, i.e., the ***State of Haryana and others vs. Rani Devi and another*** (1996) 5 SCC 308. While examining the object and purpose of compassionate appointment the Apex Court had also taken into consideration the equality clause under Article 14 of the Constitution of India. The Apex Court further laid down in the said judgment that while framing any rule in respect of appointment on compassionate ground the authorities have to be conscious of the fact that this right which is being extended to a dependent of the deceased employee is an exception to the right granted to the citizen under Articles 14 and 16 of the Constitution of India. As such, there should be a proper check and balance. Following was laid down in para 5 of the above judgment:-

5."The question of appointment of one of the dependants of an employee of the State or Central Government who dies while in service has of late assumed importance and subject - matter of controversy before different courts. This Court in the case of Sushma Gosain vs. Union of India, AIR 1989 SC 1976 after referring to the government memorandum under which the appointment on compassionate ground was being claimed observed that the purpose of providing appointment on compassionate ground is to mitigate the hardship due to the death of the breadearner in the family. It cannot be disputed that appointment on compassionate ground is an exception to the equality clause under Article 14 and can be upheld if such appointees can be held to form a class by themselves, otherwise any such appointment merely

on the ground that the person concerned happens to be a dependent of an ex-employee of the State Government or the Central Government shall be violative of Articles 14 and 16 of the Constitution. But this Court has held that if an employee dies while in service then according to rules framed by the Central Government or the State Government to appoint one of the dependents shall not be violative of Articles 14 and 16 of the Constitution because it is mitigate the hardship due to the death of the breadearner of the family and sudden misery faced by the members of the family of such employee who had served the Central Government or the State Government. It appears that this benefit has also been extended to the employees of the authorities which can be held to be a State within the meaning of Article 12 of the Constitution. But while framing any rule in respect of appointment on compassionate ground the authorities have to be conscious of the fact that this right which is being extended to a dependent of the deceased employee is an exception to the right the granted to the citizen under Articles 14 and 16 of the Constitution. As such there should be a proper check and balance."

17. The above observations of the Apex Court clearly lay down that giving of compassionate appointment to a dependant of the deceased employee is valid classification and does not offend Articles 14 and 16 of the Constitution, but the giving of compassionate appointment is only an exception to the general rule and there should be check and balances, and the appointments on compassionate ground have to be in accordance with the rules. The Apex Court further laid down that for giving effect to the compassionate appointment, it is necessary for the authorities to frame rules, regulations which can stand the test of Articles 14 and 16 of the Constitution. The observation made by the Apex Court in paragraph 6 of the judgment extracted below:-

6."It need not be pointed out that the claim of the person concerned for appointment on compassionate ground is based on the ground that he was a dependent of the deceased employee. Strictly this claim cannot be upheld on the touchstone of Articles 14 and 16 of the Constitution. But this Court has upheld this claim as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. That is why it is necessary for the authorities to frame rules, regulations or to issue such administrative orders which can stand the test of Articles 14 and 16."

18. Thus the giving of compassionate appointments itself by the Government or authorities to the dependant of its employee does not offend Articles 14 and 16 of the Constitution and it is the scheme of particular Government or authority, which has to stand the test of Articles 14 and 16 of the Constitution. As noted above, the compassionate appointment is an exception to the general rule. The general rule of recruitment by giving equal opportunity to all eligible persons and the exception to the above rule of general recruitment has to remain as exception and cannot be given such magnitude that it may eat the rule itself. Any rule or scheme, thus, cannot annihilate the general rule of recruitment itself.

19. The conclusion is irresistible that the compassionate appointment itself cannot be held to be violative of Articles 14 and 16 of the Constitution.

20. The other reasons given by the learned Single Judge in Ram Pratap Singh's case (supra) relate to misuse of rules of compassionate appointment, collusion and misdeeds committed by the government officers in giving compassionate appointment. The fact that any power given in the Statute is misused or the exercise of power is made arbitrarily or have improper object, does not make the Statute itself unconstitutional. Any improper exercise of power under the Statute, or arbitrary action taken by any functionary can always be scrutinized and corrected, but that itself does not make the Statute unconstitutional. Further, the question as to whether particular Government, Institution and Organization provides for compassionate appointment for its deceased employee's dependant is a question of policy. It is well settled that no dependant of the deceased employee can claim appointment on compassionate ground without there being any rules or regulations. The compassionate appointment is an enabling provision empowering the proper legislature and employer to provide for compassionate appointment. It is open for the Government or other organization not to provide for compassionate appointment, if in any particular situation or circumstance, it is not possible or for any reason or it does not serve the object and purpose. But the rules or schemes for compassionate appointment cannot be held unconstitutional only on the ground that it provides a special procedure of recruitment of dependant of deceased employee.

21. In view of the foregoing discussions, with respect, we are unable to approve the observations of the learned Single Judge in ***Ram Pratap Singh's*** case (supra){in paragraph 69 (ii)} that the Dying in Harness Rules do not stand the test of valid classification and are hit by Articles 14 and 16 of the Constitution of India, the above observations do not lay down the correct law.

22. The providing for compassionate appointment by Rules, Schemes or Regulations, itself is not violative of Articles 14 and 16 of the Constitution.

23. Coming back to the facts of this case, the learned Single Judge dismissed the writ petition of the appellant-writ petitioner only on the ground that the claim of the appellant for compassionate appointment was rejected on 28.4.1987 and the relief has been sought after expiry of so many years. The learned counsel for the appellant has rightly submitted that the claim of the appellant was rejected only on 28.4.1997, and not on 28.4.1987. Learned counsel for the appellant further contended that the appellant has made several requests for supply of the order dated 28.4.1997, but the said copy was not supplied to him and due to above fact, certain time was taken in approaching this Court.

24. We are satisfied that the learned Single Judge has committed an error in dismissing the writ petition filed by the appellant-writ petitioner only on the ground that the claim of the appellant for compassionate appointment was rejected on 28.4.1987, and we set aside the

impugned order dated 17.8.2005 and remit the writ petition back for a fresh consideration in accordance with law.

The appeal is, accordingly, **allowed**. No order as to costs. Appeal Allowed.

APPELLATE JURISDICTION
CRIMINAL JURISDICTION
DATED: ALLAHABAD 04.05.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 3497 of 2006

Saurabh ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri R.K. Yadav

Counsel for the Opposite Party:
Sri S.P.S. Rathore
A.G.A.

Code of Criminal Procedure-439-Bail Application-offence under Section 498-A, 304-B I.P.C.-unnatural death within 5 months of marriage-allegation of demand of dowry and cruelty in dying declaration role of applicant specified-held-not entitled for bail.

Held: Para 5

Considering the fact and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A., and considering the fact that the deceased died within 5 months of her marriage, the death is unnatural, the allegation of demand of dowry and cruelty is against the applicant, there is a dying declaration of the deceased in which specific role of committing the murder of the deceased has been attributed to the applicant and without expressing any opinion on the merit of the case, the applicant is not entitled for bail. The prayer for bail is refused.

(Delivered by Hon'ble Ravindra Singh, J.)

1. This application is filed by the applicant Saurabh with a prayer that he may be released on bail in case crime no. 112 of 2005 under section 498 A, 304 B I.P.C. P.S. Kasiraj district Etah.

2. The prosecution story, in brief is that in the present case the F.I.R. has been lodged by Rajesh Kumar, brother of the deceased Smt. Baby alias Pinky on 15.5.2005 at 6.00 p.m. in respect of the incident which had occurred in the night of 26/27.4.2005 at 4.30 a.m. It is alleged that the marriage of the deceased was solemnized with the applicant on 15.12.2004. The amount of Rs. 2 lacs was defrayed in the marriage but the in laws of the deceased were not satisfied with the dowry given to them. They were demanding motor cycle and Rs.50,000/- and to fulfill the demand of dowry they were torturing the deceased physically and mentally. In the night of 26/27.4.2005 at about 4.30 a.m. the applicant and other co-accused poured acid and petrol on the deceased, consequently, she received injuries she was taken to the hospital. The first informant was given an information about the treatment of his sister in the hospital he went there and saw her condition. Thereafter he lodged the F.I.R.

3. Heard Sri Radhakrishna Yadav learned counsel for the applicant; learned A.G.A. and Sri S.P. Rathore, learned counsel for the complainant.

It is alleged by the learned counsel for the applicant:-

I. That there was no demand of dowry and the deceased was never subjected to cruelty to full fill the demand of dowry. She was always maintained as a house wife in a cool and calm atmosphere. She did not receive any injury as alleged by the prosecution. The deceased received injury accidentally due to short-circuits of electric wire. She was taken to the C.H.C. Kasiraj where she was medically examined and referred to better hospital. She was also admitted by the applicant in the hospital, during her treatment blood was given to her by the family members of the applicant and the applicant provided medical aid and borne the heavy expenses.

II. That the deceased was caught by fire accidentally, the younger brother of the applicant namely Gaurav tried to save her life who also suffered burn injuries. He was medically examined on 27.4.2005, he received superficial to deep burn injuries.

III. That the deceased was forcibly taken by the first informant against her wishes from the hospital of Kasganj to district Hospital Farrukhabad where she died.

IV. That the applicant gave information to the first informant on that information the first informant came to the hospital and the deceased was tutored by the first informant and others and a tutored dying declaration was recorded on 27.4.2005.

4. It is opposed by the learned A.G.A. and the learned counsel for the complainant by submitting:-

I. That the death of the deceased was unnatural, she died due to burn injuries within five months of her marriage. There was a demand of dowry. She was subjected to cruelty to fulfill the same. The applicant is the husband. He is the main accused. The dying declaration of the deceased was recorded on 27.4.2005 at 11.30 a.m. in which she clearly stated that she was beaten by the applicant and kerosene was poured on her by the applicant, thereafter, she was set on fire. She has made allegation which is against the applicant. She did not make any allegation against other family members, in such a circumstances the applicant may not be released on bail.

5. Considering the fact and circumstances of the case and the submission made by the learned counsel for the applicant and the learned A.G.A., and considering the fact that the deceased died within 5 months of her marriage, the death is unnatural, the allegation of demand of dowry and cruelty is against the applicant, there is a dying declaration of the deceased in which specific role of committing the murder of the deceased has been attributed to the applicant and without expressing any opinion on the merit of the case, the applicant is not entitled for bail. The prayer for bail is refused.

6. Accordingly this application is rejected. Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.07.2006

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 4897 of 2003

Huzbar Uddin Khan ...Petitioner
Versus
Director General of Police and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Anurag Jauhari

Counsel for the Respondents:
S.C.

U.P. Government Servant Conduct of Rules, 1956-Rule 28-Punishment Dismissal-petitioner working as Sub Inspector-promised to marry a lady but failed to do with fact that so-from enquiry report incident of love affairs not confirmed-complainent being fully aware the petitioner a married man having two childeren-provision of section 28 not attrected-punishment of dismissal-wholly dispropationate punishment of withholding 25% back wages-awarded.

Held: Para 43,50,52,58

In my opinion, Rule 28 does not apply in the present case. From the record, it is also clear that the petitioner has not been afforded an opportunity to the amended charge sheet dated 10.6.2001 and the enquiry officer has submitted his report dated 28.8.2001.

In view of the aforesaid proposition of law, discussed above, there is no doubt to this effect that this Court while exercising power under Article 226 of the Constitution of India can only interfere when the Court comes to the conclusion that the punishment which has been awarded is highly disproportionate and the same shocks the conscience of the Court in the sense that it was in defiance of logic or moral standards. From the perusal of the record, it clearly goes to show that the charges levelled against the petitioner does not come under the definition of ''misconduct' as defined above. From the perusal of Rule 28 of the Conduct Rules, in my opinion, this also does not cover the charges levelled against the petitioner. The complaint made by the lady does not come in relation to the performance of the petitioner's in service. There is no charge against the petitioner that he was ever having any illicit relation with that lady. From the record, it is also clear that the complainant was fully aware that the petitioner was married having two children.

In view of the aforesaid facts and circumstances and in view of the definition of ''misconduct', I am of the opinion, that awarding punishment of dismissal from service to petitioner is wholly disproportionate and cannot be sustained as this Court is of the view that the complaint and allegations do not constitute a misconduct.

In special facts and circumstances of the present case, as narrated above, this Court without remitting the matter to the disciplinary authority while exercising the power under Article 226 of the Constitution of India, itself substituting the punishment to the petitioner. Justice will be served if a punishment to the petitioner to the tune of withholding 25% of back wages is awarded from the date of dismissal till the date of reinstatement. This will be sufficient in the facts and circumstances of the present case.

Case law discussed:
2001 (2) ESC (Alld.) 719
2002 (1) ESC (Alld.) 341
2004 (2) UPLBEC-1461
2003 (8) SCC-9
1987 (3) SCC-1

2002 (3) SCC-667
AIR 1979 SC-1022
J.T. 1992 (4) SC-253
AIR1989 SC-1185

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

1. By means of the present writ petition, the petitioner has approached this Court for issuing a writ of certiorari quashing the orders dated 26.10.2002, 1.5.2002 and 3.12.2001 passed by the respondents Nos 1, 2 and 3 respectively. Further issuing a writ in the nature of mandamus restraining the respondents from interfering in the working of the petitioner on the basis of impugned orders.

2. The facts arising out of the writ petition are that the petitioner was appointed as Sub Inspector of Police in the year 1984 and since then he is discharging his duties faithfully. There was no complaint regarding work and conduct of the petitioner. While the petitioner was posted in District Rampur, an application was submitted by one Km. Rana Rais before Inspector General of Police, Bareilly Zone, Bareilly making certain false and frivolous allegations against the petitioner and asserting that the petitioner after promising her to marry has resiled from his promise. A copy of the same has been filed as Annexure 1 to the writ petition. A preliminary enquiry was conducted by Circle Officer, Bilaspur, District Rampur, who submitted his enquiry report on 5.7.1999 exonerating the petitioner from the aforesaid charge. The Superintendent of Police vide its letters dated 12.8.1999 and 23.12.1999 addressed to Deputy Inspector General of Police informed him that the charges levelled against the petitioner by Km. Rana Rais have been found to be false by the enquiry officer. Km. Rana Rais then again on 8.1.2001 directly submitted an application before the Inspector General of Police Bareilly. An order-dated 3.2.2001 was passed directing the Superintendent of Police to submit his comments regarding conduct of the petitioner in accordance with the provisions of the U.P. Government Servants Conduct Rules, 1956 (hereinafter referred to as Conduct Rules, 1956). In compliance of the aforesaid order, the circle officer Bilaspur sent a letter dated 3.3.2001 stating therein that he had overlooked the conduct of the petitioner in the light of the provisions of Conduct Rules, 1956. By order dated 12.3.2001, passed by the Superintendent of Police directing the petitioner to show cause as to why an entry of censure be not made in his character roll for committing breach of Conduct Rules, 1956. However, by order dated 27.3.2001, the Inspector General of Police directed the Superintendent of Police, Rampur to proceed against the petitioner in accordance with the provisions of Rule 14 (1) of the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to 1991 Rules). On receipt of the aforesaid order dated 19.5.2001, the Superintendent of Police, Rampur recalled the earlier show cause notice dated 12.3.2001 and appointed Additional Superintendent of Police as an enquiry officer.

3. A charge sheet dated 10.6.2001 was served upon the petitioner by enquiry officer and time was granted till 19.6.2001 to submit his reply. From the perusal of the aforesaid charge sheet indicates that only one charge was levelled against the petitioner namely that

in the year 1991, while he was posted as Sub Inspector he had a love affair with Km. Rana Rais in spite of the fact that he was married, which constituted an offence under Rule 28 of the Conduct Rules, 1956. An application was submitted by the petitioner for being supplied certain documents, which were, however, supplied to him only on 6.7.2001. An application was thereafter submitted by the petitioner on 10.7.2001 seeking 30 days time to the petitioner for filing his reply to the aforesaid charge sheet. However, only three days time was granted to the petitioner by the Enquiry Officer. On 21.7.2001, an application was submitted by the petitioner before the Enquiry Officer stating therein that the provisions of Rule 28 of the Conduct Rules 1956 are not applicable keeping in view of the nature of the charges levelled against him and so he may be informed accordingly so as to enable him to submit a proper reply. It has also been stated that the enquiry officer vide letter dated 21.7.2001 had fixed 23.7.2001 for recording the statement of Km. Rana Rais, but however, the statement of the said lady was recorded on 22.7.2001 i.e. one day prior to the date fixed. The statement was recorded ex parte behind the back of the petitioner. Subsequently on continuation of the aforesaid statement another statement was recorded on 23.7.2001. The petitioner categorically asserts that he had no notice of postponing the enquiry proceeding or of the recording of the statement of Km. Rana Rais on 22.7.2001. On 9.5.2001 the petitioner was transferred to Meerut zone from Rampur, as such, an application dated 22.7.2001 was moved before the competent authority seeking transfer of the enquiry proceeding. It has also been asserted in the said application that the petitioner does not expect a proper enquiry from the enquiry officer on account of bias and malafides. A copy of the said application dated 22.7.2001 has been filed as Annexure 12 to the writ petition. Realizing the provisions of Rules 28 of the Conduct Rules 1956 were not applicable, an amended charge sheet was issued to the petitioner on 24.7.2001. From the perusal of the aforesaid charge sheet it indicates that now the charge, which has been levelled against the petitioner, was in violation of Rule 4 (1) of U.P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules, 1991. Since the petitioner had fallen ill and cannot recovered from his illness, as such, he could not participate in the enquiry proceedings and ultimately an exparte enquiry report was submitted by the enquiry officer on 21.8.2001.

4. On the basis of the aforesaid enquiry report a show cause notice was given to the petitioner on 25.10.2001 by the Deputy Inspector General of Police. The reply of the aforesaid show cause notice was submitted by the petitioner on 17.11.2001. The respondents without taking into consideration the aforesaid reply of the petitioner an order dated 3.12.2001 was passed by which the Deputy Inspector General of Police has enforced a punishment of dismissal from service. A copy of the same has been filed as Annexure 17 to the writ petition.

5. Being aggrieved by the aforesaid order, the petitioner filed a writ petition before this Court which was numbered as Writ Petition No.1363 or 2002, which was disposed of on 10.1.2002 on the ground of alternative remedy with a liberty to the petitioner to file an appeal before the Director General of Police. It was further

provided that it will be open to the petitioner to file an application before the Director General of Police to transfer his appeal to some other Inspector General of Police but the appeal of the petitioner was also dismissed by its order dated 1.5.2002. A copy of the same has been annexed as Annexure 20 to the writ petition.

6. Being aggrieved by the aforesaid order, the petitioner filed a revision before the Director General of Police, who also by its order dated 26.10.2002 has rejected the revision filed by the petitioner. A copy of the same has been filed as Annexure 21 to the writ petition.

7. It has been contended on behalf of the petitioner that from the perusal of the order, it clearly goes to show that the services of the petitioner have been dispensed with on the ground that his conduct was in violation of Rule 3 of the Conduct Rules 1956. The aforesaid order is wholly illegal and contrary to law as the provisions of the aforesaid rules are clearly not applicable against the petitioner. Rule 3 is being reproduced below:-

"3. General-(1) Every Government servant shall at all times maintain absolute integrity and devotion to duty.

(2)Every Government servant shall at all times conduct himself in accordance with the specific or implied orders of Government regulating behaviour and conduct which may be in force."

8. Even otherwise neither the appellate or revisional authority have taken into consideration the points raised by the petitioner in the memo of revision or appeal even it has also not taken into consideration the fact regarding the enquiry proceedings that the enquiry officer has proceeded ex parte and no opportunity of hearing has been afforded to the petitioner. Admittedly, all the proceedings have been initiated against the petitioner on the basis of a letter/complaint by Km. Rana Rais. Her statement has also been recorded behind the back of the petitioner and he has not been afforded any opportunity to cross examine her. The said action of the respondents is in clear violation of the principles of natural justice and as such, the aforesaid statement could not have formed the basis for terminating the services of the petitioner. Even otherwise, the charge levelled against the petitioner does not constitute a misconduct either under the provisions of the Conduct Rules, 1956 or under 1991 Rules. Thus no disciplinary proceedings could have been initiated against the petitioner on the basis of the aforesaid complaint. There is no allegation against the petitioner that the petitioner at any point of time as a Sub Inspector has acted in violation to the Service Rules. Thus on the basis of such charge the services of the petitioner could not have been dispensed with, therefore, the orders impugned passed by the respondents are clearly illegal and without jurisdiction.

9. Even assuming without admitting this fact that the charges levelled against the petitioner are correct, then that also relates only to his private life and it does not in any manner relate to his official duties and in view of the aforesaid fact, no proceeding under the provisions of the Service Rules could have been initiated against the petitioner. There is no allegation against the petitioner to

establish that the petitioner has in any manner any physical relations with the complainant, which is amply disclosed by her in statement recorded during the enquiry proceedings. Thus the punishment awarded against the petitioner is highly excessive, disproportionate and clearly violates the provisions of Article 14 of the Constitution of India. The contention of the petitioner is established in view of the application dated 5.6.1999 submitted by Km. Rana Rais. A certificate issued by Dr. Zilani W.H.Siddiqui, brother-in-law of Km. Rana Rais in which it has also been clearly stated that they were fully aware regarding the fact that the petitioner was already married. The respondents themselves in view of the present facts and circumstances are not clear as regards the provisions of the Service Rules or Conduct Rules which have been violated by the petitioner but in spite of the aforesaid fact, the enquiry was conducted and have imposed an excessive order of punishment without giving proper and reasonable opportunity to the petitioner. The petitioner further submits that he is entitled to the protection of the Service Rules and the procedure provided therein for holding an enquiry under the law. None of the provisions have been followed and the Rules have been violated and the charges levelled against the petitioner have not been proved, therefore, the punishment is to be quashed. While rejecting the appeal of the petitioner the respondents have also not applied their mind.

10. The further contention raised on behalf of the petitioner is that in spite of the fact that if respondents were of the opinion that some mistake or there is some misconduct on the part of the petitioner is there some minor punishment should have been awarded as it was decided in earlier proceeding to award a censure entry against the petitioner. As admittedly, the charges, which have been levelled against the petitioner, does not come under the definition of misconduct, therefore, there cannot be any punishment of dismissal. The punishment awarded to the petitioner is clearly disproportionate to the charges as such, the same is liable to be quashed.

11. The reliance has been placed by the petitioner upon a Division Bench decision of this Court in ***Pravina Solanki Vs. State of U.P. and others*** reported in 2001 (2) ESC (Allahabad), 719 and has submitted that in the aforesaid case, the lady petitioner who was constable in U.P. Police was dismissed on the charge that she was found at her residence under influence of liquor and sleeping with one person in the same bed. This Court hold that she has not committed any misconduct for which she can be departmentally proceeded against and the order of dismissal has been quashed. Reliance has been placed upon Paras 4 and 5 to the judgment. The same are being quoted below:-

"4. *There are no allegations against the petitioner that her conduct in any way affected her official functions. There is also no allegation that she was on duty at the relevant time. In our opinion unless an employee does some act which interferes with his/her official function then ordinarily whatever he/she does in his/her private life cannot be regarded as misconduct. In the case of Rabindra Nath Ghosh 1985 (1) SLR 598 it was the view taken by the Calcutta High Court and this was also the view taken by a Division bench of this Court in* ***State of U.P. V.***

B.N. Singh *AIR 1989 Alld. 359. The position may have been different if the petitioner was doing the aforesaid acts while on duty, but in the present case she was at her residence late in the night, and there is no allegation that she was on duty at that time. As held by this Court in the case of* ***State of U.P. V. B.N.Singh*** *(Supra) in order to bring a case of a government servant within the definition of personal immorality on the ground of habit of sex, it must be shown that this habit of the government servant has reduced his utility as a public servant so as to damage the government or official generally in public esteem. In* ***Sukhdev Singh V. State of Punjab*** *1983 (2) SLR 645 the Punjab High Court held that a constable under influence of alcohol while not on duty cannot be held to be guilty of misconduct. In the present case the petitioner was not having sex in a public place but at her residence. Hence it cannot be said that she has committed any misconduct for which she can be departmentally proceeded against.*

5. *We cannot help observing that if the petitioner had been a male employee perhaps the authorities would have done nothing about it but since she was a female she has been proceeded against. Thus, this is a case which smacks of sexual discrimination."*

12. Another judgment cited by the petitioner in 2002 (1) ESC Allahabad, 341 ***Shahjahan Khan Vs. State of U.P. and others***. The charge in the aforesaid case was that the petitioner in that writ petition was having a married wife, lived with another woman for seven months. The same was in violation of Rule 29 of the U.P. Government Servants Conduct Rules, 1956. This Court has held that merely because of government servant who had married wife lived with a woman, it does not mean that he has married to her, unless the evidence proves the second marriage. The order of dismissal was quashed.

13. Another judgment relied upon by the counsel for the petitioner is ***Raj Kishore Yadav Vs. U.P. Public Service Tribunal, Indra Bhawan, Lucknow and others*** reported in (2004) 2 UPLBEC 1461. In support of the contention of the aforesaid judgment, the petitioner submits that this Court as well as the Apex Court has a wide power of judicial review of the quantum of punishment. In that case, the employee concerned made some wrong measurement. This Court has held that mistake may be committed by any person. It is apart of human nature, therefore, applying the principle laid down by the Apex Court it has been held that the punishment imposed is highly excessive and disproportionate.

14. The another judgment relied upon by the petitioner in ***Dev Singh Vs. Punjab Tourism Development Corporation Ltd. and another*** reported in (2003) 8 SCC, 9. In the light of the aforesaid judgment the counsel for the petitioner submits that this Court has full power of judicial review regarding proportionality of punishment and this Court while considering the aforesaid fact can set aside the punishment, if the punishment imposed by the disciplinary authority or the appellate authority shocks the judicial conscience of the Court, the Court can mould the relief. The reliance has been placed upon paras 6 and 7 to the judgment. The same is being reproduced below:-

*"**6.** A perusal of the above judgments clearly shows that a court sitting in appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty, however, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, then the court would appropriately mould the relief either by directing the disciplinary/appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this Court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case.*

***7.** Applying the said principles laid down by this Court in the cases noted hereinabove, we see that in this case the appellant has been serving the respondent Corporation for nearly 20 years with unblemished service, before the present charge of misconduct was leveled against him. The charge itself shows that what was alleged against the appellant was misplacement of a file and there is no allegation whatsoever that this file was either misplaced by the appellant deliberately or for any collateral consideration. A reading of the charge-sheet shows that the misplacement alleged was not motivated by any ulterior consideration and at the most could be an act of negligence, consequent to which the appellant was unable to traced the file again. The disciplinary authority while considering the quantum of punishment came to the conclusion that the misconduct of the nature alleged against the appellant should be viewed very seriously to prevent such actions in future, whereby important and sensitive records could be lost or removed or destroyed by the employee under whose custody the records are kept. Therefore, he was of the opinion that a deterrent punishment was called for, forgetting for a moment that no such allegations of misplacing of important or sensitive record was made in the instant case against the appellant and what he was charged of was misplacement of a file, importance or sensitiveness of which was not mentioned in the charge-sheet. Therefore, in our opinion, the disciplinary authority was guided by certain facts which were not on record, even otherwise, we are of the opinion that when the Service Bye-laws applicable to the Corporation under Service Bye-law 17 provide various minor punishments, we fail to appreciate why only maximum punishment available under the said Bye-laws should be awarded on the facts of the present case. We think the punishment of dismissal for mere misplacement of a file without any ulterior motive is too harsh a punishment which is totally disproportionate to the misconduct alleged and the same certainly shocks our judicial conscience. Hence, having considered the basis on which he punishment of dismissal was imposed on the appellant and the facts and circumstances of this case, we think to avoid further prolonged litigation it would be appropriate if we modify the punishment ourselves. On the said basis, while upholding the finding of misconduct against the appellant, we think it appropriate that the appellant be imposed a punishment of withholding of one*

increment including stoppage at the efficiency bar in substitution of the punishment of dismissal awarded by the disciplinary authority. We further direct that the appellant will not be entitled to any back wages for the period of suspension. However, he will be entitled to the subsistence allowance payable up to the date of the dismissal order."

15. In view of the aforesaid fact, the petitioner submits that the total disciplinary proceedings against the petitioner is vitiated only on the ground that the petitioner has not been afforded an opportunity, which was necessary to follow the principle of natural justice. Another aspect of the matter is that as it does not come under the definition of "misconduct', therefore, the punishment of dismissal is highly excessive and disproportionate to the offence committed and is liable to be quashed.

16. Aggrieved by the aforesaid orders, the petitioner has approached this Court and this Court had issued notice to the respondents to file counter affidavit. A counter affidavit has been filed and the respondents wanted to justify the punishment which has been awarded against the petitioner that in the preliminary enquiry, the charges against the petitioner have been proved and after departmental enquiry, according to Rule 14(1) as the charges against the petitioner was proved, the services have been dispensed with. As the petitioner has promised one Km. Rana Rais when he was posted in 1991 as Sub Inspector and there were certain letters and photos, which clearly proves the misconduct against the petitioner. In paragraph 10 of the counter affidavit, the allegation against the petitioner regarding taking the statement prior to one day before the date fixed, it has been stated that the date was fixed for 23.7.2001 but Km. Rana Rais appeared on 22.7.2001. The petitioner was searched but he was not available, therefore, the statement of Km. Rana Rais was taken on 22.7.2001. It has further been stated in Para 18 of the counter affidavit that as the charge against the petitioner that he has adduced Km. Rana Rais by non fulfilling the promise and he has deceived the lady and he maintain the relationship of love affair with that lady is in violation of Sub Rule 3 of U.P. Government Servants Conduct Rules. Reliance has been placed upon 1987 (3) SCC , 1 ***Daya Shanker Vs. High Court of Judicature at Allahabad and others*** and reliance has been placed upon para 11 of the writ petition. The same is being quoted below:-

"11. In our opinion the conclusion reached by the Inquiry Officer that the petitioner used unfair means is fully justified. No amount of denial could take him away from the hard facts revealed. The conduct of the petitioner is undoubtedly unworthy of a judicial officer. Judicial officer cannot have two standards, one in the court and another outside the court. They must have only one standard of rectitude, honesty and integrity. They cannot act even remotely unworthy of the office they occupy. The second contention urged for the petitioner also fails and is rejected."

17. I have heard learned counsel for the petitioner and learned Standing Counsel and have perused the record.

18. From the record, it is clear that the proceedings against the petitioner were initiated only on the basis of

complaint made by Miss Rana Rais. On an application made in 1997, an enquiry to that effect was made and it was found false. Subsequently, on the basis of another application dated 8.1.2001 directly submitted to the Inspector General of Police by which the Superintendent of Police was directed to submit report regarding petitioner's conduct and the Superintendent of Police had issued a show cause notice for awarding an censure entry but on the basis of order dated 27.3.2001, the Inspector General of Police directed the Superintendent of Police, Rampur to proceed against the petitioner in accordance with the provisions of Rule 14(1) of the U.P. Police Officer Rules, 1991 and on the basis of aforesaid fact the order was recalled and enquiry officer was appointed and a show cause notice was served upon the petitioner. From the perusal of the charge sheet, it is clear that one and only charge against the petitioner that he was having friendship with Miss Rana Rais and promise to marry her but the petitioner has not fulfilled his promise. From the earlier report submitted to the Inspector General of Police dated 3.3.2001 a finding to this effect has been recorded that no incident of love affair has been confirmed and it does not come under the definition of "misconduct'. From the perusal of the show cause notice dated 12.3.2001, it is also clear that Superintendent of Police had decided to award a punishment of censure entry in his character roll for committing breach of Conduct Rules, 1956. It appears that on the basis of instigation of higher authorities, the disciplinary proceedings against the petitioner have been initiated. From the record, it is also clear that the statement of Km. Rana Rais has been recorded one day prior the date fixed and the petitioner has not been afforded an opportunity for cross examination. It is not the case of the complainant that on the basis of the aforesaid promise as stated by the respondent, the petitioner was having an illicit relation with the complainant. There is no prove to that effect. It is also apparent from the record that the complainant was fully aware regarding that the petitioner was a married man. From the record, it is also clear that when the proceedings were transferred to Meerut zone, after that no date, time and place was fixed for conducting the enquiry and the enquiry officer has submitted report. From the charges levelled against the petitioner, no charge has been levelled to this effect that the petitioner while in service has not maintained discipline and has violated any provision of the Service Rules, therefore, in my opinion, it does not constitute a misconduct as defined under the Conduct Rules of 1956 or under 1991 Rules.

19. The scheme of the disciplinary rules in general is to identify the conduct which is made punishable and then to provide for the various punishments which may be imposed for the acts which are inconsistent with such conduct. The Conduct Rules contain provisions which pertain to the standards of conduct which the Government servant are to follow whereas the Conduct and Appeal Rules provide the punishment or penalties which may be imposed for misconduct. The conduct rules and the rules for punishment may be provided in separate rules or combined into one. Moreover, there are a host of departmental instructions, which elucidate, amplify and provide guidelines regarding the conduct of the employees. The range of activities

which may amount to acts which are inconsistent with the interest of public service and not befitting the status, position and dignity of a public servant are so varied that it would be impossible for the employer to exhaustively enumerate such acts and treat the categories of misconduct as closed. It has, therefore, to be noted that the word "misconduct" is not capable of precise definition. But at the same time though incapable of precise definition, the word "misconduct" on reflection receives its connotation from the context, the delinquency in performance and its effect on the discipline and the nature of the duty. The act complained of must bear a forbidden quality or character and its ambit has to be construed with reference to the subject-matter and the context wherein the term occurs, having regard to the scope of the statue and the public purpose it seeks to serve.

20. In ***Baldev Singh Gandhi Vs. State of Punjab and others***, JT 2002 (Suppl.1) SC 602: 2002(3) SCC 667, it was held that the expression "misconduct" means unlawful behaviour, misfeasance, wrong conduct, misdemeanor etc. Similarly, in State of Punjab and others V. Ram Singh Ex. Constable, JT 1992 (4) SC 253, it was held that the term "misconduct" may involve moral turpitude. It must be improper or wrong behaviours, unlawful behaviour, willful in character, forbidden act, a transgression of established and definite Rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character.

21. "Misconduct" as stated in Batt's Law of Master and Servant ("4 Edition) (At page 63) is "comprised positive acts and not mere neglects or failures." The definition of the word as given in Bakllentine's law Dictionary (148th Edition) is "A transgression of some established and definite Rule of action, where n discretion is left except what necessity may demand, it is a violation of definite law, a forbidden act. It differs from carelessness'.

22. "Misconduct' as defined in ***Webster's Encyclopedic Unabridged Dictionary*** as follows- 1. improper conduct; wrong behaviour. 2. Unlawful conduct by an official in regard to his office, or by a person in the administration of justice, such as a lawyer, witness, or juror. 3. to mismanage 4. to misbehave (oneself).

23. In ***Union of India and others Vs. J. Ahmed*** reported in A.I.R. 1979 Supreme Court 1022, the Apex Court while interpreting the meaning of "misconduct' has defined what is misconduct. In para 11 and 13 of the aforesaid judgment, the Apex Court has held that "misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment or innocent mistake, do not constitute such misconduct. Paras 11 and 13 are being quoted below:-

11. *Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected to a member of the service. It would follow that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent*

with due and faithful discharge of his duty in service, it is misconduct (see Pearce V. Foster) (1886) 17 QBD 536 (at p.542). A disregard of an essential condition of the contract of service may constitute misconduct (see Laws V. London Chronicle (Indicator Newspapers) (1959) 1 WLR 698. This view was adopted in Shardaprasad Onkarprasad Tiwari V. Divisional Supdt., Central Railway, Nagpur Divn., Nagpur, 61 Bom LR 1596: (AIR 1961 Bom 150) and Satubha K.Vaghela V. Moosa Raza (1969) 10 Guj LR 23. The High Court has noted the definition of misconduct in Stroud's Judicial Dictionary which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct."

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in Management, Utkal Machinery Ltd. V. Workmen, Miss Shanti Patnaik, (1966) 2 SCR 434 : (AIR 1966 SC1051), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In S.Govinda Menon V. Union of India, (1967) 2 SCR 566: (AIR 1967 SC 1274), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P.H.Kalyani V. Air France, Calcutta, (1964) 2 SCR 104 : (AIR 1963 SC 1756), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life an, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar (examples) instances of which (are) a railway cabinman signalling in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashing causing heavy loss of life. Misplaced sympathy can be a great evil

(see Navinchandra Shakerchand Shah V. Manager, Ahmedabad Co-op. Department Stores Ltd., (1978) 19 Guj. LR 108 at P.120). But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an interference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

13. Having cleared the ground of what would constitute misconduct for the purpose of disciplinary proceeding, a look at the charges framed against the respondent would affirmatively show that the charge inter alia alleged failure to take any effective preventive measures meaning thereby error in judgment in evaluating developing situation. Similarly, failure to visit the scenes of disturbance is another failure to perform the duty in a certain manner. Charges Nos. 2 and 5 clearly indicate the shortcomings in the personal capacity or degree of efficiency of the respondent. It is alleged that respondent showed complete lack of leadership when disturbances broke out and he disclosed complete inaptitude, lack of foresight, lack of firmness and capacity to take firm decision. These are personal qualities which a man holding a post of Deputy Commissioner would be expected to possess. They may be relevant considerations on the question of retaining him in the post or for promotion, but such lack of personal quality cannot constitute misconduct for the purpose of disciplinary proceedings. In fact, charges 2,5 and 6 are clear surmises on account of effective preventive measures to arrest or to nip in the bud the ensuring disturbances. We do not taken any notice of charge No. 4 because even the Enquiry Officer has noted that there are number of extenuating circumstances which may exonerate the respondent in respect of that charge. What was styled as charge No.6 is the conclusion, Viz, because of what transpired in the inquiry, the Enquiry Officer was of the view that the respondent was unfit to hold any responsible position. Somehow or other, the Enquiry Officer was of the view that the respondent was unfit to hold any responsible position. Somehow or other, the enquiry Officer completely failed to take note of what was alleged in charges 2, 5 and 6 which was neither misconduct nor even negligence but conclusions about the absence or lack of personal qualities in the respondent. It would thus transpire that the allegations made against he respondent may indicate that he is not fit to hold the post of Deputy Commissioner and that if it was possible he may be reverted or he may be compulsorily retired, not by way of punishment. But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct, viz, such acts and omissions which would render him liable for any of the punishments set out in Rule 3 of the Discipline and Appeal Rules, 1955. No such case has been made out.

24. In ***The State of Punjab and others Vs. Ram Singh Ex-Constable*** reported in Judgment Today 1992 (4) Supreme Court, 253, the Apex Court has defined the word "misconduct'. The relevant paras 5 and 6 are being reproduced below:-

5. *Misconduct has been defined in Black's Law Dictionary, Sixth edition at page 999 thus:-*

"A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour, its synonyms are misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness."

Misconduct in office has been defined as :

"Any unlawful behaviour by a public officer in relation to the duties of his office, willful in character. The term embraces acts which the office holder had no right to perform, acts performed improperly, and failure to act in the face of an affirmative duty to act."

P.Ramanatha Aiyer's the Law Lexicon, Reprint Edition 1987 at page 82 "misconduct' defines thus:-

"The term misconduct implies a wrongful intention, and not a mere error of judgment. Misconduct is not necessarily the same thing as conduct involving moral turpitude. The word misconduct is a relative term, and has to be construed with reference to the subject matter and the context wherein the term occurs, having regard to the scope of the Act or statute which is being construed. Misconduct literally means wrong conduct or improper conduct. In usual parlance, misconduct means a transgression of some established and definite rule of action, where no discretion if left, except what necessity may demand and carelessness, negligence and unskilfulness are transgressions of some established, but indefinite, rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness or abuse of discretion under an indefinite law. Misconduct is a forbidden act; carelessness, a forbidden quality of an act, and is necessarily indefinite. Misconduct in office may be defined as unlawful behaviour or neglect by a public officer, by which the rights of a party have been affected."

6. *Thus it could be seen that the word "misconduct' though not capable of precise definition, its reflection receive its connotation from the context, the delinquency in its performance and its effect on the discipline and the nature of the duty. It may involve moral turpitude, it must be improper or wrong behaviour; unlawful behaviour, willful in character; forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty; the act complained of bears forbidden quality or character. Its ambit has to be construed with reference to the subject matter and the context wherein the term occurs, regard being had to be scope of the statute and the public purpose it seeks to serve. The police service is a disciplined service and it requires to maintain strict discipline in the service causing serious effect in the maintenance of law and order.*

25. From the perusal of the aforesaid definition and interpretation made by the Apex Court it cannot constitute a misconduct of the petitioner, as it does not constitute misconduct of the petitioner,

therefore, the question is whether this Court while exercising the jurisdiction under Article 226 of the Constitution of India can have a power of judicial review to set aside the finding and punishment awarded by the administrative authorities.

26. In a case like instant, the Court can review only the " decision making procedure" and not the "decision" of the authority. The Court, not being a Court of Appeal, is not competent to substitute its own view on factual aspect of the case.

27. The Court can review to correct errors of law or fundamental procedural requirements which may lead to manifest injustice and can interfere with the impugned order in "exceptional circumstances" (Vide Union of India Vs. Parma Nanda, AIR 1989 SC 1185; State Bank of India Vs. Samarendra Kishore Endow, (1994) 2 SCC 537; State of Punjab Vs. Surjit Singh, (1996) 8 SCC 350; State of U.P. Vs. Ashok Kumar Singh, AIR 1996 Supreme Court 736; State of U.P. Vs. Nand Kishore Shukla 7 Anr., AIR 1996 Supreme Court 1561; Transport Commissioner, Madras Vs. Thiru ARK Moorthy, (1995) 1 SCC 332; Rae Bareily Kshetriya Gramin Bank Vs. Bhola Nath Singh & Ors., AIR 1997 Supreme Court 1908; State of Punjab Vs. Bakshish Singh, AIR 1997 Supreme Court 2696; Yoginath D.Bagde Vs. State of Maharashtra & Anr., (1999) 7 SCC 739; Union of India Vs. Lt. Gen.R.S.Kadyan & Ors., AIR 2000 Supreme Court 2513; Food corporation of India Vs. A. Prahalada Rao & Anr., AIR 2001 Supreme Court 51; Kumaon Mandal Vikas Nigam Ltd. Vs. Girja Shankar Pant & Ors., AIR 2001 Supreme Court 24; N.R. Nair Vs. union of India & Ors., AIR 2001 Supreme Court 2337; Union of India vs. Ashutosh Kumar Srivastava, 92002) 1 SCC 188; and Lalit Popli Vs. Canara Bank, (2003) 3 SCC 583.

28. In the State of Tamil Nadu Vs. S.Subramaniam, AlR 1996 Supreme Court 1232, the Apex Court held that as the High Court has power of judicial review of the administrative action on complaint relating to service conditions of the employee, it is within the exclusive domain of the disciplinary authority to consider the evidence on record and to record findings whether the charge stood proved or not. It is equally settled law that technical rules of evidence have no application in the disciplinary proceedings and the authority is to consider the material on record. In judicial review, the Court "has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion. Judicial review is not an appeal from a decision but a review of the matter in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion, which the authority reaches, is necessarily correct in view of the Court or the Tribunal. When the conclusion reaches by the authority is based on evidence, the Court or the Tribunal is devoid of power to re-appreciate the evidence and would come to its own conclusion on the proved charges. The only consideration the Court /Tribunal has, in its judicial review, is to consider whether the conclusion is based on the evidence on record that support the finding, or whether the conclusion is based on no evidence."

29. In the General Court Martial & Ors. Vs. Col. Aniltej Singh Dhaliwal, AIR 1998 Supreme Court 983, the Hon'ble Supreme Court has held that the High

Court, in its limited power of exercise of judicial review, may interfere by appreciating the evidence only if there is an omission on the part of the Inquiry Officer or the Disciplinary Authority to consider the relevant evidence. Similarly, in Rajendra Kumar Kindra Vs. Deli Administration, (1984) 4 SCC 635, the Court observed as under:-

"It is equally well settled that where a quasi-judicial Tribunal or arbitrator records findings based on no legal evidence and the findings are either his ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated... Viewed from either angle, the conclusion of the Inquiry Officer... are wholly pervasive and hence unsustainable. The High court, in our opinion, was clearly in error in declining to examine the contention that the findings were perverse on the short, specious and wholly untenable ground that the matter depends on appraisal of evidence. Between appraisal of evidence and total lack of evidence, there is an appreciable difference which could never be lost sight of and the High Court ought not to have short-circuited the writ petition."

In R.S.Saini Vs. State of Punjab (1999) 8 SCC 90, the Apex Court noted as follows:-

"We will have to bear in mind the rule that the Court while exercising writ jurisdiction will not reverse a finding of the inquiry authority on the ground that the evidence adduced before it is insufficient. If there is some evidence to reasonably support the conclusion of the inquiry authority, it is not the function of the court to review the evidence and to arrive at its own independent finding. The inquiring authority is the sole judge of the fact so long as there is some legal evidence to substantiate the finding and the adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the court in writ proceedings."

30. Even the issue of interference on quantum of punishment has also been considered by the Hon'ble Supreme Court in a catena of judgments and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary and thus would violate the mandate of Article 14 of the Constitution. Thus, being illegal, it cannot be enforced. (Vide Bhagat Ram Vs. State of Himachal Pradesh, AIR 1983 Supreme Court 454; S.K.Giri Vs. Home Secretary, Ministry of Home Affairs & Ors., 1995 Suppl (3) SCC 519; Union of India Vs. Giriraj Sharma, AIR 1994 Supreme Court 215; Bishan Singh & Ors. Vs. State of Punjab, (1996) 10 SCC 461; Ranjit Thakur Vs. Union of India & ors., AIR 19087 Supreme Court 2386; & B.C.Chaturvedi Vs. Union of India & Ors., AIR 19965 Supreme Court 484).

31. In Ranjeet Thakur (supra), the Hon'ble Apex Court observed as under:-

"But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on the aspect, which is otherwise, within the exclusive province

of the Court Martial, if the decision of the Court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. In the present case, the punishment is so stringently disproportionate as to call for and justify interference. It cannot be allowed to remain uncorrected in judicial review."

32. The said judgment has been approved and followed by the Apex Court in Union of India Vs. G. Ganayutham, AIR 1997 SC 3387, and after examining elaborately the concept of reasonableness, rationality and proportionality, the same view has been reiterated.

33. In B.C. Charturvedi (supra), after examining various earlier decisions of the Supreme Court, the court observed that in exercise of the powers of judicial review, the Court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an Authority "shocks the conscience" of the Court, it would appropriately mould the relief either directing the Authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself "impose appropriate punishment with cogent reasons in support thereof. "While examining the issue of proportionality, Court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced him to do so, though he had no intention to do so. (Vide Giriraj Sharma (supra). The Court may further examine the effect, if order is set aside or substituted by some other minor penalty.

34. In ***Regional Manager, U.P.S.R.T.C. Vs. Hoti Lal***, (2003) 3 SCC 605, the Hon'ble Supreme Court held that judicial review of the quantum of punishment is not warranted by a writ court unless it is held to be arbitrary. While deciding the said case, the Hon'ble Supreme Court placed reliance upon it earlier judgment in ***Om Kumar vs. Union of India***, (2001) 2 SCC 386.

35. Thus, in view of the above, the legal position can be summarized that the judicial review in a disciplinary proceedings is permissible only in exceptional circumstances wherein the Court comes to the conclusion that the matter suffers from errors of law or decision is wrong for not following the fundamental procedural requirement, which have led to manifest injustice. The quantum of punishment cannot be interfered with and substituted by the Court like an Appellate Authority unless it shocks the judicial conscious being disproportionate to the misconduct and for that, reasons have to be recorded as how the punishment is found to be not commensurate to the delinquency. Thus, punishment itself should be held to be arbitrary before interfering with it by the writ court. "

36. In the present case, as weeded out from the record that it cannot be held that the petitioner has not maintained discipline in service or he has committed an offence which relates to the performance of his service. Admittedly, the incident alleged to have been of 1991 but first time the compliant has been made by Km.Rana Rais in the year 1999 after a lapse of about eight years. The Superintendent of Police after enquiry has found that there is no misconduct on the

part of the petitioner and only to give a caution to the petitioner has decided to award a censure entry but the higher authority was of the opinion that this is a misconduct and the petitioner should be departmentally proceeded ignoring the Rules. The charge sheet was given and the petitioner has submitted a reply.

37. The order-dated 5.7.1999 is a copy of the first enquiry report, which is in favour of the petitioner. Then a show cause notice was given to the petitioner on 12.3.2001. The said show cause notice was under Rule 14(2) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991. Then by letter-dated 27.3.2001, it has been directed that the said show cause notice be treated under Rule 14 Sub-Clause 1 of the Rules, 1991 and subsequently the order has been passed terminating the services of the petitioner. From the perusal of the record, it appears that the preliminary enquiry which was made against the petitioner that was under Rule 3 of the Uttar Pradesh Government Servants Conduct Rules, 1956. The same is being reproduced below:-

3. General- *(1) Every Government servant shall at all times maintain absolute integrity and devotion to duty.*
(2) Every Government servant shall at all times conduct himself in accordance with the specific or implied orders of Government regulating behaviour and conduct which may be in force.

38. The letter dated 10.6.2001, which has been filed as Annexure 10 to the writ petition sent by the enquiry officer clearly goes to show that the conduct of the petitioner was treated to be in violation of Rule 28 of the U.P. Government Servants Conduct Rules, 1956. The same is being reproduced below:-

28. Unauthorised pecuniary arrangements- *No Government servant shall enter into any pecuniary arrangement with another Government servant or any other person so as to afford any kind or advantage to either or both of them in any unauthorized manner or against the specific, or implied, provisions of any rule for the time being in force.*

39. Subsequently, the said charge sheet was amended and it was treated to be under Rule 14 (1) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 1991. From the perusal of the aforesaid rules 4 & 5, it is clear that Rule 4 relates to the punishment and Rule 5 relates to the procedure for the purposes of awarding punishment and Rule 14 is relating to procedure for the purposes of conducting departmental proceedings. Rules 4, 5 and 14 are being reproduced below:-

4. Punishment. - *(1) The following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed upon a Police Officer, namely:-*

(a) Major Penalties:-
(i) Dismissal from service.
(ii) Removal from service.
(iii) Reduction I rank including reduction to a lower scale or to a lower stage in a time-scale.

(b) Minor Penalties :-
(i) With-holding of promotion.
(ii) Fine not exceeding one month's pay.

(iii) With-holding of increment, including stoppage at an efficiency bar.
(iv) Censure.

(2) In addition to the punishments mentioned in sub-rule (1) head Constables and Constables may also be inflicted with the following punishments:-

(i) Confinement to quarters 9this term includes confinement to quarter Guard for a term not exceeding fifteen days extra guard or other duty).
(ii) Punishment Drill not exceeding fifteen days.
(iii) Extra guard duty not exceeding seven days.
(iv) Deprivation of good conduct pay.

(3) In addition to the punishments mentioned in sub-rules (1) and (2) Constables may also be punished with Fatigue duty, which shall be restricted to the following tasks:

(v) Tent pitching;
(vi) Drain digging;
(vii) Cutting grass, cleaning jungle and picking stones from parade grounds;
(viii) Repairing huts and butts and similar work in the lines;
(ix) Cleaning Arms.

***5. Procedure for award of Punishment**.- (1) The cases in which major punishments enumerated in Clause (a) of Sub-rule (1) of Rule 4 may be awarded shall be dealt with in accordance with the procedure laid down in sub-rule (1) of Rule 14.*
(2) The cases in which minor punishments enumerated in Clause (b) of sub-rule (1) of Rule 4 may be awarded, shall be dealt with in accordance with the procedure laid down in sub-rule(2)of Rule 14.
(3) The cases in which minor penalties mentioned in sub-rules (2) and (3) of Rule 4 may be awarded shall be dealt with in accordance with the procedure laid down in Rule 15.

***14. Procedure for conducting departmental proceedings-** (1) Subject to the provisions contained in these rules, the departmental proceedings in the cases referred to in sub-rule (1) of Rule 5 against the Police Officers may be conducted in accordance with the procedure laid down in Appendix 1.*

(2) Notwithstanding anything contained in Sub-rule (1) punishments in cases referred to in sub-rule (2) of Rule 5 may be imposed after informing the Police Officer in writing of the action proposed to be taken against him and of the imputations of act or omission on which it is proposed to be taken and giving him a reasonable opportunity of making such representation as he may wish to make against the proposal.

(3)The charged Police Officer shall not be represented by counsel in any proceedings instituted under these rules.

40. It is also clear from the letters annexed to the writ petition which has not been denied by the respondents that earlier the show cause notice dated 12.3.2001 was under Rule 14(2). Subsequently, by letter-dated 27.3.2001, it has been stated that the petitioner should not be proceeded under Rule 14(2) and it should be treated under Rule 14 (1).

41. From the perusal of the order dated 24th July, 2001 sent by the Enquiry Officer, it has been stated that the enquiry against the petitioner is not under Rule

14(1) of 1991 Rules but it should be treated under Rule 28 of the Uttar Pradesh Government Servants Conduct Rules, 1956.

42. From the record, it is also clear that the petitioner has not been afforded an opportunity in view of the aforesaid amended charge sheet and the enquiry report has been submitted and a punishment to the petitioner has been awarded. There is no allegation against the petitioner that the petitioner has misused his position as Sub-Inspector and any action of the petitioner is in violation of Service Rules. The respondents themselves are not sure that under which provision the petitioner can be proceeded for the purposes of awarding the punishment. From time to time, the provision of Rules relating to awarding the punishment is being changed and lastly the enquiry officer has stated that the petitioner has been proceeded for enquiry under Rule 28 of the Conduct Rules. Admittedly, the petitioner has completed 17 years of service when the services of the petitioner have been terminated.

43. It is not the case of the respondents that except this complaint at any point of time there was any complaint against the petitioner regarding discharging of his official duties. It is also clear from the record that the petitioner has not been afforded proper opportunity which was necessary to follow the principle of natural justice. The Court has perused the various provision. From the perusal of the various provisions like Rule 28 of the Conduct Rules, Rule 14 of the 1991 Rules, under which the offence alleged against the petitioner is stated to be covered. In my opinion, Rule 28 does not apply in the present case. From the record, it is also clear that the petitioner has not been afforded an opportunity to the amended charge sheet dated 10.6.2001 and the enquiry officer has submitted his report dated 28.8.2001.

44. As regards, the punishment in B.C. Chartuvedi's case (Supra) the Apex Court has clearly observed that in exercise of powers of judicial review the Court cannot substitute its own conclusion and penalty. However, if the penalty imposed by an authority shocks the conscience of the Court, it would appropriately mould the relief. In exceptional cases, the Court can reconsider penalty imposed in exceptional and rare cases and in order to shorten the litigation itself impose appropriate punishment with cogent reasons in support thereof.

45. In ***V.Ramana Vs. A.P. SRTC and others*** reported in 2006, Supreme Court Cases (Labour and Service), 69, the Court has again discussed regarding the scope of judicial review. The Apex Court has held that scope of interference with quantum of punishment has been the subject matter of various decision of this Court. Such interference cannot be a routine matter. In para 7 of the said judgment, the Apex Court has observed as follows:-

7. Lord Greene said in 1948 in the famous Wednesbury case that when a statute gave discretion to an administrator to take a decision, the scope of judicial review would remain limited. He said that interference was not permissible unless one or the other of the following conditions was satisfied, namely, the order was contrary to law, or relevant factors were not considered, or

irrelevant factors were considered; or the decision was one which no reasonable person could have taken. These principles were consistently followed in the UK and in India to judge the validity of administrative action. It is equally well known that in 1983, Lord Diplock in Council of Civil Service Unions V. Minister for Civil Service 9called the CCSU case) summarized the principles of judicial review of administrative action as based upon one or other of the following viz. illegality, procedural irregularity and irrationality. He, however, opined the "proportionality" was a "future possibility".

46. In ***Damoh Panna Sagar Rural Regional Bank and another Vs. Munna Lal Jain*** reported in Judgment Today, 2005 (1) 70 the Apex Court has again taken the similar view. The Apex Court has held that if the punishment imposed by the disciplinary authority or the appellate authority shocks conscience of the Court, it would appropriately mould the relief. Further to shorten litigation it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. It has further held that in normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the disciplinary authority or the appellate authority to re-consider the penalty imposed.

47. *However, the principle of "strict scrutiny" or "proportionality" and primary review came to be explained in* ***R.V. Secy. of State for the Home Department ex p Brind*** *(1991) 1 AC 696. That case related to directions given by the Home Secretary under the Broadcasting Act, 1981 requiring BBC and IBA to refrain from broadcasting certain matters through persons who represented organizations which were prescribed under legislation concerning the prevention of terrorism. The extent of prohibition was linked with the direct statement made by the members of organizations. It did not however, for example, preclude the board casting by such persons through the medium of a film, provided there was a "voice-over" account, paraphrasing what they said. The applicant's claim was based directly on the European Convention of Human Rights. Lord Bridge noticed that the Convention rights were not still expressly engrafted into English law but stated that freedom of expression was basic to the common law and that, even in the absence of the Convention, English Courts could go into the question.*

".....whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organizations"

and that the Courts were "not perfectly entitled to start from the premise that any restrictions of the right to freedom of expression requires to be justified and nothing less than an important public interest will be sufficient to justify it".

Lord Templeman also said in the above case that the Courts could go into the question whether a reasonable minister could reasonably have concluded that the interference with this freedom was justifiable. He said that "in terms of the Convention" any such interference must be both necessary and proportionate.

In the famous passage, the seeds of the principle of primary and secondary review by courts were planted in the administrative law by Lord Bridge in the ***Brind*** *case (1991) 1 AC 696. Where convention rights were in question the courts could exercise a right of primary review. However, the courts would exercise a right of primary review. However, the courts would exercise a right of secondary review based only on Wednesbury principles in cases not affecting the rights under the Convention. Adverting to cases where fundamental freedoms were not invoked and where administrative action was questioned, it was said that the courts were then confined only to a secondary review while the primary decision would be with the administrator. Lord Bridge explained the primary and secondary review as follows:*

"The primary judgment as to whether the particular competing public interest justifying the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But, we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him, could reasonably make the primary judgment."

In B.C. Chaturvedi Vs. Union of India (Supra) it was observed by the Apex Court that "A review of the above legal position would establish that the disciplinary authority, and on appeal the Appellate Authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the Appellate Authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/Appellate Authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In ***Union of India Vs. G. Ganayutham*** (Supra), the Apex Court in para 31 has observed as follows:-

"31. The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The court would also consider whether the decision was absurd or perverse. The court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its

decision to that of the administrator. This is the Wednesbury test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational- in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay, Brind and Smith as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b)If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedom as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b)Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and nor for Article 14.

48. But where an administrative action is challenged as "arbitrary' under Article 14, the question will be whether the administrative order is "rational' or "reasonable' and the test then is the Wednesbury test. The courts would then be confined only to a secondary role and will only have to see whether the administrator has done will in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken.

49. In view of the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disiciplinary cases is questioned as "arbitrary' under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing

court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. If the Court is satisfied that settled principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment.

50. In view of the aforesaid proposition of law, discussed above, there is no doubt to this effect that this Court while exercising power under Article 226 of the Constitution of India can only interfere when the Court comes to the conclusion that the punishment which has been awarded is highly disproportionate and the same shocks the conscience of the Court in the sense that it was in defiance of logic or moral standards. From the perusal of the record, it clearly goes to show that the charges levelled against the petitioner does not come under the definition of "misconduct' as defined above. From the perusal of Rule 28 of the Conduct Rules, in my opinion, this also does not cover the charges levelled against the petitioner. The complaint made by the lady does not come in relation to the performance of the petitioner's in service. There is no charge against the petitioner that he was ever having any illicit relation with that lady. From the record, it is also clear that the complainant was fully aware that the petitioner was married having two children.

51. Another point for consideration is that the incident is alleged to be of 1991 but the complaint is of 1999, after a lapse of eight years. Initially in the preliminary enquiry the charges framed against the petitioner was not found proved but for the reasons best known to the authorities they have proceeded against the petitioner under Rule 14 of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal), Rules, 1991. From the perusal of the aforesaid rule, it appears that there is a procedure provided. The punishment is mentioned in Rule 4. As in my opinion, it does not cover any provision of aforesaid Rules including Rule 28 of the Conduct Rules therefore, in my opinion, the punishment which has been awarded against the petitioner, is totally improper and disproportionate.

52. In view of the aforesaid facts and circumstances and in view of the definition of "misconduct', I am of the opinion, that awarding punishment of dismissal from service to petitioner is wholly disproportionate and cannot be sustained as this Court is of the view that the complaint and allegations do not constitute a misconduct.

53. As discussed above, it is well settled principle of law by this Court as well as by Apex Court that generally this Court should not consider regarding quantum of punishment as it is total discretion of the administrative authority, but as in the present case, the alleged incident is of 1991 but the complaint by the lady concerned has been made in the year 1999 after a lapse of eight years, normally in view of the Apex Court judgment, reported in (2005) AIR SCW, 5690, ***P.V. Mahadevan Vs. M.D., Tamilnadu Housing Board***, the Apex Court has quashed the disciplinary enquiry only on the ground of in apparent

and unexplained delay of 10 years in issuance of charge memo and the Apex Court has held that the total disciplinary proceedings is vitiated, as there is no explanation by the department regarding initiating the disciplinary proceedings against the petitioner. The relevant para 16 is being reproduced below:-

16. *Under the circumstances, we are of the opinion that allowing the respondent to proceed further with the departmental proceedings at this distance of time will be very prejudicial to the appellant. Keeping a higher government official under charges of corruption and disputed integrity would cause unbearable mental agony and distress to the officer concerned. The protracted disciplinary enquiry against a government employee should, therefore, be avoided not only in the interest of the government employee but in public interest and also in the interest of inspiring confidence in the minds of the government employees. At this stage, it is necessary to draw the curtain and to put an end to the enquiry. The appellant had already suffered enough and more on account of the disciplinary proceedings. As a matter of fact, the mental agony and sufferings of the appellant due to the protracted disciplinary proceedings would be much more than the punishment. For the mistakes committed by the department in the procedure for initiating the disciplinary proceedings, the appellant should not be made to suffer.*

54. In ***Canara Bank and others Vs. Swapan Kumar Pani and others***, reported in Judgment Today, 2006 (3) Page 472, the Apex Court has gone to this extent and quashed the High Court order by which the High Court had granted a liberty to the Bank to initiate a fresh enquiry. In that case, some charges were against bank employee, a charge sheet was given in 1987, of an act committed in 1985. He was exonerated in the year 1989, then again a charge sheet was issued in the year 1996 in that circumstances, when the High Court has quashed and given a liberty to the Bank for issuance of fresh charge sheet, the Apex Court has quashed the said liberty given by the High Court only on the ground that there was delay in initiation in the proceedings. For the same set of charges, the charge sheet is being given third time and the Apex Court has further held that if the High Court was of the opinion that new material purported to have been found were not sufficient for initiation of the enquiry in question, we fail to understand as to on what basis liberty was given to the Bank to initiate fresh enquiry more so when the misconduct, if any, was committed in the year 1985.

55. In the latest decision of the Apex Court reported in Judgments Today 2006 (4) 469 ***M.V.Bijlani Vs. Union of India and others***, the Apex Court has substituted the punishment only on the ground that there was a delay in initiation of disciplinary proceedings as the incident in that case was of 1969-70. In Bijlani's case (Supra), the charge against the delinquent for non-maintainance of ACE-8 Register and non-supervision of working of the line. The Apex Court has held that as the enquiry officer or the appellate authority has not held that whether the appellant was required to prepare the ACE-8 register and the disciplinary proceeding being a quasi-judicial in nature, there should be such evidence to prove the charge. The report

of the enquiry officer is to be based on a relevant consideration of record. Taking into all the facts and circumstances of that case, the Apex Court in spite of holding that jurisdiction of the Court in judicial review is very limited but instead of remitting back the matter to the disciplinary authority, has substituted the punishment only on the ground of delay.

56. As observed in the present case, it is borne out from the record and fact that admittedly, the incident is of 1991 but no complaint was made against the petitioner. It was only in the year 1999 that there was only one single charge against the petitioner that in the year 1991, he has assured the complainant to marry but as he has not married, therefore the petitioner be punished for not fulfilling the promise. From the perusal of the Service Rules, it is also clear that assuming without admitting this fact if the contents of the complaint are treated to be true it does not amount to misconduct. There is no finding by any authority that the petitioner has violated any provisions of Service Rules during his official duty and he has not maintained the proper integrity, which was required to be maintained. From the record it is also clear that the petitioner has not been afforded an opportunity to the amended charge sheet and without affording an opportunity to the petitioner the enquiry report was submitted by the enquiry officer and the disciplinary authority on that basis has awarded the punishment. It is also clear that the allegation against the petitioner does not constitute any misconduct, as such, in my opinion, the punishment of termination or dismissal cannot be awarded.

57. In view of the aforesaid fact, in my opinion, it is a case in which this Court while exercising the power under Article 226 of the Constitution of India treating it to be a rare case, it will not serve any fruitful purpose to remit the matter to the disciplinary authority for awarding any other punishment. Though this Court in exercising the power under Article 226 of the Constitution of India should not substitute the punishment but in the facts and circumstances of the present case, treating this case to be an exceptional, as there is nothing against the petitioner and the alleged act does not include any act relating to service of the petitioner and complaint does not constitute a misconduct, as such, this Court is setting a side the order of termination dated 3.12.2001 as well as orders dated 1.12.2002 and 26.10.2002 passed by the respondent Nos. 1, 2 and 3.

58. In special facts and circumstances of the present case, as narrated above, this Court without remitting the matter to the disciplinary authority while exercising the power under Article 226 of the Constitution of India, itself substituting the punishment to the petitioner. Justice will be served if a punishment to the petitioner to the tune of withholding 25% of back wages is awarded from the date of dismissal till the date of reinstatement. This will be sufficient in the facts and circumstances of the present case.

59. In view of the aforesaid fact, the writ petition is allowed. The orders passed by the respondents Nos. 1,2 and 3 dated 26.10.2002, 1.5.2002 and 3.12.2001 are hereby quashed. The consequence of the said order would have been to remit the matter to the disciplinary authority. As

stated above, as the charge is of 1991 and due to pendency of the present proceeding, the petitioner has suffered a lot, as such, I hereby direct that he may be reinstated in service but keeping in view of the facts and circumstance of the present case, as the petitioner has not worked, I direct that he may only be paid 75% back wages.

There shall be no order as to costs.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.8.2005

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE R.K. RASTOGI, J.

First Appeal From Order no. 24 of 1997

U.P. State Road Transport Corporation
...Respondent/Appellant
Versus
Smt. Rani Srivastava and others
...Claimants/Respondents

Counsel for the Appellant:
Sri Samir Sharma

Counsel for the Respondents:
Sri Amarendra Singh
Sri R.H. Srivastava

Motor Vehicle Act 1939-S-110-Contributory Negligence-deceased was bona fide passenger from Allahabad to Gorakhpur by UPSRTC Bus No. U.T.Y. 9346-became out of order in Jaunpur-all the passengers including the deceased were asked to get down and to go by another but No. UTY 9228-at the Bus Stand Jaunpur while trying to board on Bus-dashed by the bus and received grievous injuries-lastly died-held-extra-responsibility upon the conductor to give signal for starting the bus after properly checking-the driver and the owner held responsible–plea of contributory negligence-not available.

Held: Para 17

Here the deceased was a bona fide passenger of bus no. UTY 9346, and when this bus reached Jaunpur, it went out of order, and then the passengers of this bus were asked to board on another bus of the U.P.S.R.T.C. and so Desh Deepak Srivastava along with other persons rushed towards bus no. UTY 9228 to board upon it. At such time every passenger of the defective bus rushes fast towards the new bus to board upon it, so that he may occupy a good seat, and at such a time there is extra responsibility upon the conductor of the bus to give a signal for starting the bus after all the transported passengers had boarded on the bus and upon the driver to start the bus after properly checking the above facts. In the present case, the driver did not check these facts and so the driver and the owner are responsible for the accident and the plea of contributory negligence of the deceased is not available to them.

Case law discussed:
2000 (3) T.A.C. 588 SC

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

1. This is an appeal against judgment and award dated 10.9.1996 passed by Sri Ram Kishore, then learned II Addl. District Judge, Jaunpur in Motor Accident Claim Petition no. 11 of 1982, Smt. Rani Srivastava and others Vs. U.P. State Road Transport Corporation.

2. The facts relevant for disposal of this appeal are that the claimant respondents and Sri Sant Saran filed an application under section 110 of the Motor Vehicles Act, 1939 with these allegations that Sri Desh Deepak Srivastava, husband of claimant no.1 Smt.

Rani Srivastava, father of claimant no.2 Km. Uma Srivastava and son of claimant nos. 3 and 4, Smt. Shail Bala Srivastava and Sant Saran Srivastava was going from Allahabad to Gorakhpur on 7.10.1981 in roadways bus no. UTY 9346. The bus went out of order in Jaunpur at about 10.30 P.M. and so the passengers of that bus were asked to get down from the bus and to go by another bus of the roadways. Desh Deepak was trying to board on bus no. UTY 9228 of the U.P. State Road Transport Corporation at Jaunpur bus stand which had come from Allahabad and at that time he was dashed by the bus and he received grievous injuries. He was given treatment at the railway hospital Gorakhpur and then at the Medical College, Lucknow, but he died in between the night of 17/18.10.1981. His age was 27 years at the time of accident and he was working as Sub Engineer, (Electrical), Rajkiya Nirman Nigam, Civil Court's Unit, Allahabad. He was drawing Rs.920/- per month as his salary in the pay scale of Rs.400-750/-. Normal expectancy of life in his family was 70 years. The claimants, therefore, claimed Rs.4,74,720/- for monetary loss for a period of 43 years at the rate of Rs.920/- per month due to death of Desh Deepak. They claimed Rs.1,00,000/- for loss of future increments, promotion, gratuity and pension etc., Rs.10,000/- for loss of consortium to the petitioner no.1 Smt. Rani Srivastava, Rs.10,000/- for mental agony, sufferings due to sudden death of Desh Deepak, Rs.5,000/- for medical expenses, attendant charges and travelling expenses and Rs.1000/- for funeral expenses and religious rites etc., in all Rs.6,00,720/-. They also claimed interest on this amount at the rate of 12% per annum till the date of actual recovery. It was further alleged that the accident had taken place due to rash and negligent driving of the driver of bus no. UTY 9228.

3. The opposite party appellant U.P.S.R.T.C. contested the case. It simply admitted the ownership of bus no. UTY 9346 and UTY 9228 and denied the remaining allegations made in the petition. It further pleaded that bus no. UTY 9228 left Allahabad on 7.10..1981 at 4.30 P.M. and Bus no. UTY 9346 left Allahabad at 5.15 P.M. As such Bus no. UTY 9228 reached Jaunpur before arrival of Bus no. UTY 9346 and so there was no question of transportation of the passengers of Bus no. UTY 9346 to Bus no. UTY 9228 specially at 10.30 P.M. in the night as alleged in the petition. Moreover, Desh Deepak Srivastava was not a bona fide nor valid passenger of bus no. UTY 9228. There is nothing to show that any official competent direction was issued for transportation of the passengers from one bus to another. No F.I.R. of the incident was lodged at Jaunpur after the alleged accident. The U.P.S.R.T.C. denied the allegation of the accident at Jaunpur specially in the premises of Jaunpur Bus Depot. It was further stated that there was no report or complaint of the alleged accident even in the office of Jaunpur Bus Depot. As such, there was no question of rash and negligent driving of the bus or of any fatal injury to Sri Desh Deepak Srivastava by bus no. UTY 9228 or of any liability of the opposite party on this account. It was further alleged that even according to the averments made in the petition it was a case of contributory negligence. The opposite party is not liable for negligence or delay in treatment of Desh Dipak Srivastava. His death allegedly took place after ten days of the incident after so-called treatment at

Gorakhpur and Lucknow, so the cause of death must be some secondary factor. The UPSRTC also denied the relationship of the claimants with the deceased, his age and earning capacity, his health and longevity of life in his family. It was further pleaded that Desh Deepak Srivastava could not receive salary after the retirement age and there was no justification for claiming the medical expenses, and compensation for loss of consortium, mental agony etc. The calculations were vague and the claim was time barred.

Following issues were framed in this case:

1. Whether Desh Deepak Srivastava was travelling by bus no. UTY 9228 as alleged?

2. Whether bus no. UTY 9228 was involved in accident on 7.10.1981 at about 10.30 P.M. on roadways bus station Jaunpur?

3. Whether accident occurred due to rash and negligent driving of the bus?

4. If so, to what amount of compensation are the petitioners entitled to get from the roadways?

4. This case was originally heard and decided by Sri L.S.P. Singh, then District Judge, Jaunpur vide his judgment and award dated 30.10.1984. He held on issue no.1 that Desh Deepak Srivastava was not travelling by bus no. UTY 9228. He held on issue no.2 that bus no. UTY 9228 was involved in the accident as alleged in the petition. He held on issue no. 3 that the accident had taken place due to negligence of the deceased himself. In view of this finding he held on issue no.4 that the petitioners were not entitled to any compensation. He, therefore, dismissed the claim petition. Aggrieved with that judgment and award, the petitioners filed F.A.F.O. no. 147 of 1985.

5. This appeal was heard and decided by this Court vide judgment dated 21.11.1994. This Court pointed out in its judgment that the Motor Accident Claims Tribunal had rejected the claim petition of the petitioner on the ground that there was negligence of the deceased himself in the accident but had not recorded any finding on the point of compensation. It was observed that in appealable cases it is mandatory for the trial court to record finding on all the issues, so that the appellate court, even if it disagrees with the finding of the trial court on any issue, may be in a position to decide the case finally on the basis of the findings recorded in the judgment. Regarding finding of the court below on the point of negligence this Court made the following observations in its judgment:

"5. Tribunal has not taken note of the fact that driver of the vehicle and conductor who are the best witnesses to describe the circumstances have not been examined. Deceased succumbed to the fatal injuries being crushed under the wheels of the bus. Tribunal has not considered to apply the principle of res-ipsa loquitor. In case on the available materials including evidence of P.W.1 we finally decide the claim petition, parties are likely to be prejudiced. Therefore, interest of justice would be best served in case award is set aside and proceeding is remitted back for further enquiry where both parties shall get full opportunity to

adduce all material evidence from which Tribunal will be able to answer all issues."

6. After remand the case was heard and decided by Sri Ram Kishore, II Addl. District Judge, Jaunpur vide his judgment dated 10.9.1996. It may be mentioned that inspite of the direction of this Court for examining the conductor and the driver of the vehicle, these persons were not examined by the opposite party appellant nor any additional, oral or documentary evidence was produced by the opposite party appellant.

7. Sri Ram Kishore held on issue nos. 1 and 2 that at the time of accident Desh Deepak Srivastava was traveling on bus no. UTY 9228 and the accident on that bus had taken place on 7.10.1981 at 10.30 P.M. at the roadways bus station, Jaunpur. He held on issue no.3 that the accident had taken place due to rash and negligent driving of bus by its driver. He held on issue no.4 that the claimants were entitled to a sum of Rs.1,78,000/- as compensation. He, therefore, allowed the petition for recovery of Rs.1,78,000/- as compensation with pendentelite and future interest on this amount till the date of actual recovery at the rate of 9% per annum. Aggrieved with that judgment and order the U.P.S.R.T.C. filed this appeal.

8. We have heard the learned counsel for both the parties and perused the record.

9. The first contention of the learned counsel for the appellant was that the deceased was trying to board on a moving bus and so he himself committed contributory negligence, and so a reduction should be made in the amount of compensation taking into consideration the percentage of his negligence. On the other hand, the learned counsel for the respondents submitted that there was no negligence of Desh Deepak, and so there was no question of any reduction in the amount of compensation.

10. In this connection first of all it is to be seen that the petitioners had come with a clear cut case that due to mechanical defect in bus no. UTY 9346 at Jaunpur, the passengers of that bus were asked to get down from the bus and to board on another bus of the UPSRTC, and so the passengers of that bus rushed to board on bus no. UTY 9228 which was ready to depart from the bus station at that time and Desh Deepak also rushed to board on that bus. It was further alleged that when he was trying to board upon the bus, he was knocked down resulting into injuries to him, and as a result of those injuries he died after lapse of a period of ten days from the date of accident, which is 7.10.1981. In reply to the above case, the UPSRTC came with a self contradictory case in its written statement. At first, it simply admitted the ownership of both the above buses and denied the contents of rest of the paragraphs of the petition stating that those paragraphs were not admitted. Then it stated in para 26 of the written statement that bus no. UTY 9346 had left Allahabad at 4.30 P.M. and bus no. UTY 9228 left Allahabad at 5.15 P.M., so bus no. UTY 9228 could not be present at bus station Jaunpur when bus no. UTY 9346 reached Jaunpur and so, there was no question of transportation of the passengers of bus no. UTY 9346 on its alleged failure to bus no. UTY 9228. Thereafter it was alleged in paragraph no. 27 of the written statement that Desh Deepak Srivastava was not a bona fide

passenger of bus no. UTY 9228 and there was nothing to show that there was any official competent direction for transfer of the passengers from bus no. UTY 9346 to bus no. UTY 9228. Then it has been pleaded in paragraph no.28 that no F.I.R. Of the so called incident was lodged and so the incident is false and it is denied. It was also pleaded in paragraph no. 29 that there was no record of such accident even in Jaunpur Bus Depot and then it had been pleaded in paragraph no.30 that as such there was no question of rash and negligent driving of bus no. UTY 9228 by its driver.

11. The noteworthy aspect of the case, however, is that Prem Chandra Misra, conductor of bus no. UTY 9228 had himself lodged a report of this accident at police station Kotwali, Jaunpur on 8.10.1981 at 6.10 P.M. on the basis of which entry no.2 was made in the G.D. of the police station on that date. It was stated in the application submitted by Prem Chandra Misra, conductor, which was addressed to Station officer, Kotwali, Jaunpur that on 7.10.1981 at 10.30 P.M. bus no. UTY 9228 was being driven from Allahabad to Azamgarh and its driver was Sri Aamirullah Khan. The vehicle was taking turn at the Jaunpur Bus Station compound. At that time one passenger named Desh Deepak Srivastava, who is resident of Gorakhpur, tried to board on the bus from the side of driver's gate after catching the steering. All of a sudden his foot slipped and so he fell down and received an injury on his right foot. Some persons who were accompanying him took him to the hospital, and he (Prem Chandra Misra) was giving information of this accident. Thus, the allegations made in the aforesaid paragraphs of the written statement that no accident had taken place with bus no. UTY 9228 is falsified by the report submitted by Sri Prem Chandra Misra, conductor of the above vehicle, who is an employee of the opposite party appellant.

12. The appellant took the plea of contributory negligence of the deceased in para no. 31 of the written statement. It is, however, to be seen that when the appellant was specifically denying the accident in the paragraphs of the written statement referred to above, there was no question of pleading contributory negligence of the deceased. The plea of contributory negligence is available in that case only where factum of the accident is admitted and it is not available in those cases where the accident is denied. In the present case also the opposite party appellant had denied the factum of accident in paras 26 to 29 of the written statement and so technically speaking the plea of contributory negligence could not be available in the present case. It is also to be seen that the opposite party appellant had not taken these pleas in alternative.

13. The appellant also took a plea in para no. 30 of the written statement that the accident is not the cause of death of the deceased because the deceased survived for ten days after the accident, so the accident was not the cause of his death.

14. In this connection, it is to be seen that according to the statement of Sri Ravindra Nath Pandey P.W.1, who is the only eye witness of the accident examined in this case, Desh Deepak Srivastava fell down from the bus when he was trying to board upon it and then he was immediately taken to the district hospital

at Jaunpur where he was medically examined at 11.30 P.M. and the doctor found 60 cm x 12 cm x muscle deep-lacerated wound on medial side and back of the lower end of right thigh and upper end of right thigh including the lower knee joint. X-Ray was advised and the police was also informed. His medical examination report is paper no. C-13/1. Desh Deepak was referred for treatment to Gorakhpur after administering several injections , the reference of which is in prescription slip, paper no. C-13/3. He remained admitted in the railway hospital at Gorakhpur and from that hospital he was shifted to the G.M. & Associated Hospital, Lucknow, where he died on 18.10.1981 at 12.30 A.M. as a case of Post Traumatic Gas Gangrene Right Lower Limb Septicaemia as per memo paper no. C-13/4. It has been further stated in this memo issued by the above hospital that he had died of Cardio Respiratory Failure. In his death certificate (paper no. C-13/5) cause of his death was shown as P.V.F. As such there is no force in the contention of the appellant that the accident was not the cause of death of Sri Desh Deepak Srivastava.

15. The counsel for the appellant referred to examination-in-chief of Ravindra Nath Pandey (P.W. 1) who has stated that when bus no. UTY 9346 reached Jaunpur bus station, bus no. UTY 9228 was ready to depart and its conductor had given whistle and the driver was sitting on the driving seat and the engine had been started and at that time Desh Deepak Srivastava reached there and he tried to board on the moving bus and at that time Desh Deepak Srivastava fell down and received injuries. His contention was that this attempt to board on a moving vehicle is wrongful act and a person doing so is guilty of contributory negligence and so the UPSRTC should not be held liable for the accident.

16. In this connection it is to be seen that the petitioners' case is that when Desh Deepak was trying to board upon the bus he received a jurk due to rash and negligent driving of the bus and so he fell down and received injuries upon his leg. Now it is to be seen that the conductor and the driver of the bus could be the best witnesses to deny the allegation of negligence on the part of the driver. This Court had specifically observed in its judgment in F.A.F.O. no. 147 of 1985 that driver and conductor of the vehicle who are the best witnesses should be produced to describe the circumstance in which the accident took place but inspite of fresh opportunity provided to the UPSRTC to produce those persons, who are its employees, it did not produce them. So the presumption shall be against the UPSRTC under the provisions of the Evidence Act that if these witnesses had been examined, their evidence would not have supported the appellant's case.

17. It is also to be seen that it is not such a case where an unauthorised passenger might have tried to board on a moving bus or an authorized passenger of the same bus after getting down from it would not have cared to board on the bus in time and would have tried to board on it when it had started and in that attempt he might have fallen down. In such cases the injured can be said to be guilty of contributory negligence. But in the present case, the facts are different. Here the deceased was a bona fide passenger of bus no. UTY 9346, and when this bus

reached Jaunpur, it went out of order, and then the passengers of this bus were asked to board on another bus of the U.P.S.R.T.C. and so Desh Deepak Srivastava along with other persons rushed towards bus no. UTY 9228 to board upon it. At such time every passenger of the defective bus rushes fast towards the new bus to board upon it, so that he may occupy a good seat, and at such a time there is extra responsibility upon the conductor of the bus to give a signal for starting the bus after all the transported passengers had boarded on the bus and upon the driver to start the bus after properly checking the above facts. In the present case, the driver did not check these facts and so the driver and the owner are responsible for the accident and the plea of contributory negligence of the deceased is not available to them.

18. Learned counsel for the appellant further submitted that the deceased was trying to board on the bus from the driver's gate as stated in the report of Sri Prem Chandra Misra, conductor of bus no. UTY 9228 (paper no. C-13/2). He submitted that it was a wrongful act of the deceased to try to board on the bus from the driver's gate and so when he fell down in his attempt to do so, he shall be held liable for contributory negligence. There is no force in this contention. No suggestion was given to Ravindra Nath Pandey (P.W.1), the only eye witness examined in the case, that the deceased was trying to board on the bus from the driver's gate. This suggestion was given to Sant Saran (P.W. 2) who is not an eye witness, but he has denied this allegation. The appellant could produce its driver and conductor to prove this allegation, but it did not do so inspite of direction of this Court. The above allegation was made in the report which was lodged after the lapse of twenty hours from the time of the accident and when there is no evidence to corroborate it, no reliance can be placed upon it, and so no adverse inference can be drawn against the deceased nor can he be held to be guilty of contributory negligence.

19. The learned counsel for the appellant cited before us a ruling of Hon'ble Apex Court in 'Mohammad Aynuddin Miyan Vs. State of Andhra Pradesh' reported in 2000(3) T.A.C. 588 (SC). We have carefully gone through this ruling . It was not a case for compensation under the Motor Vehicles Act. In this case driver was charged under section 304-A I.P.C. for the death of a passenger who had fallen from a moving bus and had died. The trial court held him guilty and punished him and his sentence was confirmed by the Sessions Court and the High Court. Hon'ble Apex Court pointed out that no witness including conductor had stated that the driver moved the vehicle before getting signal to move it. Under these circumstances, criminal negligence could not be fastened upon the driver and he was acquitted.

20. Now it is to be seen that the above ruling was delivered by Hon'ble Apex Court in a criminal case under section 304-A I.P.C. The standard of proof is different in civil and criminal cases. In criminal case, guilt of the accused is to be proved upto the hilt and if the prosecution is not in a position to prove it, in that manner, its benefit is to go to the accused. In civil cases the evidence led by both the parties is to be weighed and then it is to be considered as to which version is more probable. It is also to be seen that in the above case, the

conductor of the bus had no where stated that the driver moved the vehicle without getting signal from him and under these circumstances, the driver was held not guilty. On the other hand, in the present case, the position is that the witnesses produced from the side of the petitioners have alleged that the accident took place due to rashness and negligence of the bus driver and this Court in F.A.F.O. no.147 of 1987 had given an opportunity to the appellant to examine its driver and conductor observing that they are the best witnesses to describe the circumstance under which the accident took place, but even then the appellant did not produce them. As such, under these circumstances, a presumption shall be raised against the appellant that these witnesses, if produced, might have deposed against the appellant's interest. Moreover, as we have pointed out above, it is not a case where a passenger of the bus after getting down from it might have tried to board on the bus after it had started. But in the present case passengers of bus no. UTY 9346 were permitted to travel on bus no. UTY 9228 as bus no. UTY 9346 had gone out of order and so the passengers of bus no. UTY 9346 rushed to bus no. UTY 9228 to board upon it, and when the passengers of the other bus were boarding upon it, it was the duty of the driver and the conductor to check that all the passengers who had come to bus no. UTY 9228 had properly boarded upon it, and then only the bus should have been started. In this view of the matter, the UPSRTC is liable for the above negligent act of its driver and this ruling does not render any help to the appellant.

21. The position in this way is that there is no legal error in the finding of the court below that the accident had taken place due to rash and negligent driving of the bus by its driver. We find no error in this finding and confirm the same.

22. Now we take up the question of compensation which should be awarded in this case. It may be mentioned that the age of Desh Deepak at the time of his death was 27 years and he was employed as Sub Engineer (Electrical), Rajkiya Nirman Nigam and was posted in the Civil Court's Unit, Allahabad. He was drawing Rs.920/- per month as salary in the pay scale of Rs.400-750/-. The claimants alleged that normal expectancy of life in their family was 70 years and if Desh Deepak had not died in this accident, he would have normally survived upto the age of 70 years, and since he was drawing Rs.920/- per month, they multiplied it by 12 to reach the figure of annual income, and then claimed it for a period of 43 years after deducting 27 from 70, and thus, they claimed Rs.4,74,720/- under the head of monetary loss. They also claimed Rs.100,000/- for loss of future increment, promotion, gratuity and pension etc., Rs.10,000/- for loss of consortium to the petitioner no.1, Smt. Rani Srivastava and Rs.10,000/- for mental agony and sufferings to the petitioners due to sudden death of Desh Deepak Srivastava, Rs.5000/- for medical expenses incurred on treatment of Desh Deepak and Rs.1000/- for funeral and religious rites; in all Rs.6, 00,720/-.

23. Sri Ram Kishore, learned Presiding Officer of the Claims Tribunal was of the view that if Desh Deepak had not died in the accident, he would have been in service for 31 years more upto the age of 58 years and by that time his monthly income would have been Rs.1300 to 1400/-, and so by that time the

petitioners might have been getting from him Rs.1,000/- per month. He applied the multiplier of 16 to annual dependency of Rs.12,000/- and thus, the figure of Rs.1,92,000/- was reached, then he made 1/3 deduction for lump-sum payment and reduced the amount of compensation to Rs.1,28,000/-. He was further of the view that due to death of Desh Deepak the petitioners were also entitled to Rs.20,000/- for mental pain and shock and Rs.20,000/- for loss of love and affection. He was further of the view that the petitioners were entitled to Rs.5,000/- as funeral expenses and Rs.5000/- for medical expenses. He, therefore, decreed the claim for Rs.1,78,000/-.

24. It was contended by the learned counsel for the appellant that the court below had awarded excessive amount because there was no question of determining the dependency at Rs.1,000/- per month when the deceased was drawing Rs.920/- per month as his salary. He further contended that there was no question of awarding Rs.20,000/- for mental pain, suffering and shock and Rs.20,000/- for the loss of love and affection. He further submitted that the petitioners had claimed Rs.1000/- only as funeral expenses but the Tribunal erroneously awarded Rs.5,000/- under this head. It was also submitted that the claim of Rs.5,000/- for medical expenses was not supported by any documentary evidence and so it was not admissible. It was contended by him that no amount is admissible for mental pain, suffering and for loss of love and affection under the II Schedule of the Motor Vehicles Act, which provides for compensation in case the petition is under section 163-A of the Motor Vehicles Act. His contention was that in this way excessive compensation has been awarded and so it should be reduced.

25. In this context it is to be seen that when this claim petition was filed in the year 1982 the old Motor Vehicles Act, 1939 was in force, and the claim petition was filed under section 110 of the above Act. The corresponding provision of section 110 of the old Act is contained in section 166 of the new Motor Vehicles Act, 1988. Section 163-A and Schedule II were introduced in the Motor Vehicles Act 1988 vide the Amending Act no. 54 of 1994 with effect from 14.11.1994. This provision of section 163-A and Schedule II of the Act were in force when this case was decided by Sri Ram Kishore, learned II Addl. District Judge, Jaunpur on 10.9.1996, and so there was no legal bar to decide the case under the provisions of section 163-A. Under these circumstances, the assistance of section 163-A and of Schedule II could be taken by the learned lower court for deciding the claim but it is to be seen that the claim was to be decided either under section 110 of the old Act and 166 of the new Act or it could be decided in accordance with the provisions of section 163-A of the new Act but it is not permissible to partly decide the claim under section 166 and partly under section 163-A.

26. Now we consider as to what amount would have been admissible to the claimants if the case had been decided under section 163-A of the Act. It is to be seen that as per petitioners' case, monthly salary of Desh Deepak was Rs.920/-per month. After making deduction of Rs.300/- for the expenses which the deceased might have incurred upon him, monthly dependency of the petitioners would come to Rs.620/-. Since the age of

Desh Deepak was 27 years at the time of accident, the multiplier of 18 years would be applicable to his case and so after multiplying Rs.620/- with 12 & then with 18, the amount of compensation comes to Rs.1,33,920/-. The petitioner no.1 who is widow of Desh Deepak is also entitled to Rs.5,000/- under the II Schedule for loss of consortium. There is also a provision for payment of medical expenses upto Rs.15,000/- in the above Schedule. It is true that in this case no cash-memo etc. had been filed to substantiate the claim, but it is to be seen that the accident had taken place in the night on 7.10.1981 at about 10.30 P.M. and after this accident Desh Deepak was immediately taken to the district hospital, Jaunpur where six injections mentioned in paper no.C-13/3 were administered to him and then he was advised to be shifted to Gorakhpur. He was taken to Gorakhpur that very night in a taxi where he was admitted in railway hospital but when there was no improvement in his condition, he was shifted to King George Medical College, Lucknow for treatment where he died on 18.10.1981.Taking into consideration the aforesaid period spent in the hospitals, and that he was shifted from Jaunpur to Gorakhpur and from Gorakpur to Lucknow, the claim of Rs.5000/- for his treatment which continued for ten days does not appear to be excessive, and it is a reasonable amount, so, the petitioners are entitled to Rs.5,000/- under the head, 'medical expenses'. The petitioners are also entitled to Rs.2,500/- for the loss of estate and Rs.2,000/- for funeral expenses as provided in the above Schedule. Thus, the petitioners are entitled to a sum of Rs.1,48,420/- only.

27. It was further contended by the learned counsel for the appellant that the Tribunal has awarded interest at the rate of 9% per annum and taking into consideration the present market rate of interest, it should be 6% per annum only. It is true that taking into consideration the present market rate of interest we have been awarding interest at the rate of 6% per annum and have made orders for suitable deduction in the rate of interest in several cases, but it is to be seen that where the decretal amount has not been paid, the liability to pay interest continues due to non-payment of the amount. In the present case the entire amount including interest had been deposited by the appellant in the year 1997, and thereafter the liability of the appellant came to an end. It is also to be seen that in the year 1996 the rate of interest was higher and so the interest was being allowed even at the rate of 12% per annum at that time in motor accident claim cases. Under these circumstances, when the entire interest had been deposited in 1997 at the above rate of 9% per annum, which was prevalent at the time of deposit, there is no question of reducing the rate of interest.

28. The appeal in this way deserves to be partly allowed and the amount of compensation deserves to be reduced to Rs.1,48,420/-.

29. The appeal is partly allowed and the award passed by the Motor Accident Claims Tribunal is modified to this extent that it is reduced to Rs.1,48,420/- plus proportionate costs. The rest of the award regarding interest is confirmed. Both the parties shall bear their own costs of appeal. The excess amount, if any, deposited by the appellant shall be returned to it. Appeal Partly Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.10.2005

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 13526 of 1994

Katar Singh ...Petitioner
Versus
District Magistrate/Collector, Saharanpur and others ...Respondents

Counsel for the Petitioner:
Sri Ajai Kumar Srivastava
Sri Prabha Kanta Mishra
Sri Rati Kanta Mishra
Sri Anupam Shukla

Counsel for the Respondents:
Sri H.R. Misra
Sri K.M. Misra
S.C.

Constitution of India-Art.-226-Termination order-Petitioner appointed as Cooperative Kurk Amin-appointment letter stipulates about the nature of appointment as temporary-circle officer as enquiry officer found the petitioner guilty of embezzlement of Rs.9000-No opportunity of hearing given-held-termination is not simpliciter-but punitive in nature-Order can not sustained.

Held: Para 10

The order of terminating the services of the petitioner is not a simpliciter termination but has been founded on the charge of misconduct. Taking into entire facts and circumstances of the present case as brought on record it is clear beyond any shadow of doubt that the termination order was passed on, finding of guilt of embezzlement which is the foundation of the order. The termination order is not termination simpliciter but is punitive in nature.

Case law discussed:
2001 (2) UPLBEC-1185
1999 (3) UPLBEC 1901
W.P. 738/98 decided on 16.11.85
2005 (6) SCC-135
1999 (3) SCC-60

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

1. Heard Sri Ajai Kumar Srivastava, learned counsel for the petitioner, standing counsel appearing for the respondent NO.1 and Sri K. M. Misra appearing for the respondents No. 2 and 3 Counter and rejoinder affidavits have been exchanged between the parties. The writ petition is being finally disposed of with the consent of both the parties.

2. By this writ petition the petitioner has prayed for quashing the termination order dated 10.11.1993 Annexure- 3 to the writ petition.

Brief facts necessary for deciding the writ petition are:_____

3. The petitioner was selected for appointment as Cooperative Kurk Amin by the Collector, Saharanpur vide his order dated 1.6.1985 The District Assistant Registrar issued an order dated 10.6 1985 directing the petitioner to complete certain formalities within one week, the appointment order dated 25.6.1985 was Issued by the District Assistant Registrar in pursuance of the selection of the petitioner on commission basis as Kurk Amin. The appointment order stated that the petitioner's services are temporary. By an order dated 10.11.1993 issued by the Collector, Saharanpur petitioner's services were terminated with immediate effect. The

petitioner submitted representation to the Collector protesting against his termination vide his representation dated 18.12.1993. It was stated by the petitioner in the representation that the termination has been affected without affording any opportunity of hearing to the applicant. The termination order dated 10.11.1993 terminating the services of the petitioner has been challenged by means of this writ petition.

4. A counter affidavit has been filed on behalf of the respondents No. 2 and 3. In the counter affidavit it has been stated in paragraph 4 that the petitioner was found guilty of embezzlement that is why his services were dispensed with by the impugned order. In paragraph 8 of the counter affidavit it has been stated that the Circle Officer, Collection was made Enquiry Officer and in the enquiry it was found that the petitioner is guilty of embezzlement of the amount to the tune of Rs.9000/-. On the basis of the aforesaid allegation of embezzlement it was decided to terminate the petitioner's services. It is relevant to note the allegation made in paragraph 8 of the counter affidavit for ascertaining the real cause of termination of petitioner's services. Following is the averment made in paragraph 8 of the counter affidavit:

"**8**. ..... Ultimately by the order dated 30.10.1992 the C.O./Collection was made enquiry officer who after holding the enquiry found that the petitioner is guilty of embezzlement of the amount to the tune of Rs.9,000/- and consequently there upon the petitioner deposited a sum of Rs.7800/-on 13.1.1993, a sum of Rs.1200/- on 16. 1. 1993 and a sum of Rs.280/- on 13.2.1993. Thus total Rs.8,980/- was deposited in the Bank Thus, it is clear that the petitioner who was appointed on commission basis has embezzled the aforesaid amount and the same came into light after a gap of five years and when the enquiry was conducted the petitioner deposited the same. Thereafter it· was decided by the respondent no. 1 not to retain the petitioner in service and consequently the impugned order dated 10.11.1993 was passed by which the petitioner's services were dispensed with."

5. In Paragraph 12 of the counter affidavit it was again stated that the petitioner was not only negligent in performing his duties but also found guilty of embezzlement and that is why his services have rightly been dispensed with.

6. Learned counsel for the petitioner challenging the termination order submitted that the termination of the petitioner is in violation of protection given to petitioner under Article 311 (2) of the Constitution of India. Learned counsel contended that the Kurk Amin appointed on commission basis is also a civil servant as held by the apex Court in (2001) 2 UPLBEC 1185 **State of Uttar Pradesh** Versus **Chandra Prakash Pandey and others**; hence the protection of Article 311 (2) of the Constitution' is fully applicable to the petitioner.' It is further contended that the termination order was punitive in nature having been passed on the charge of embezzlement and proper enquiry was necessary before passing the impugned ,order. Reliance has been placed by the counsel for the petitioner on the judgement of this Court reproved in (1999) 3 UPLBEC 1901 **Jagdish Prasad** Versus **State of Uttar Pradesh & others**. Learned counsel

appearing for the respondents No. 2 and 3 contended that the order of termination passed by the respondent is a termination simpliciter which did not require holding of any enquiry before passing the order. It is contended that the petitioner was a temporary employee and his services' were liable to be terminated by simpliciter order without holding any enquiry. Learned standing counsel also adopted the arguments raised by the learned counsel appearing for the respondents NO.2 and 3.

7. I have considered the submissions and perused the record.

8. There is no dispute that the petitioner was appointed by the order of Collector as Kurk Amin on commission basis. A Division Bench of this Court in Writ Petition No. 738 of 1998 **Ram Behari Misra** Versus **District Assistant Registrar. Cooperative Societies & others** by its judgment dated 16.11.1985 has already held that the Kurk Amins appointed on commission basis are civil servants and are entitled to be dealt with in accordance with law before terminating their services. The above Division bench judgement of this Court was approved by the apex Court in the case of **State of Uttar Pradesh** Versus **Chandra Prakash Pandey and others** (Supra).

9. The petitioner though was temporary government servant was fully entitled for the protection of Article 311 (2) of the Constitution of India, The question raised in this writ petition is as to whether the termination of petitioner's services was simplicitor termination or the same is punitive in nature. It is well settled that· for deciding the question as to: whether the termination is simplicitor or punitive in nature the court can look into other attended circumstances and materials on record. The apex Court in (2005) 6 Supreme Court Cases 135 **State of U.P. and others** Versus **Vijay Shanker Tripathi** had again considered the test to find out as to when the simple order of termination' is founded on the allegation of misconduct or the complaint are only motive for passing simple order of termination. The apex Court quoted with approval paragraph 21 of the apex Court judgement in (1999) 3 Supreme Court Cases 60 **Dipti Prakash .Banerjee** Versus **Satyendra Nath Bose National Centre for Basic Sciences**. It is relevant to quote paragraph 4 of the judgement of the apex Court in **State of U.P.& others** Versus **Vijay Shanker Tripathi** (supra):-

"4.. .....

21. if findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as 'founded' on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid.

From a long line of decisions it appears to us that whether an order of

termination is simplicier or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. ·It may be difficult either to categorise or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter of on motive on the ground of unsuitability to continue in service".

10. Applying the above test in the present case it is clear from the own averments of the respondents in· the counter affidavit that the termination order was proceeded by enquiry in which charge. of embezzlement was established against the petitioner. Petitioner in the Writ petition has categorically stated that no opportunity or show cause was given to the petitioner before passing the order of termination. Thus the finding of guilt of the petitioner has been recorded in an ex parte enquiry and the finding of embezzlement is the foundation of the order of termination. The categorical assertions have been made in the counter affidavit that the services have been terminated after finding the petitioner guilty of embezzlement. The order of terminating the services of the petitioner is not a simpliciter termination but has been founded on the charge of misconduct. Taking into entire facts and circumstances of the present case as brought on record it is clear beyond any shadow of doubt that the termination order was passed on, finding of guilt of embezzlement which is the foundation of the order. The termination order is not termination simpliciter but is punitive in nature.

11. In view of foregoing discussion the impugned order dated 10.11.1993 cannot be sustained and is hereby quashed. The petitioner shall be deemed to continue in service and shall be reinstated by the respondents within a period of one months from the date of production of a certified copy of this order. However, since the petitioner was appointed on commission basis there is no occasion to direct for payment of any arrears of salary. Other benefits of service as permissible including the continuity of service shall be admissible to the petitioner in accordance with relevant rules, government orders issued by the State Government from time to time.

The writ petition is allowed with the aforesaid directions. Parties shall bear their own costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.09.2005

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 9798 of 1986

Mohan Singh Bais ...Petitioner
Versus
State of U.P. and others ...Respondents
AND
Civil Misc. Writ Petition No. 15100 of 1999

Counsel for the Petitioner:
Sri V.C. Misra
Sri C.P. Tripathi
Smt. Suniti Vandana Misra
Sri Shailesh Verma

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

Constitution of India, Art. 226-Practice & Procedure-Maxim "Actus Curiae neminem gravabit "explained-appointment on adhoc basis-for specific period-after expiretry of specified period term not extended by subsequent order-Govt. refused for creation of post-both orders stayed by writ court-petitioner continued on the basis of interim order-finally writ petition dismissed being devoid of merit-held-court is under obligation to under the wrong which caused to other party by such interim order.

Held: Para 18

No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court.

Constitution of India-Art.-226-Service law-Regularisation-appointment of petitioner for a period of one year-after expiry of such period-petitioner has no right to continue-continuation of petitioner on the basis of interim order-abolition or creation of the post-exclusively within the domain of executive-court has no jurisdiction to interfere-continuation on the basis of wrong interim order-can not be ground for regularisation.

Held: Para 13,14 & 23

The post temporarily created for only one year stood abolished. Petitioner filed Writ Petition No. 9798 of 1986 and while entertaining the same this Court vide order dated 23.06.1986 stayed the operation of the orders dated 3.5.1986 and 12.05.1986, by which the post was abolished and petitioner was removed from the said post. In fact, petitioner had no concern, no right and no locus to approach any Court of law for any relief, whatsoever after expiry of the tenure of his posting.

It is settled legal proposition that creation and abolition of posts is a policy matter and lies exclusively within the domain of the Executive. The Court has no jurisdiction to interfere in such matters.

In view of the above, we are of the considered opinion that as the petitioner had been working under the interim order of the Court and the writ petition in which he got the interim order is devoid of any merit as the creation and abolition of the post is within the exclusive domain of the Executive and the Courts cannot interfere in such matters, the petitioner cannot take the benefit of working under the interim order of the Court.

Case law discussed:
AIR 1980 SC-656, AIR 1992 SC-1988, 1995 (2) Supp. SCC-726, AIR 1997 SC-993, 1998 (3) SCC-376, 1997 (5) SCC-772, AIR 1997 SC-1896, AIR 1999 SC-1198, 1998 (8) SCC-529, 2003 (8) SCC-648, 2004 (2) SCC-783

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

1. Both these writ petitions have been filed by Shri Mohan Singh Bais. Writ Petition No.9798 of 1998 has been filed for quashing the orders dated 03.05.1986 and 12.05.1986, by which the post of Sports Officer had been abolished and the petitioner had been reverted to his original post and Writ Petition No.15100 of 1999 has been filed for a direction upon the respondents to regularise the services of the petitioner on the post of Sports Officer.

2. The facts and circumstances giving rise to this case are that the petitioner had been appointed as a Routine Grade Clerk-II in 1968 in Nagar Mahapalika, Kanpur. He was asked to look after the sports by the respondent-Nagar Mahapalika. On the recommendation of the Chief Minister of Uttar Pradesh, a post of Sports Officer was sanctioned temporarily for a period of one year and the petitioner was appointed on the said post on ad hoc basis with an understanding that his ad hoc appointment was for a period of one year or till the regular selected candidate was made available for the post, whichever was earlier. The petitioner claims to have been given extension even subsequently, though the tenure of the post was not extended. The last extension was, according to the petitioner, upto 12.30.1987. As the post was not sanctioned rather a specific order was passed by the State authorities abolishing the said post vide order dated 03.05.1986, the petitioner was reverted to his original post vide order dated 12.05.1986. Being aggrieved, petitioner filed Writ Petition No.9798 of 1986 and this Court, vide order dated 23.06.1986, stayed the operation of both the orders, i.e. 03.05.1986 and 12.05.1986. During the pendency of the said writ petition, the Writ Petition No.15100 of 1999 was filed seeking the relief of regularisation on the post, as he had been working on the said post since long.

3. Shri Shailesh Verma, learned counsel for the petitioner has submitted that there could be no justification for abolishing the said post and reverting the petitioner, as the post was found to be necessary in the public interest. As the petitioner had been working under the interim order of this Court since long, he is entitled for regularisation on the post of Sports Officer and there can be no justification for reverting him at the verge of his retirement, therefore, both the petitions deserve to be allowed.

4. On the contrary, it has been submitted by the learned Standing Counsel that the post had been sanctioned only for a period of one year. His appointment was maximum for a period one year which came to an end after efflux of tenure of his posting. Therefore, the question of his extension could not arise, as the post was created for a limited period. Even the petitioner was working under interim order of this Court, it will not confer any right to the petitioner. Creation and abolition of the post falls within the exclusive domain of the Executive and the Courts and Tribunals have to keep their hands off in such matters, as it involves the financial burden and being policy matter, such matters are outside the scope of the judicial review by the Courts. Thus, the petitions are liable to be dismissed.

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

It is evident from the record that the petitioner had been appointed as a Routine Grade Clerk-II. He was asked to look after the sports. Subsequently, as the post had been sanctioned temporarily for a period of one year, he was appointed with a clear stipulation that his appointment was for a period of one year or till the regular selected candidate was made available by the State whichever was earlier. There is nothing on record to show that the tenure of post so created has been extended beyond the period of one year, therefore, in such a fact situation, the question of extension of services of the petitioner could not arise. Even otherwise, the petitioner had been appointed on the said post without advertising the vacancy or calling the names from Employment Exchange. The services of the petitioner were not governed by any Statutory Rules rather he was bound by the terms and conditions incorporated in his appointment letter. Any appointment so made is invalid as it violates the fundamental rights of other eligible candidates who could have applied for the post.

6. It is settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

7. In Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors., AIR 1992 SC 789, the Hon'ble Apex Court held that calling the names from Employment Exchange may curb to certain extent the menace of nepotism and corruption in public employment.

8. In State of Haryana Vs. Piara Singh, AIR 1992 SC 2130, the Hon'ble Supreme Court held as under:-

"Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, **some appropriate method consistent with the requirements of Article 16 should be followed.** In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly."

9. Any appointment made on temporary or ad hoc basis in violation of the mandate of Articles 14 and 16 of the Constitution of India is not permissible, and thus void as the appointment is to be given after considering the suitability and merit of all the eligible persons who apply in pursuance of the advertisement. In Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216, the larger Bench of the Hon'ble Supreme Court reconsidered its earlier judgment in Union of India & Ors. Vs. N. Hargopal & Ors., AIR 1987 SC 1227, wherein it had been held that insistence of requirement through employment

exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution, and held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the provisions of Articles 14 and 16 of the Constitution and even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the Employment Exchange does not meet the requirement of the said Articles of the Constitution. Same view has been reiterated in Arun Tewari & Ors. Vs. Zila Manaswavi Shikshak Sangh & Ors., AIR 1998 SC 331; Kishore K. Pati Vs. District Inspector of Schools, Midnapur & Ors., (2000) 9 SCC 405 and Subhas Chand Dhrupta & Anr. Vs. State of H.P. & Ors., (2000) 10 SCC 82. Therefore, it is settled legal proposition that no person can be appointed even on temporary or ad hoc basis without inviting applications from all eligible candidates and if any such appointment has been made or appointment has been offered merely inviting names from the Employment Exchange that will not meet the requirement of Articles 14 and 16 of the Constitution.

10. In the instant case, there is no pleading to show that at the time of initial appointment of the petitioner on a tenure post, applications had been invited for the post nor the names have been requisitioned from the Employment Exchange. Petitioner had been appointed vide order dated 13.11.1984 on ad hoc basis for a period of one year or till the regular selected candidates were made available by the State Government, whichever was earlier. As the petitioner's service had been under no Statutory Rules, the service conditions of the petitioner were governed by the terms and conditions incorporated in his appointment letter. There were crystal clear stipulations that under no circumstances the petitioner shall be in service after 12.09.1985.

11. There was no occasion for the authority to terminate his services or pass a termination order as his appointment came to an end automatically by efflux of time in view of the terms and conditions incorporated in his appointment letter after one year of his appointment. (Vide State of Punjab & Anr. Vs. Surinder Kumar & Ors., AIR 1992 SC 1593; Director, Institution of Management, Development, U.P. Vs. Smt. Pushpa Srivastava, AIR 1992 SC 2070; and State of U.P. & Anr. Vs. Dr. S.K. Sinha & Ors., AIR 1995 SC 768).

12. In view of the aforesaid settled legal proposition, the question of continuation of the petitioner in service after 12.09.1985 could not arise as this was the last date on which the petitioner would be deemed to have automatically been removed from service. There could be no occasion to pass an order of extension of his service after 12.09.1985, as the post had been sanctioned only for one year.

13. The post temporarily created for only one year stood abolished. Petitioner filed Writ Petition No. 9798 of 1986 and while entertaining the same this Court vide order dated 23.06.1986 stayed the operation of the orders dated 3.5.1986 and 12.05.1986, by which the post was abolished and petitioner was removed

from the said post. In fact, petitioner had no concern, no right and no locus to approach any Court of law for any relief, whatsoever after expiry of the tenure of his posting.

14. It is settled legal proposition that creation and abolition of posts is a policy matter and lies exclusively within the domain of the Executive. The Court has no jurisdiction to interfere in such matters.

15. A Constitution Bench of the Hon'ble Supreme Court in N. Ramanatha Pillai Vs. State of Kerala & Anr., AIR 1973 SC 2641, has held as under:-

"The discharge of a civil servant on account of abolition of the post held by him is not an action which is proposed to be taken as a personal penalty but it is an action concerning the policy of the State whether a permanent post should continue or not.....the abolition of post may have consequence of the termination of service of a government servant. Such termination is not dismissal or removal within the meaning of Article 311 of the Constitution.....**The abolition of post is an executive policy decision.** Whether after abolition of the post the government servant who was holding the post would or could be offered any employment under the State, would therefore be a matter of policy decision of the government because the abolition of the post does to confer on the person holding the abolished post any right to hold the post."(Emphasis added).

16. In K. Rajendran & Ors. Vs. State of Tamil Nadu & Ors., AIR 1982 SC 1107, the Hon'ble Supreme Court held as under:-

"In modern administration it is necessary to recognise the existence of the powers with the legislature or the executive to create or abolish post in the civil service or State. The volume of administrative work, the measures of economy and the need for stream-line of the administration to make it more efficient may induce the State Government to make alteration in the staffing pattern of the civil services necessitating either the increase or decrease in the number of posts. This power is inherent in the very concept of governmental administration. To deny that power to the government is to strike at the very right of the proper public administration. The power to abolish a post which may result in the holder thereof ceasing to a government servant has got to be recognised".

17. In Union of India & Ors. Vs. Tejram Parashramji Bombhate & Ors., AIR 1992 SC 570, the Hon'ble Supreme Court held that "direction to create or abolish a post cannot be issued by the Court being a policy matter involving financial burden. The Courts cannot compel the State to change its policy involving expenditure."

Similarly, in Piara Singh (supra), the Supreme Court held as under:-

"Ordinarily speaking, the **creation and abolition of a post is the prerogative of the Executive**. It is the Executive against that lays down the conditions of service subject, of course, to a law made by the appropriate legislature.....The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any,

governing the conditions of service. The main concern of the Court in such matters is to ensure the rules of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16." (Emphasis added)

In view of the above, as the petitioner had no right to hold the post after 12/9/1985 and to maintain the Writ Petition No. 9798 of 1986, he cannot be granted any relief, whatsoever.

The petitioner claims the benefit of regularisation, having worked under the interim order of this Court dated 23.06.1986.

18. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. (Vide Grindlays Bank Ltd. Vs. Income Tax Officer, Calcutta & ors., AIR 1980 SC 656; Ram Krishna Verma Vs. State of Uttar Pradesh & Ors., AIR 1992 SC 1888; Dr. A.R. Sircar Vs. State of Uttar Pradesh & ors., 1993 Suppl. (2) SCC 734; Shiv Shanker & Ors. Vs. Board of Directors, Uttar Pradesh State Road Transport Corporation & anr., 1995 Suppl (2) SCC 726; State of Madhya Pradesh Vs. M/s. M.V. Vyavsava & Co., AIR 1997 SC 993; The Committee of Management, Arya Inter College Vs. Sree Kumar Tiwary, AIR 1997 SC 3071; and GTC Industries Ltd. Vs. Union of India & Ors., (1998) 3 SCC 376).

19. In Kanoria Chemicals and Industries Ltd. Vs. U.P. State Electricity Board & Ors., (1997) 5 SCC 772, the Hon'ble Apex Court approved and followed its earlier judgment in Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association, (1992) 3 SCC 1, and observed as under:-

"It is equally well settled that an order of stay granted pending disposal of a writ petition/suit or other proceeding, comes to an end with the dismissal of the substantive proceeding and that it is the duty of the court in such a case to put the parties in the same position they would have been but for the interim orders of the Court."

20. The same view has been taken by the Hon'ble Supreme Court in the case of N. Mohanan Vs. State of Kerala & Ors., AIR 1997 SC 1896; and Bileshwar Khan Udyog Khedut Shahakari Mandali Ltd. Vs. Union of India & Anr., AIR 1999 SC 1198 wherein it has been held that the appointment/continuation in service by interim order, does not create any legal right in favour of the appointee. In State

of U.P. & Ors. Vs. Raj Karan Singh, (1998) 8 SCC 529, the Hon'ble Apex Court has categorically held that interim order cannot disturb the position in law and if a person is in service by virtue of the interim order of the Court, he cannot agitate the issue that his continuation in service in such a condition has improved his claim to regularisation.

21. In South Eastern Coalfields Ltd. Vs. State of M.P. & Ors., (2003) 8 SCC 648, Hon'ble Apex Court observed as under:-

".....There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced....."

22. Similar view has been reiterated in Karnataka Rare Earth & Anr. Vs. Senior Geologist, Department of Mines & Geology & Anr., (2004) 2 SCC 783, in which the Hon'ble Apex Court observed as under:-

".....When on account of an act of the party, persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed. The successful party can demand: (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost."

Thus, it is evident that a litigant cannot take benefit of his own mistake of getting the interim order in a case having no merit.

23. In view of the above, we are of the considered opinion that as the petitioner had been working under the interim order of the Court and the writ petition in which he got the interim order

is devoid of any merit as the creation and abolition of the post is within the exclusive domain of the Executive and the Courts cannot interfere in such matters, the petitioner cannot take the benefit of working under the interim order of the Court.

Both the petitions are devoid of any merit and are accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 42344 of 2004

Ram Das ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Manoj Mishra

Counsel for the Respondents:
Sri Prem Chandra
S.C.

Constitution of India, Art. 21- Termination order-petitioner was appointed on compassionate ground- after 14 years of service termination order passed without affording any opportunity without giving the copy of enquiry report-petitioner was not even in service prior to death of his father-for interpolation made by unknown person is service record of the father of petitioner held out and out illegal, arbitrary-a right of livelihood can not be taken away.

Held: Para 7

In the aforesaid circumstances, the petitioner can not be penalized for any alleged interpolation in the service record by some unknown person. What is the material is the fact that the father of the petitioner died in harness. There is no illegality in the appointment of the petitioner who has worked in the department for last about 14 years when his services have suddenly been terminated without affording an opportunity. The impugned order of termination is therefore out and out, illegal, arbitrary and without reasonable basis. A right of livelihood has accrued to the petitioner as enshrined under Article 21 of the Constitution, which can not be taken away without proper opportunity of hearing even otherwise in the circumstances of this case.

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

1. Heard counsel for the parties and perused the record.

The father of the petitioner was an employee of Nagar Palika Parishad, Jalabad, Shahjahanpur. He died in harness on 27.7.89. The petitioner was appointed on compassionate ground on the post of Safai Karmchari in Nagar Palika Parishad, Jalabad, Shahjahanpur and continued in service till 31.8.2004. On that date, the respondent no.3, Executive Officer, Nagar Palika Parishad, Jalabad, Shahjahanpur terminated the services of the petitioner without any opportunity of hearing inter-alia, that the father of the petitioner had completed 60 years of age on 30.6.1988, hence he could not be deemed to have been in service as such the appointment given to the petitioner on compassionate ground was illegal.

2. The counsel for the respondents has relied upon the averments made in the counter affidavit and submits that according to records the father of the petitioner had not died in harness. He

submits that he or some other person in his interest changed the date of superannuation of the father of the petitioner to 30.6.1988. As a result the father of the petitioner continued in service even after the date of superannuation and the petitioner as a consequence got employment on compassionate grounds. It is further submitted that an enquiry was held by the Additional District Magistrate, Jalabad, Shahjahanpur and the services of the petitioner were terminated on submission of enquiry report dated 5th August, 2004.

3. The counsel for the petitioner in rebuttal has relied upon the averments made in paragraphs 6 and 7 of the rejoinder affidavit wherein it is averred that the father of the petitioner continued in service till his death and the petitioner was entitled to be considered for appointment under the Dying in Harness Rules. It is urged that neither the petitioner received appointment by fraud or misrepresentation nor his services had been terminated as a consequence of any enquiry conducted against him for committing any misconduct and as such, the appointment of the petitioner can not be termed as illegal. It is specifically stated that the alleged enquiry by the Additional District Magistrate and the said enquiry report relied upon by the counsel for the respondents was also never served upon the petitioner and the enquiry was conducted exparte and no opportunity of hearing whatsoever was afforded to the petitioner.

4. The counsel for the petitioner has also placed the Retention and Retirement of Service of Municipal Board Regulations, 1965 which provides that an employee of the Municipal Board can continue in service up to the age of 62 years for special reasons. He has also relied upon averments made in paragraph 9 of the rejoinder affidavit wherein it has been stated that the petitioner can not be penalized for the own mistake of the department and no action whatsoever was taken by the department for finding out who had manipulated the service records of the father of the petitioner.

5. It is urged that in fact the petitioner was continued by the Municipal Board and interpolation has been made by the respondents themselves in the service record of the father of the petitioner in order to create a ground for termination of the services of the petitioner which were in the custody of the respondents. It is vehemently urged that respondents are now stopped from challenging the appointment of the petitioner after 14 years back and that the appointment of the petitioner was not void abinitio as alleged by the respondents.

6. After hearing counsel for the parties and on perusal of the record I am of the opinion that the father of the petitioner had actually worked till his death and his service records were in the custody of the respondents. The application of the petitioner must have been forwarded for compassionate appointment after scrutiny of the service records of his father, hence it can be safely concluded that till his appointment there was no cutting or interpolation in the date of birth of the father of the petitioner recorded in the service book. The petitioner was not even in service before the date of death of his father. Admittedly even according to the respondents nothing could be said with certainty as to who made interpolations,

but one fact stands undisputed i.e. the father of the petitioner had worked in the respondents Corporation till his death. Admittedly, no enquiry has been conducted as to who is guilty of interpolation. The ex-parte enquiry report dated 5th August, 2004 has neither been appended with the writ petition by the respondents nor has been shown before this Court.

7. In the aforesaid circumstances, the petitioner can not be penalized for any alleged interpolation in the service record by some unknown person. What is the material is the fact that the father of the petitioner died in harness. There is no illegality in the appointment of the petitioner who has worked in the department for last about 14 years when his services have suddenly been terminated without affording an opportunity. The impugned order of termination is therefore out and out, illegal, arbitrary and without reasonable basis. A right of livelihood has accrued to the petitioner as enshrined under Article 21 of the Constitution, which can not be taken away without proper opportunity of hearing even otherwise in the circumstances of this case.

No other point has been argued before me.

8. For the reasons stated above, the writ petition is allowed and the impugned order is quashed. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2006

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

Civil Misc. Writ Petition No. 34387 of 2006

Satya Vrat Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Smt. Durga Tiwari

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

Constitution of India, Art. 226 Fisheries Rights-settlement of 10 years lease through auction-for Rs.2 Lacs-1/4th Rs.50,000/- deposited-person belonging the fisheries community or S.C./S.T. participated-D.M. set aside on the ground such settlement against the full Bench decision-reported 2005 (99) R.D. 823-Full Bench decided on 29.9.05-G.O. dated 23.3.06-providing settlement of lease through public auction by action-held-based on wrong interpretation of Full Bench-shall not be given effect-settlement in question-held-perfectly valid.

Held: Para 11

Before parting with the case it is essential to notice the Government Order dated 23.2.2006, shown by the learned Standing Counsel. The said Government Order was issued after the aforesaid Full Bench decision of Ram Kumar. In the said Government Order it has been mentioned that Full Bench authority of Allahabad High Court in its judgment dated 29.9.2005 in Writ Petition of Ram Kumar vs. State has held that State Government has got a right to settle the

fisheries lease on the basis of priorities in stead of public auction. The Full Bench in para 29, which has been quoted above, has clearly held that fisheries lease should be settled through public auction so that every person belonging to the preferential category may know about it and in case more than one person belonging to preferential category are interested in taking the lease, then it shall be settled through auction. The Government Order dated 23.2.2006 is clearly based upon wrong interpretation of the Full Bench Authority. Hence it shall not be given effect to. Fisheries lease shall be settled strictly in accordance with Full Bench authority which clearly mandates that a date for public auction shall be advertised in news paper. It is needless to add that the advertisement must appear at least about a week before the date of auction. However, in case only one person belonging to preferential category comes forward on the advertised date, then fisheries lease shall be settled in his favour. In case more than one person belonging to preferential category as provided in the Government Order dated 17.10.1995 intend to take the fisheries lease, then it shall be settled through auction amongst them. In case no person belonging to preferential category is present on the date of auction then general auction amongst all the participants shall take place.

Case law discussed:

2005 (99) R.D. 823 (FB) relied on

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

1. Heard learned counsel for the petitioner and Sri S.P. Misra, learned Standing Counsel for respondents 1 to 4.

2. On 6.7.2006 it had been indicated in the order sheet that as pure question of law regarding interpretation and application of Full Bench authority of this Court reported in Ram Kumar vs. State of U.P. 2005 (99) R.D. 823 was involved, hence no counter affidavit was required.

3. The matter pertains to grant of 10 years lease for fishing rights in respect of pond comprised in plot no.419 area 1.335 hectares situate in village Dandopur Tahsil Padrauna district Kushi Nagar. Petitioner was granted 10 years lease for fishing rights in respect of the pond in dispute as he was the highest bidder in the auction held on 23.1.2006. Petitioner's bid was for Rs.Two lacs for ten years. Petitioner also deposited 1/4th of the said amount i.e. Rs.50,000/-. It has also been stated that no person belonging to fishermen's community or scheduled caste/scheduled tribes participated in the auction proceedings. Deputy Collector Padrauna through order dated 2.3.2006 set aside the auction on the ground that it was hit by the aforesaid Full Bench authority. It was also observed in the said order that earlier Pradhan had himself granted the lease of the pond in question to another person. As far as the said aspect is concerned, it was not at all relevant, as Pradhan had no authority to settle the lease with any one and the same having been done without any auction etc. was illegal. The said lease by Pradhan was also not subjudice before the Deputy Collector.

4. It may be mentioned that petitioner has also filed Original Suit No. 54 of 2006 in this regard.

5. In the aforesaid Full Bench authority in para 29 it has clearly been held that fisheries lease shall be settled through auction after due advertisement in news paper. It has also been held in the said authority that no renewal must be granted. The Government Order dated

17.10.1995 dealing with manner of settlement of fisheries lease and preference for such settlement with certain castes/communities has been approved subject to these two exceptions. The said Government Order has been upheld by the Full Bench in respect of priorities to members belonging to such casts, who are traditionally carrying on the fisheries business. Para 29 of Ram Kumar's Full Bench decision is quoted below:

"29. The settlement of fishery according to the directions under section 126 of 1950 Act is settlement of property vested in the Gaon Sabha which should be done in a prescribed manner giving opportunity to all eligible persons to participate. The Revenue Officers, who are entrusted with duty, shall ensure proper advertisement of the date of settlement so that all persons who are eligible to participate have sufficient notice of the proposed settlement. The Government order itself contemplates "wide publicity". The Sub-Divisional Officer himself should see that wide publicity is made. Now a days newspapers having wide circulation in the area is surest mode to publish a proposed settlement. As a general rule the sub-Divisional Officer should publish in a newspaper having wide circulation of the settlement of fishing right to enable all concerned to participate. As observed above, in the event there are more than one person in one particular category of preference, the Sub-Divisional Officer is not prohibited to award the said fishing right by inviting bids by tender or auction."

6. However, if no person belonging to the preferential category as mentioned in the Government order dated 17.10.1995 is interested in taking the lease then the pond can not be left vacant. It will have to be given to any other person who is interested in taking the fisheries lease and is highest bidder in the open auction. According to the Full Bench even if in the preferential category more than one person are interested, then the lease shall be settled through auction.

7. Amount of Rs.2 lacs for 10 years offered by the petitioner was more than sufficient. Learned Standing Counsel has stated that in the auction no person belonging to the preferential category as per the aforesaid Government Order participated.

8. In view of the above, auction in favour of the petitioner should have been confirmed.

9. Accordingly writ petition is allowed. Order passed by the Sub Divisional Officer/Deputy Collector dated 2.3.2006 is set aside. It is directed that the auction in favour of the petitioner held on 23.1.2006 shall be confirmed and consequent formalities shall be completed.

10. In view of the above order, the suit filed by the petitioner has become meaningless. He must withdraw the same.

11. Before parting with the case it is essential to notice the Government Order dated 23.2.2006, shown by the learned Standing Counsel. The said Government Order was issued after the aforesaid Full Bench decision of Ram Kumar. In the said Government Order it has been mentioned that Full Bench authority of Allahabad High Court in its judgment

dated 29.9.2005 in Writ Petition of Ram Kumar vs. State has held that State Government has got a right to settle the fisheries lease on the basis of priorities in stead of public auction. The Full Bench in para 29, which has been quoted above, has clearly held that fisheries lease should be settled through public auction so that every person belonging to the preferential category may know about it and in case more than one person belonging to preferential category are interested in taking the lease, then it shall be settled through auction. The Government Order dated 23.2.2006 is clearly based upon wrong interpretation of the Full Bench Authority. Hence it shall not be given effect to. Fisheries lease shall be settled strictly in accordance with Full Bench authority which clearly mandates that a date for public auction shall be advertised in news paper. It is needless to add that the advertisement must appear at least about a week before the date of auction. However, in case only one person belonging to preferential category comes forward on the advertised date, then fisheries lease shall be settled in his favour. In case more than one person belonging to preferential category as provided in the Government Order dated 17.10.1995 intend to take the fisheries lease, then it shall be settled through auction amongst them. In case no person belonging to preferential category is present on the date of auction then general auction amongst all the participants shall take place. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 13478 of 2006

Smt. Simran Jeet Kaur ...Petitioner
Versus
State of U.P. and Others ...Respondents

Counsel for the Petitioner:
Sri U.N. Sharma
Sri Shishir Tandon
Sri Anil Kr. Bajpai

Counsel for the Respondents:
C.S.C.

U.P. Police Officers of Subordinate Ranks (punishment and Appeal) Rules 1991-Section-8 B (2) proviso B Dispension of Departmental Enquiry-Petitioner a sub inspector-suspended on the basis of episode telecast by News Channel-in preliminary enquiry found guilty of demand of illegal gratifications-without holding enquiry decision for dismissal-held-contrary to the provisions of Section 8 (2) proviso (B)-can not sustained-direction issued to conclude the departmental enquiry within 3 months.

Held: Para 6

From the impugned order it is apparent that the mandate of Rule 8 (2) Proviso (B) has not been carried out and absolutely no reasons for dispensation with the departmental enquiry before dismissing the petitioner from service have been recorded in writing as to why it was not reasonably practicable to hold such an enquiry In such circumstances the order not being supported by sufficient reasons recorded for dispensing with the enquiry is hit by Rule

8 (2) Proviso (B), and, therefore, cannot be legally sustained.

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

1. Petitioner who is employed as Sub Inspector in U.P. Police was placed under suspension by an order dated 18.2.2006 on the basis of an episode telecast by Star News Channel on 17.2.2006. A preliminary enquiry was directed into the facts as noticed in the episode. The officer conducting the preliminary enquiry submitting a report to the effect that the petitioner was guilty of demanding illegal gratification for ensuring that persons mentioned in the report are not harassed by the police. On the basis of the report so submitted which according to the petitioner is wholly ex parte, the Inspector General of Police, Meerut Range, Meerut by means of the order dated 21.2.2006 has decided to dismiss the petitioner from service without holding departmental proceedings in exercise of powers under Rule 8 (2) Proviso (B) of the 1991 Rules. This order of Deputy Inspector General of Police, Meerut Range, Meerut is under challenged in the present writ petition.

2. Counsel for the petitioner Shri U.N.Sharma, Senior Advocate assisted by Shri Shishir Tandon submits that the impugned order does not record any reasons as to why it was not reasonably practicable to hold such enquiry. In absence of reasons having been recorded in writing as required under Rule 8 (2) Proviso (B), the order impugned cannot be legally sustained.

3. Standing Counsel on the other hand submits that since the news channel had telecast the episode depicting the involvement of the petitioner in a misconduct live, it was appropriate that such police offices who damage the image of the police department at large should not be permitted to continue in service and, therefore, he suggests that no interference be made in the impugned order. Standing Counsel further submits that petitioner has efficacious alternative remedy by way of Appeal under Rule 20 of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991. The writ petition be, therefore, dismissed.

4. I have heard counsel for the parties and gone through the records of the case. Since the facts involved in the present writ petition are not in dispute, it would be worthwhile to reproduce Rule 8 (2) Proviso (B) of U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 as is applicable :

"8. Dismissal and removal - (1)----------.
(2) No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules :
Provided that this rule shall not apply –
(a) ----------.
(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or
(c) ----------."

5. From the aforesaid Rule it is established that normal rule to be adopted against a police officer to be subjected to major penalty is after holding a departmental enquiry as contemplated

under the Rules i.e. U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991. Dispensation of the departmental enquiry is an exception and, therefore, the Section 8 (2) Proviso B itself mandates that reasons for such dispense must be recorded in writing.

6. From the impugned order it is apparent that the mandate of Rule 8 (2) Proviso (B) has not been carried out and absolutely no reasons for dispensation with the departmental enquiry before dismissing the petitioner from service have been recorded in writing as to why it was not reasonably practicable to hold such an enquiry In such circumstances the order not being supported by sufficient reasons recorded for dispensing with the enquiry is hit by Rule 8 (2) Proviso (B), and, therefore, cannot be legally sustained.

7. It is settled law that availability of statutory remedy is not an absolute bar for entertainment of writ petitions.

8. In the facts and circumstances of the case this Court is satisfied that it would be more appropriate to exercise discretion under Article 226 of the Constitution of India instead of refusing to do so on the ground of availability of alternative remedy. Accordingly the objection raised by the Standing Counsel is hereby turned out.

9. For the reasons recorded hereinabove the impugned order dated 21.2.2006 is hereby quashed. However since the petitioner was under suspension prior to passing of the impugned order it is provided that such suspension shall continue till the respondents take a fresh decision in the matter in accordance with law. If a decision is taken to hold a departmental enquiry against the petitioner in respect of charges, such departmental proceedings must be completed within three months from the date a certified copy of this order is filed before respondent no. 2. In case respondent no. 2 feels that departmental proceedings in the facts and circumstances of the case is not practicable, he shall record reasons for the same in writing. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2005

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

Civil Misc. Writ Petition No.18022 of 1986

Dhajja Ram ...Petitioner
Versus
VI th A.D.J., Muzaffar Nagar and others ...Respondents

Counsel for the Petitioner:
Sri Tarun Verma

Counsel for the Respondents:
Sri M.K. Rajvanshi
S.C.

(A) U.P. Urban Buildings (Regulation letting of Rent & Eviction) Act 1972-S-20 (4)-Benefits claimed by the tenant-deposit made on 28.8.84, on the same day written statement filed after taking permission of the Trial Court-once with the permission of court written statement filed-No date prior to that can be first date of hearing-held benefit-tenant not liable to entitled for ejectment.

Held: Para 5

As far as deposit in the suit giving rise to the instant writ petition is concerned I find that it was made on or before first date of hearing. Deposit was made on 28.8.1984 and written statement was filed on or before 28.8.1984 after permission/time being granted in that regard by the trial court. I have held in *K.K. Gupta Vs. A.D.J. 2004 (2) A.R.C. 659* after discussing five authorities of the Supreme Court that in case written statement is filed after permission of the court then no date prior to the date of filing of written statement can be taken to be date of first hearing. I accordingly hold that tenant had deposited the entire amount as required by Section 20(4) of the Act on or before the first date of hearing hence he was not liable to ejectment on the ground of default.

Case law discussed:

2004 (2) ARC-659 S.C. relied on.

(B) Code of Civil Procedure-S-11-Resjudicate-earliar judgment-observation made about no pleading regarding denial of title-as has been made during pendancy of suit-in subsequent suit it can be treated as opinion of court-held-principle not applicable.

Held: Para 6

After recording the finding that plea of denial of title could not be considered it was not all necessary for the revisional court to express the opinion that what the tenant stated in the written statement amounted to denial of title. By maximum it can be treated to be an opinion of the court. The Supreme Court in R. Prasad Vs. Shri Krishna A.I.R. 1969 S.C. 316 has held that the expression of the opinion of court does not operate as resjudicata if that question was not in issue before the court.

AIR 2000 SC-568
AIR 1974 SC-1126
AIR 1969 SC-316
AIR 1991 SC-264

(C) Constitution of India Art. 226-Enhancement of Rent-while granting relief the tenant-against eviction court is empowered to enhance the monthly rent-accommodation a shop-situated in Muzaffarnagar adjacent to Delhi rate of rent enhanced from Rs.65 to 1000/- per month.

Held: Para 11

I have held in Khursheed Vs. A.D.J.2004(2) A.R.C. 64 that while granting relief to the tenant against eviction in respect of building covered by Rent control act writ court is empowered to enhance the rent to a reasonable extent. The property in dispute is a shop situate in Muzzaffar Nagar which is adjacent to Delhi. Rate of rent of Rs.65/- per month is highly inadequate. It is virtually no rent. Accordingly, it is directed that with effect from November, 2005 tenant-petitioner shall pay rent to the landlord-respondent at the rate of Rs.1,000/- per month.

Case law discussed:

2004 (2) ARC-64

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

1. This writ petition was dismissed as abated after rejecting the substitution application through order dated 7.5.2001. The said order was set aside by the Hon'ble Supreme Court in Civil Appeal No.6711 of 2001 dated 24.9.2001 and High Court was directed to decide the writ petition on merit.

2. This is tenant's writ petition arising out of suit for eviction filed by landlord-respondent no.3 Kashi Ram since deceased and survived by legal representatives against tenant-petitioner being SCC suit no.19 of 1984. Eviction was sought on the ground of default and denial of title through written statement filed by the tenant petitioner in the earlier

suit for eviction which had been filed by the landlord against him being SCC suit no.77 of 1980.

3. In the earlier suit (SCC suit no.77 of 1980) petitioner had filed written statement. In the said written statement it had been pleaded that apart from Kashi Ram the plaintiff his brother Sagar Mal was also owner landlord of the property in dispute and suit was bad for non-joinder of necessary party. The earlier suit was dismissed for eviction on the ground that entire arrears of rent had been deposited by the tenant on the first date of hearing. Kashi Ram who was also plaintiff of the earlier suit was permitted to withdraw the amount deposited by the tenant. Against the said judgment and decree Kashi Ram - plaintiff landlord filed SCC revision no.62 of 1982. The revision was dismissed on 15.9.1983 by A.D.J./Special Judge, Muzaffar Nagar. In respect of question of denial of title it was held in the said judgment by the revisional court that the allegation of the tenant in the written statement that plaintiff alone was not the landlord amounted to denial of title. However, it was further observed that as denial had taken place during the pendency of the suit i.e. in the written statement hence eviction on the ground of denial of title could not be sought for and granted in the same suit. It was further observed that landlord could file a fresh suit for eviction on the basis of the said denial. In view of the said observations, later suit for eviction giving rise to the instant writ petition (SCC suit no.19 of 1984) was filed. In the second suit giving rise to the instant writ petition tenant pleaded that he had not denied the title of the landlord Kashi Ram. Tenant further pleaded that as landlord refused to accept the rent hence he deposited the same in the earlier concluded suit. Tenant on 28.8.1984 also deposited the entire amount of rent, interest and cost of the suit and claimed the benefit of Section 20(4) of the Act. In respect of denial of title JSCC, held that the assertion of the tenant in the written statement filed in the earlier suit that Kashi Ram alone was not the landlord did not amount to denial of title. In respect of deposit of rent made by the tenant in the earlier concluded suit trial court held that the said deposit was valid and in view of this tenant was not defaulter when notice terminating the tenancy and demanding the rent was given by landlord to him i.e. notice dated 1.2.1984. In respect of benefit of Section 20(4) of the Act the trial court held that the deposit was made by the tenant after the first date of hearing hence he was not entitled to the benefit of Section 20(4) of the Act. The trial court therefore dismissed the suit on the ground that there was no denial of title and notice of termination of tenancy and demand of rent was invalide as at the time of notice tenant was not defaulter. The trial court therefore dismissed the suit and permitted the landlord to withdraw the amount deposited by the tenant. The suit was decided by trial court on 17.5.1985. Against judgment and decree dated 17.5.1985 Kashi Ram landlord filed SCC revision no.57 of 1985. Vith ADJ, Muzaffar Nagar through judgment and order dated 7.10.1986 allowed the revision, set aside the judgment and decree passed by the trial court and decreed the suit for ejectment also hence this writ petition by the tenant.

4. The revisional court held that deposit of rent by the tenant in the concluded suit was not valid hence at the time of notice he was defaulter and notice

was therefore quite valid (it is admitted in para-3 of the plaint that rent till 31.8.1983 had been paid by the tenant). In respect of benefit of Section 20 (4) of the Act revisional court did not say anything as trial court itself had held that the first deposit was beyond the first date of hearing. In respect of invalidity of deposit of rent in the concluded suit and validity of notice of demand I fully agree with the findings of the revisional court. Tenant had no right to deposit rent in the concluded suit hence notice of demand was perfectly valid.

5. As far as deposit in the suit giving rise to the instant writ petition is concerned I find that it was made on or before first date of hearing. Deposit was made on 28.8.1984 and written statement was filed on or before 28.8.1984 after permission/time being granted in that regard by the trial court. I have held in ***K.K. Gupta Vs. A.D.J. 2004 (2) A.R.C. 659*** after discussing five authorities of the Supreme Court that in case written statement is filed after permission of the court then no date prior to the date of filing of written statement can be taken to be date of first hearing. I accordingly hold that tenant had deposited the entire amount as required by Section 20(4) of the Act on or before the first date of hearing hence he was not liable to ejectment on the ground of default.

6. As far as question of denial is concerned, it has been held by the Supreme Court in ***C. Chandramohan Vs. Sengottaiyan A.I.R. 2000 S.C. 568*** that mere assertion of tenant that landlord is co-owner because of lack of knowledge of deed does not amount to denial of his title. If a tenant asserts that plaintiff is co-landlord then it means that he is admitting him to be landlord because a co-landlord is also landlord. I therefore hold that the allegation of the defendant in his written statement filed in the previous suit (SCC suit no.77 of 1980) does not amount to denial of title.

Now the only question which remains to be decided is as to whether finding of the revisional court in the judgment of the revision arising out of the previous suit to the effect that tenant had denied the title of the landlord Kashi Ram amounts to res-judicata or not. The said revision had been dismissed by the revisional court hence there was no occasion for the tenant to file appeal or writ petition against the said judgment. It has been held by the Supreme Court in ***Ganga Bai Vs. Vijai Kumar A.I.R. 1974 S.C. 1126*** that no appeal lies against a mere finding. In the earlier judgment revisional court had held that as there was no pleading in respect of denial of title and as denial of title had taken place during pendency of suit hence no relief on the basis of said ground could be granted in that very suit. After recording the finding that plea of denial of title could not be considered it was not all necessary for the revisional court to express the opinion that what the tenant stated in the written statement amounted to denial of title. By maximum it can be treated to be an opinion of the court. The Supreme Court in ***R. Prasad Vs. Shri Krishna A.I.R. 1969 S.C. 316*** has held that the expression of the opinion of court does not operate as resjudicata if that question was not in issue before the court.

7. The Supreme Court in ***Mahesh Chandra Vs. Shiv Charan Das A.I.R. 1991 S.C. 264*** has held that an observation which was not only off the

mark but unnecessary could not operate as resjudicata. It was further held therein that one of the tests to ascertain if a finding operates as resjudicata is if the party aggrieved could challenge it. It was held that since the appeal was dismissed and appellate decree was not against defendant no. 2 and 3 they could not challenge it by way of further appeal.

8. On this point a comparatively recent authority of the Supreme Court reported in ***Pawan Kumar Gupta vs. R. Nagdeo A.I.R. 1999 SC 1823*** also requires consideration. The facts of the said case were that in the suit for eviction against the tenant, the tenant asserted that plaintiff was not his landlord. However the tenant in the alternative deposited the entire arrears of rent on the first date of hearing. The court held that the plaintiff was the owner. However suit for eviction was dismissed on the ground that entire arrears of rent had been deposited on the first date of hearing. In a subsequent suit by the same plaintiff defendant sought to assert again that plaintiff was not the owner-landlord. In respect of applicability of doctrine of resjudicata it was asserted in the second suit by the tenant that as earlier suit had been dismissed hence he could not file appeal against the said judgment and therefore any finding recorded against the tenant in the earlier judgment would not operate as resjudicata. The Supreme Court did not accept the said plea of the tenant. The Supreme Court held that even though word dismissed was used by the trial court while deciding the earlier suit however the plaintiff had been permitted to withdraw the amount deposited by the tenant hence in fact suit was decreed for recovery of arrears of rent and tenant could very well file appeal against the said judgment and decree. In view of this it was held that a finding in the earlier suit that plaintiff was owner landlord operated as resjudicata. Paragraph 19 of the said authority is quoted below:

"Thus the second legal position is this: If dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishments of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit. "

9. In the instant case also in the earlier judgment of the revisional court plea of denial of title was not permitted to be raised and refused to be adjudicated upon on the ground that it had come into existence during pendency of the suit and not prior to filing of the suit. In this manner it affected the maintainability of the said plea i.e. that of denial of title hence the observation of the revisional court adverse to the tenant to the effect that his allegation in the written statement amounted to denial of title would not operate as resuscitate. In the earlier suit it was held that Kashi Ram alone was the landlord and the plea of the tenant that suit was bad for non joinder of Sagarmal the other alleged co-landlord was decided against the tenant. These findings operate as resjudicata and in the subsequent suit

tenant could not be permitted to say that Kashi Ram alone was not the landlord. However the observation of the revisional court in the earlier judgment that allegation of the tenant amounted to denial of title does not operate as resjudicata.

10. Accordingly, judgment and order passed by the revisional court being erroneous in law is set aside and judgment and decree passed by the trial court is approved even though on different grounds. Writ petition is allowed.

11. I have held in ***Khursheed Vs. A.D.J.2004 (2) A.R.C. 64*** that while granting relief to the tenant against eviction in respect of building covered by Rent control act writ court is empowered to enhance the rent to a reasonable extent. The property in dispute is a shop situate in Muzzaffar Nagar which is adjacent to Delhi. Rate of rent of Rs.65/- per month is highly inadequate. It is virtually no rent. Accordingly, it is directed that with effect from November, 2005 tenant-petitioner shall pay rent to the landlord-respondent at the rate of Rs.1,000/- per month.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2006

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

Civil Misc. Writ Petition No.68636 of 2005

Jai Bhagwan Singh ...Petitioner
Versus
District Inspector of Schools, Gautambudh Nagar and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Goel

Counsel for the Respondents:
Sri A.P. Singh Raghav
Sri Ran Vijay Singh
S.C.

U.P. Intermediate Education Act 1921-Chepter-III Reg. 2-Section 16-G-Promotion on class III post-Single Post of Clerck-recognised aided Intermediate College-whether such post can be filled by way of promotion from class 4th employees? Whether law laid down reported in 1999 UPLBEC (III) 2315, Palak Dhari Yadav case has been correctly decided?-On reference made by Single Judge-D.B. onsward alternative regarding filling the Single post by way of promotion-but further held-the law decided in Palak Dhari Case is not good law.

Held: Para 12,16 & 18

Thus a bare reading of note of Regulation 2 (2) of the Regulations makes it clear that if there is only one sanctioned post, the same is to be filled up through the channel of promotion since 50% of one shall be half and half or more than half is to be deemed as one, as per the legal fiction contemplated in the note.

Thus, we are of the view that in the judgment of Palak Dhari Yadav's case, reliance on the Post Graduate Institution of Medical Education and Research, Chandigarh (supra), was not a correct reliance and the said reliance is clearly misplaced. In Palak Dhari Yadav's case, the learned Single Judge has incorrectly taken the view that the rule making authority while enacting Regulation 2 (2) read with Note did not visualise reservation of only one post for promotion.

A single post of Class-III available in an Intermediate College governed by the

1921 Act can be filled by way of promotion.

Case law discussed:

1999 (3) UPLBEC-2315-not correctly decided
AIR 1998 SC-1767
1999 SCC-(L&S) 513
J.T. 2081 SC-47
1976 (2) SCC-905
1995 (2) SCC-745

(Delivered by Hon'ble Ajoy Nath Ray, CJ.)

1. Heard Sri V.K. Goel, learned counsel appearing for the writ petitioner, Sri A.P.S. Raghav, learned counsel appearing for respondent no.3 and Sri Ran Vijay Singh, learned Standing Counsel.

2. In the writ petition, by order dated 28.10.2005, the learned Single Judge has referred the following question for consideration by a larger Bench:-

"Whether a single post of class III available in an Intermediate College governed by the 1921 Act can be filled by way of promotion and whether the case of Palak Dhari Yadav reported in 1999 Vol. 3 U.P.L.B.E.C. 2315 has been correctly decided keeping in view the opinion expressed by another Single Judge in writ petition No.4165 of 2004 as also the pronouncement of the Apex Court in the case of B. Badami Vs. State of Mysore and All India Federation Vs. Union of India?"

3. The brief facts necessary for appreciating the question referred by the learned Single Judge be noted.

4. The writ petitioner has been working as a Class-IV employee in a recognised aided Institution governed by U.P. Intermediate Education Act, 1921. In the Institution, there is only one sanctioned post of Clerk, which fell vacant due to death of its last incumbent, namely, Ratan Pal Singh on 15.12.1994. The Committee of Management passed a resolution in favour of the writ petitioner promoting him from Class-IV to the post of Clerk. The District Inspector of Schools, vide his letter dated 25.2.1995 approved the promotion of the writ petitioner as Clerk, and the writ petitioner thereafter started functioning on the post of Clerk. The father of respondent no.3-Ratan Pal Singh abovementioned, who was working as Clerk in the Institution died. Thereafter the respondent no.3 claimed his appointment on compassionate ground on the post of Clerk; respondent no.3 was appointed as a Clerk against supernumerary post by the order of the District Inspector of Schools dated 7.4.1995. In the year 2004, one vacancy of Clerk arose at Rajendra Prasad Intermediate College, Vilaspur, District Gautam Budh Nagar. The District Inspector of Schools passed an order dated 13.12.2004 directing the adjustment of respondent no.3 in the aforesaid Institution. Respondent no.3 could not join and subsequently the District Inspector of Schools, vide his letter dated 9.7.2005 cancelled the attachment of respondent no.3 as well as the promotion of the writ petitioner vide his order dated 15.10.2005. The District Inspector of Schools in his order has taken the view that since there was only one post of Clerk in the Institution, the said post cannot be filled by promotion of the writ petitioner. The District Inspector of Schools was of the view that single post can never be filled by promotion. The said order was challenged by the writ petitioner in the writ petition, and after hearing the learned counsel for the parties, the learned Single Judge referred

the question for our consideration, as noted above.

5. Chapter-III Regulation-2 of the U.P. Intermediate Education Act, 1921 has been framed under Section 16-G of the 1921 Act providing for promotion from Class-IV to Class-III. Chapter-III Regulation-2, which is relevant for the purposes of this case, is quoted below:-

"2. (1) For the purpose of appointments of clerks and Fourth Class employees the minimum educational qualification would be the same as has been fixed from time to time for the equivalent employees of Government Higher Secondary Schools.

(2) Fifty per cent of the total number of sanctioned posts of head clerk and clerks shall be filled among the serving clerks and employees through promotion. If employee possesses prescribed eligibility and he has served continuously for 5 years on his substantive post and his service record is good, then promotion shall be made on the basis of seniority, subject to rejection of the unfit.

If any employee is aggrieved by any decision or order of the management committee in this respect then he can make representation against it to the Inspector within two weeks from the date of such decision or order. Inspector on such representation can make such orders as he thinks fit. Decision of the Inspector would be final and promptly executed by the management.

Note.--In calculating fifty per cent of posts parts less than half would be left and half or more that half post would be deemed as one.

6. A learned Single Judge of this Court in **Palak Dhari Yadav Vs. Regional Inspectors of Girls Schools & others**, reported at 1999 (3) UPLBEC 2315 considered the Regulation 2 (2) of Chapter-III and took the view that a single post of Clerk cannot be filled up by promotion. The learned Single Judge placed reliance on the judgment of the apex court, reported at AIR 1998 S.C. 1767: **Post Graduate Institution of Medical Education and Research, Chandigarh Vs. Faculty Association and others**, and has taken the view that permitting the filling up of a single post by promotion is 100% reservation by promotion, and the ratio laid down by the apex court in the said judgment is also applicable with regard to the promotion. The learned Single Judge also took the view that the rule making authority while enacting Regulation 2 (2) did not visualise reservation of only one post for promotion. It was further held that the note comes into play only where there is more than one post. The learned Single Judge doubted the correctness of the said decision and has made reference.

7. Sri V.K. Goel, learned counsel appearing for the writ petitioner submitted that a bare reading of the statutory scheme as is delineated from reading of Regulation 2 (2) and the note indicates that if there is only one post, the said post can be filled by promotion. He submits that the promotion is a different concept as compared with the reservation and the judgment of the apex court, which has been relied by the learned Single Judge in **Palak Dhari Yadav** case (supra) had no application. He submits that Regulation 2 (2) provides for channel of promotion from two sources, which channel of promotion is inviolable and can be only changed by amendment of the Rules. He has placed reliance on the judgements of

the apex court, reported at 1999 SCC (L&S) 513: **State of Punjab and others Vs. Dr. R.N. Bhatnagar and another, JT 2001 (1) S.C. 47: Kuldeep Kumar Gupta & Ors. Vs. H.P.S.E.B. & Ors and (1976) 2 SCC 901: V.B. Badami and others Vs. State of Mysore and others**.

8. Sri A.P.S. Raghav, learned counsel appearing for respondent no.3 has submitted that promoting a single post of Clerk is nothing but 100% reservation denying the rightful claim of other candidates to participate in the recruitment of the post. He submits that in event a single post is to be filled by promotion, no chance will be availed by candidates claiming appointment on the post. He has placed reliance on the same judgment of the apex court in **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra).

9. Learned Standing Counsel has also reiterated his submission supporting the view taken by this Court in **Palak Dhari Yadav** case (supra). Learned Standing Counsel submits that the applicability of the note will arise only where there are more than one post. He submits that a single post of Clerk can never be filled by promotion.

We have considered the submissions and perused the records.

10. For the filling up of a post by promotion, it is for the rule making authority to provide for the manner and procedure. Regulations have been framed providing for procedure and manner for making appointment on various Class-III and Class-IV posts. The rule making authority has provided that 50% post of the clerical cadre including the post of head clerk shall be filled by promotion from the serving Class-IV employees. The promotion is a right given by the rule making authority to the existing Class-IV employees of an Institution. For knowing the exact scheme and the percentage of the promotion on the posts, which are to be filled up, we have to revert to Regulation 2 (2). A plain reading of the Regulation 2 (2) especially the Note makes it clear that in calculating fifty per cent of posts parts less than half would be left and half or more than half would be deemed as one. Thus the Note contemplates that half or more than half post would be deemed as one. The note is a part of Regulation 2 and provides for filling up 50% post of total number of sanctioned posts through promotion. Thus, if only half falls in promotion quota, the same will be filled up by promotion.

11. Before proceeding any further, the submission of the learned Standing Counsel that note will come into play only where there are more than one post, needs to be considered. In an Education Institution receiving the aid from the State, the posts are created by the Director of Education exercising powers under Section 9 of the Act 24 of 1971. There are no such rules that there has to be more than one posts of Clerk in every institution; there are large number of Institutions, where only one post of Clerk is sanctioned, as in the present case. Section 13 (2) of the Uttar Pradesh General Clauses Act, 1904 provides that words in the singular shall include the plural, and vice versa. Section 13 of the Act is quoted below:-

"13. Gender and number.--In all [Uttar Pradesh] Acts, unless there is anything repugnant in the subject or context,--

(1) words importing the masculine gender shall be taken to include females; and

(2) words in the singular shall include the plural, and vice versa."

12. Thus a bare reading of note of Regulation 2 (2) of the Regulations makes it clear that if there is only one sanctioned post, the same is to be filled up through the channel of promotion since 50% of one shall be half and half or more than half is to be deemed as one, as per the legal fiction contemplated in the note.

13. The learned Single Judge in **Palak Dhari Yadav** (supra) has placed reliance upon the judgment of the apex court in the case of **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra). The apex court in **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra) was considering the question of applicability of reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes categories for filling the posts. The concept of reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes referable to Article 16 (4) of the Constitution is a different concept as compared to the right of promotion, which is a right given to existing employees. The reservation, as contemplated under Article 16 (4), is a different concept with entire different object. The judgment relied upon by the learned Single Judge in **Palak Dhari Yadav** (supra) was not a case dealing with the promotion or right of serving employees.

14. The Apex Court in **State of Punjab and others** (supra) had occasion to consider almost similar controversy. The Punjab Medical College Education Service (Class-I) Rules, 1978 provided for method of appointment, 75% by promotion and 25% by direct recruitment. The question arose in that context. The submission raised before the apex court that in view of the observations made in **R.K. Sabharwal Vs. State of Punjab**, reported at (1995) 2 SCC 745, the determination as to whether the vacancy will go to the promote or direct recruitment will be decided. The submission was made before the apex court that the judgment of **R.K. Sabharwal's** case (supra), which was dealing with the reservation to the Scheduled Castes, Scheduled Tribes, and Other Backward Classes under Article 16 (4), has nothing to do, while interpreting the Rules pertaining to the quota fixed for only by promotion or direct recruitment, this submission was accepted by the apex court. In the aforesaid judgment, the apex court had also occasion to consider the **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra) and held that the judgment of **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra) had no applicability, while considering the quota for promotion and direct recruitment. Following was observed by the apex court in paragraph 12:-

"12. Before parting with the discussion, we may mention one submission placed for our consideration by learned counsel for the respondent.

Placing reliance on a latter Constitution Bench judgment in Postgraduate Institute of Medical Education & Research Vs. Faculty Assn. it was contended that this Court in the light of R.K. Sabharwal case held that where there was only one post in a cadre, there could not be any reservation under Article 16 (4) for S.Cs, STs and BCs. Similarly, if there is one post of Professor, Rule 19 may not apply. In this connection, paras 34 and 35 of the Report at p.23 were pressed into service. Ray, J., speaking for the Constitution Bench, stated in the said paragraphs as under: (SCC p.23, paras 34-35)

"34. In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the backward classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the backward classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence, until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society."

It is difficult to appreciate how this decision can be of any assistance to learned counsel for the respondent. It is obvious that in the aforesaid case, the Constitution Bench was concerned with a similar scheme of reservation for S.C., ST and BC candidates and, therefore, Article 16(4) squarely arose for consideration. To that extent, the said decision falls in line with the legal position examined by the earlier Constitution Bench in R.K. Sabharwal case. As we have already opined earlier, the factual and legal situation in the present case is entirely different. We are not concerned with any scheme of reservation under Article 16 (4). Therefore, R.K. Sabharwal case cannot be pressed into service, as seen earlier. If that is so, on the same lines the ratio of the decision of this Court in the Postgraduate Institute of Medical Education & Research case would also not apply. While deciding the question of working out the Recruitment Rule for appointment from two sources of promotees and direct recruits wherein only Article 16 (1) would hold the field, uninhibited by the exceptional category carved out from the said sub-article (1) by sub-article (4) thereof. The first point for determination is, therefore, answered in favour of the appellants and against the respondent."

15. The above judgment of the apex court clearly laid down that while interpreting the Rules regarding

promotion concept, the reservation has no application.

16. Thus, we are of the view that in the judgment of **Palak Dhari Yadav's** case, reliance on the **Post Graduate Institution of Medical Education and Research, Chandigarh** (supra), was not a correct reliance and the said reliance is clearly misplaced. In **Palak Dhari Yadav's** case, the learned Single Judge has incorrectly taken the view that the rule making authority while enacting Regulation 2 (2) read with Note did not visualise reservation of only one post for promotion.

17. Another judgment relied upon by the learned counsel for the writ petitioner in Kuldeep Kumar Gupta's case (supra) also supports his submission that providing a quota for promotional cadre does not tantamount to reservation. Following observations were made in paragraph 7:-

"7. So far as the second question is concerned, we are unable to persuade ourselves to agree with the submission of Mr. Subramanium that providing a quota tantamounts to reservation. Article 16 deals with equality of opportunity in matters of public employment and Article 16 (4) enables the State from making any provision for reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State. This Court in **Indira Sawhney's case** has held that no such reservation is permissible in the promotional posts and to get over the said decision, Article 16 (4A) has been inserted by the Constitution (Seventy Seventh Amendment) Act. But we fail to understand as to how providing a quota for a specified category of personnel in the promotional post can be held to be a reservation within the ambit of Article 16 (4). Providing a quota is not new in the service jurisprudence and whenever the feeder category itself consists of different category of persons and when they are considered for any promotion, the employer fixes a quota for each category so that the promotional cadre would be equi-balanced and at the same time each category of persons in feeder category would get the opportunity of being considered for promotion. This is also in a sense in the larger interest of the administration when it is the employer, who is best suited to decide the percentage of posts in the promotional cadre, which can be earmarked for different category of persons. In other words, this provision actually effectuates the constitutional mandate engrafted in Article 16 (1), as it would offer equality of opportunity in the matters relating to employment and it would not be the monopoly of a specified category of persons in the feeder category to get promotions. We, therefore, do not find any infraction of the Constitutional provision engrafted in Article 16 (4) while providing a quota in promotional cadre, as in our view it does not tantamount to reservation."

18. In view of the foregoing discussions, we answer the reference in the following words;

(i) A single post of Class-III available in an Intermediate College governed by the 1921 Act can be filled by way of promotion; and,

The case of **Palak Dhari Yadav** (supra) has not been correctly decided.

19. Let our opinion be placed before the learned Single Judge for deciding the writ petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2008

BEFORE
THE HON'BLE DR. B.S.C CHAUHAN, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No 30768 of 1999

No. 87181335 Ex Ct. Sheo Govind Singh ...Petitioner
Versus
Inspector General of Police CS, CRPF, Lucknow and another ...Respondents

Counsel for the Petitioner:
Sri R.K. Pandey
Sri S.K. Shukla

Counsel for the Respondents:
Sri N.K Chatterji

Constitution of India, Art. 226-Service Law-Cancellation of appointment-Petitioner was appointed as constable in C.R.P.F.-at the time of filling application form-furnished incorrect particulars-about involvement any criminal cases-appointing authority noticed the evolvement in criminal case under Section 279, 337,506 I.P.C.-during verification of character-challenged on the ground the offence do not constitute moral turpitude held-suppressing the material information about the involvement in Criminal Case-itself moral turpitude consequence of criminal proceeding about acquittal on technical ground-not material.

Held: Para 27,30,31

Thus, in view of the above, the matter requires to be examined in the facts and circumstances of the case. In the instant case, as suppressing the material information by the petitioner of his involvement in criminal case itself is a moral turpitude, it is of no consequence as to whether the offence, he was tried involved moral turpitude or not.

Thus, it is the antecedent, conduct or character of the candidate to be appointed to the services which is of paramount consideration, not of the result of the criminal case in which he has been involved, as acquittal may be on a technical ground or for want of evidence etc.

In view of the above, the petitioner has obtained the employment by misrepresentation, i.e., suppressing the material information sought by the appointing authority. The information was required to verify his character and antecedents. Thus, neither the result of the prosecution nor the nature of the offence, in which he had been involved, has any bearing on the case. Principles of natural justice are not attracted in such as fact situation.

Case law discussed:
AIR 1964 SC-853, AIR 1956 All. E.R.-349, AIR 1994 SC-853, 1956 AER-349, AIR 1994 SC-2151, 1994 (2) SCC-481, 2000 (3) SCC-581, 1995 (4) Supp. SCC-100, 1990 (3) SCC-655, AIR 1964 SC-72, 2003 (8) SCC-319, 2004 (6) SCC-325, AIR 1966 SC-1340, AIR 2000 SC-1650, AIR 1965 Alld-382, AIR 1963 Alld.-527, AIR 1996 SC-3300, 1997 (4) SCC-1, AIR 1959 AU-71, 1966 (55) SCC-605, AIR 2003 SC-179

Constitution of India-Art.-226-Writ Petition maintainability-writ petition against the state officer without impleading the state or union as necessary party-held-writ not maintainable.

Held: Para 13

Thus, we reach the inescapable conclusion that the writ is not

maintainable against the Government officers or the employees of the State, it lies only against the State/Union of India and if State is not impleaded, the writ is not maintainable.

AIR 1977 SC-1701, 2003 (2) SCC-472, AIR 1965 Ker.-277, AIR 1976 SC-2538, AIR 1964 SC-669, AIR 1987 SC-1970, AIR 1994 SC-853, 1956 AER-349, AIR 1994 SC-2151, 1994 (2) SCC-481, AIR 1992 SC-1555, 2000 (3) SCC-581

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

1. This writ petition has been filed for quashing the order dated 20.1.1988 (Annex 1), by which the services of the petitioner were terminated and order dated 3.6.1999 (Annex. 5), by which his appeal has been dismissed.

2. The facts and circumstances giving rise to this case are that petitioner was recruited on the post of Constable in the Central Reserve Police Force (in short, CRPF) in 1987. His services had been terminated vide impugned order dated 20.1.1988 on the ground that he had obtained the employment by misrepresentation. While filling up the application form for the post, every applicant was asked to furnish the particulars as to whether he had ever been implicated in any criminal case. Petitioner filled up the relevant column in negative, and as subsequently, on inquiry while verifying his character, it came in the knowledge of the appointing authority that he had been involved in a Criminal Case No.' 42 of 1987, under Sections 279, 337, 506 I.P.c., P.S. Kandhai, District Pratapgarh, his services were terminated vide order dated 20.1.1988 (Annex. 1). Being aggrieved, petitioner preferred an appeal in 1998/asked for reinstatement, which has been dismissed by the appellate authority vide impugned order dated 3rd June, 1999 (Annex.5). Hence this petition.

3. It is submitted on behalf of the petitioner that order of termination could not have been passed without giving opportunity of hearing to him. Petitioner had not been involved in a case involving moral turpitude. More so, he has been acquitted in the said case, therefore, the suppression of material information, even if it was done deliberately, did not warrant termination of his services. After acquittal in the said case, his involvement stood washed off, and therefore, it was neither desirable nor permissible to pass the order of termination of his services. More so, the appointing authority did not consider the appeal in correct prospective and dismissed it without giving any reason. As petitioner had been acquitted of the charges in the criminal case, he was entitled for reinstatement. Hence both the orders impugned are liable to be quashed.

4. On the other hand, Shri N.K. Chatterji, learned counsel for the respondents has submitted that suppression of the information sought by the appointing authority at the initial stage itself amounts to indulging in moral turpitude. Thus, it was totally irrelevant as to whether petitioner had been involved in a criminal case involving moral turpitude or not. It is the antecedents of the applicant and not the result of the case, which is the decisive factor. He was acquitted in the criminal case vide judgment and order dated 26.11.1990, i.e., after 12 years of his termination. Petitioner did not file any appeal against the said order of termination, rather applied for reinstatement on 4.12.1998 as he was acquitted of the criminal charges. The said application was rejected vide

order dated 3.6.1999 (Annex. 5). He could not claim his reinstatement as he was not removed on the ground of pendency of the criminal case against him. More so, another Criminal Case No. 79A of 1986 under Sections 147, 148, 149, 324, 504 and 506 I.P.C. was also pending against the petitioner. Thus, no interference is called for in equity jurisdiction. In addition thereto, a preliminary objection has been raised by Shri Chatterji that the writ petition itself is not maintainable. Though no such ground has been taken in the counter affidavit, but he raised prime issue that as Union of India has not been impleaded in the array of parties as respondent, the writ petition itself is not liable to be entertained. The petition is liable to be dismissed.

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

6. In Ranjeet Mal Vs General Manager, Northern Railway, New Delhi & Anr, AIR 1977 SC 1701, the Hon'ble Apex Court considered a case where the writ petition had been filed challenging the order of termination from service against the General Manager of the Northern Railways without impleading the Union of India. The Apex Court held as under:

"The Union of India represents the Railway Administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."

While considering the similar view in Chief Conservator of Forests, Government of A. P. Vs. Collector & Ors; (2003) 3 SCC 472 the Hon'ble Supreme Court accepted the submission that writ cannot be entertained without impleading the State if relief is sought against the State. The Hon'ble Apex Court had drawn the analogy from Section 79 of the Code of Civil Procedure, 1908/ which directs that the State shall be the authority to be named as plaintiff or defendant in a suit by or against the Government and Section 80 thereof directs notice to the Secretary of that State or the Collector of the district before the institution of the suit and Rule 1 of Order 27 lays down as to who should sign the pleadings. No individual officer of the Government under the scheme of the constitution nor under the Code of Civil Procedure, can file a suit nor initiate any proceeding in the name and the post he is holding, who is not a juristic person.

7. The Court also considered the provisions of Artide 300 of the Constitution which provide for legal proceedings by or against the Union of India or State and held that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be; in the case of the Central Government, the Union of India and in the case of State Government, the State, which is suing or is being sued.

8. Rule 1 of Order 27 only deals with suits by or against the Government or by officers in their official capacity. It provides that in any suit by or against the Government, the plaint or the written statement shall be signed by such person as the Government may like by general or special order authorise in that behalf and shall be verified by any person whom the Government may so appoint. The Court further held as under:-

"It needs to be noted here that a legal entity - a natural person or an artificial person- can sue or be sued in his/its own name in a court of law or a tribunal. It is not merely a procedural formality but is essentially a matter of substance and considerable significance. That is why there are special provisions in the Constitution and the Code of Civil Procedure as to how the Central Government or the Government of a State may sue or be sued. So also there are special provisions in regard to other juristic persons specifying as to how they can sue or be sued. In giving description of a party it will be useful to remember the distinction between misdescription or misnomer of a party and misjoinder or non-joinder of a party suing or being sued. In the case of misdescription of a party, the court may at any stage of' the suit/proceedings permit correction of the cause-title so that the party before the court is correctly described; however, a misdescription of a party will not be fatal to the maintainability of the Suit/proceedings. Though Rule 9 of Order 1 CPC mandates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, it is important to notice that the proviso thereto clarifies that nothing in that Rule shall apply to non-joinder of a necessary party. Therefore, care must be taken to ensure that the necessary party is before the court, be it a plaintiff or a defendant, otherwise, the suit or the proceedings will have to fail. Rule 10 Of order 1 CPC provides remedy when a suit is filed in the name of the wrong plaintiff and empowers the court to strike out any party improperly joined or to implead a necessary party at any stage of the proceedings."

The Apex Court thus held that writ is not maintainable unless the Union of India or the State, as the case may be, impleaded as a party.

9. A Full Bench of Kerala High Court in Kerala State Vs. General Manager, Southern Railway, Madras, AIR 1965 Ker 277 held that suit is not maintainable if instituted against Railway Administration. The condition precedent for its maintainability is that it must be instituted against the Union of India.

A similar view has been reiterated by Hon'ble Apex Court in The State of Kerala Vs. The General Manager, Southern Railway, Madras, AIR 1976 SC 2538.

10. The Constitution Bench of the Hon'ble Supreme Court in State of Punjab Vs. O.G.B. Syndicate Ltd., AIR 1964 SC 669, held that if relief is sought against the State, suit lies only against the State, but it may be filed against the Government if the Government has acted under the colour of legal title and not a Sovereign Authority.

11. Undoubtedly non-impleadment of the necessary party is fatal as provided by the proviso to Order 1, Rule 9 C.P.C.,

but application for impleadment can be made even at a later stage or before the appellate forum also as held by the Hon'ble Supreme Court in Sal Niketan Nursery School Vs. Kesari Prasad, AIR 1987 SC 1970. In the instant case, in spite of such serious arguments on the issue, learned counsel for the petitioner did not ask for time to move application for impleadment of the Union of India.

12. The Rajasthan High Court in Pusha Ram Vs. Modern Construction Co. (P) Ltd, AIR 1981 Raj 47, held that to institute a suit for seeking relief against the State, the State has to be impleaded as a party. But misdescription showing the State as Government of the State may not be fatal and the name of party may be permitted to be amended, if such an application is filed.

13. Thus, we reach the inescapable conclusion that the writ is not maintainable against the Government officers or the employees of the State, it lies only against the State/Union of India and if State is not impleaded, the writ is not maintainable.

14. In view of the above, we are of the considered opinion that the writ petition itself is not maintainable as Union of India has not been impleaded as a party respondent.

15. Be that as it may, undoubtedly petitioner had obtained the employment suppressing the material information sought by the appointing authority regarding the involvement of the petitioner in any criminal case. The copy of the form has been annexed by the respondents along with the counter affidavit; column 12 of the same provides for furnishing the information as to whether the applicant had ever been arrested, prosecuted, kept under detention, convicted by the Court of Law for any offence etc. etc., or he has been involved in any criminal case. Petitioner filled up the said column by saying "No". Therefore, it is evident that petitioner did not disclose the material information sought by the appointing authority.

16. It is settled proposition of law that where an applicant gets an order office by making misrepresentation or playing fraud upon the competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (Vide S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs. & ors., AIR 1994 SC 853. In Lazarus Estate Ltd. Vs. Besalay, 1956 AII.E.R. 349, the Court observed without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything."

17. In Andhra Pradesh State Financial Corporation Vs. Mis. Gar Re-Rolling Mills & Anr., AIR 1994 SC 2151; and State of Maharashtra & ors. Vs. Prabhu, (1994) 2 SCC 481, the Hon'ble Apex Court has observed that a writ Court, while exercising its equitable jurisdiction, should not act as to prevent perpetration of a legal fraud as the Courts are obliged to do justice by promotion of good faith. "Equity is, also, known to prevent the law from the crafty evasions and sub-Ietties invented to evade law.

18. In Shrisht Dhawan Vs. Shaw Bros., AIR 1992 SC 1555, it has been held as under:-

"Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct."

In United India Insurance Company Ltd. Vs. Rajendra Singh & ors., (2000) 3 SCC 581, the Apex Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

19. The ratio laid down by the Hon'ble Supreme Court in various cases is that dishonesty should not be permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and in such circumstances the Court should not perpetuate the fraud by entertaining the petitions on their behalf. In Union of India & ors. Vs. M. Bhaskaran, 1995 Suppl. (4) SCC 100, the Apex Court, after placing reliance upon and approving its earlier judgment in District Collector & Chairman, Vizianagaram Social Welfare Residential School Society Vs. M. Tripura Sundari Devi, (1990) 3 SCC 655, observed as under:-

"If by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a Court of Law as the employment secured by fraud renders it voidable at the option of the employer."

20. Similar view has been reiterated by the Apex Court in S. Partap Singh Vs. State of Punjab, AIR 1964 SC 72; Ram Chandra Singh Vs. Savitra Devi & Ors., (2003) 8 SCC 319; and Vice Chairman, Kendriya Vidyalaya Sangathan & Anr. Vs. Girdharilal Yadav, (2004) 6 SCC 325.

The Common Law doctrine of public policy can be enforced wherever an action affects/ offends public interest or where harmful result of permitting the injury to the public at large is evident.

21. Moreso, if initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. Subia Fundamento cedit opus"- a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent court. In such a case legal maxim Nullus Commodum capere Potest De Injuria Sua Propria applies. (Vide Union of India Vs. Maj. Gen. Madan Lal Yadav, AIR 1996 SC 1340).The violators of law cannot be permitted to urge that their offence ~'be subject matter of inquiry, trial or investigation. (Vide Lily Thomas Vs. Union of India & Ors., AIR 2000 SC 1650).

22. Nor a person can claim any right arising out of his wrong doing. (Juri Ex Injuria Non Oritur).

More so, we do not find any force in the submission made by the learned counsel for the petitioner that as petitioner was not involved in the case involving moral turpitude, and even if he has suppressed those material information's, the order impugned could not be passed.

23. The meaning of term 'turpitude' and 'moral turpitude' has been given in Black's Law Dictionary, Fourth Edition, as follows:-

"Turpitude-In its ordinary sense, inherent baseness or vileness of principle

or action; shameful wickedness; depravity. In its legal sense, everything done contrary to justice, honesty, modesty, or good morals. State Vs. Anderson,117 Kan. 117, 230 P.315; Hughes Vs. State Board of Medical Examiners, 162 Ga. 246; 134 S.E. 42, 46. An action showing gross depravity. Traders & General Ins. Co. Vs. Russell, Te & Civ. App. 99; S.W. 2-d 1079, 1084."

"Moral Turpitude- A term of frequent occurrence in statutes, especially those providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility. In general, it means neither more nor less than "turpitude", i.e. anything done contrary to justice, honesty, modesty, or good morals."

24. A Division Bench of Rajasthan High Court in Lachuram Vs. Inderlal, 1966 ILR Raj. 1168, has considered this aspect and took note of various Indian and foreign judgments and also quoted Bartos Vs. United States District Court, for District of Nebraska, C.C.A. Neb.,19 F.2d 722, 724, wherein the Court held as under:-

"An act of baseness, vileness, or depravity, in the private and social duties, which a man owes to his fellow-men, or to society in genial, contrary to the accepted and customary rule of right and duty between man and man" and "conduct contrary to justice, honesty, modesty or good morals."

The Court further observed as under:-

"It would appear from the above that the meanings given to the terms 'turpitude' and 'moral turpitude' indicate almost the same type of failing in a man's character or moral make-up. In our view, no absolute standard or no hard and fast rule can be laid down for deciding whether a particular act should considered as one involving moral turpitude, because it would mostly depend on the facts and circumstances in which the act or omission is committed whether it involves moral turpitude or not."

25. The Court placed reliance on the judgment of Allahabad High Court in Buddha Pitai Vs. Sub-Divisional Officer, Malihabad, Lucknow & ors., AIR 1965 All. 382, wherein the Allahabad High Court held as under:-

"Now, coming to the second question, learned counsel has urged that in deciding the question whether an offence involves moral turpitude, the Court should confine its consideration only to the nature of the offence and it should not be swayed in its opinion by the facts and circumstances in which it was committed." (Emphasis added).

The Court further observed as under:-

"Whether an offence involves moral turpitude, will depend on its nature and the circumstances in which it is committed. An offence of a certain class may generally be considered to involve moral turpitude but it may not be so if committed in particular circumstances, for example, an offence of murder may ordinarily involve moral turpitude but if it is committed in a spirit of patriotism or with a laudable object, it may not shock the public conscience and instead of being decried by the public the offender may be considered a hero.... Again an offence of theft will generally be considered mean,

vile and anti-social and a thief would be simply scorned at. However, if a starving· and emaciated person steals food is caught, prosecuted and convicted, people will take a charitable and sympathetic view of the offender's conduct and his offence may not be considered as involving moral turpitude. Thus, the case of every offence will have to be judged in the light of the circumstances in which it is committed. It is not the gravity of the offence or the quantum of punishment imposed on a person which will determine such question."

Similarly, in Mangali Vs. Chhakkital, AIR 1963 All. 527, it was observed as follows:-

"From consideration of the dictionary meaning of the words 'moral' and 'turpitude' as well as the real ratio decidendi of the cases, the principle which emerges appear to be that the question whether a certain offence involves moral turpitude or not, will necessarily depend on the circumstances in which the offence is committed.

In Pawan Kumar Vs. State of Haryana, AIR 1996 SC 3300 wherein the Apex Court has observed as under:-

"Moral turpitude' is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity.

26. The aforesaid judgment in Pawan Kumar case (supra) has been considered by the Hon'ble Supreme Court again in Allahabad Bank and another Vs. Deepak Kumar Bhola, 1997 (4) SCC 1, and placed reliance on Baleshwar Singh Vs. District Magistrate and Collector, AIR 1959 All. 71 wherein it has been held as under:-

"The expression 'moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellow men or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man"

27. Thus, in view of the above, the matter requires to be examined in the facts and circumstances of the case. In the instant case, as suppressing the material information by the petitioner of his involvement in criminal case itself is a moral turpitude, it is of no consequence as to whether the offence, he was tried involved moral turpitude or not.

28. In Delhi Administration through its Chief Secretary & Ors. Vs. Sushi Kumar, (1996) 11 SCC 605, the Hon'ble Supreme Court examined the similar case where the appointment was refused on the post of Police Constable and the Court observed as under:-

"It is seen that verification of the character and antecedents is one of the

important criteria to test whether the selected candidate is suitable to a post under the State. Though he was found physically fit, passed the written test and interview and was provisionally selected, **on account of his antecedent record, the appointing authority found it not desirable to appoint a person of such record as a Constable to the disciplined force**. The view taken by the appointing authority in the background of the case cannot be said to be unwarranted. The Tribunal, therefore, was wholly unjustified in giving the direction for reconsideration of his case. Though he was discharged or acquitted of the criminal offence, the same has nothing to do with the question. What would be relevant is the conduct or character of the candidate to be appointed to a service and not the actual result thereof. If the actual result happened to be in a particular way, the law will take care of the consequence. The consideration relevant to the case is of the antecedents of the candidate. Appointing authority, therefore, has rightly focussed this aspect and found it not desirable to appoint him to the service."

29. In Kendriya Vidyalaya Sangathan Vs. Ram Ratan Yadav, AIR 2003 SC 1709, the Hon'ble Supreme Court examined a similar case, wherein, the employment had been obtained by suppressing the material fact that criminal proceedings were pending against him at the time of appointment. The Court rejected the plea taken by the employee that Form was printed in English and he did not have good knowledge of that, and therefore, could not understand as what information was sought. The Apex Court held that as he did not furnish he information correctly at the time of filling up the Form, the subsequent withdrawal of the criminal case registered against him or the nature of offences were immaterial. "The requirement of filling column nos. 12 and 13 of the Attestation Form" was for the purpose of verification of the character and antecedents of the employee as on the date of filling in the Attestation Form. Suppression of material information and making a false statement has a clear bearing on the character and antecedent of the employee in relation to his **continuance** in service.

30. Thus, it is the antecedent, conduct or character of the candidate to be appointed to the services which is of paramount consideration, not of the result of the criminal case in which he has been involved, as acquittal may be on a technical ground or for want of evidence etc.

31. In view of the above, the petitioner has obtained the employment by misrepresentation, i.e., suppressing the material information sought by the appointing authority. The information was required to verify his character and antecedents. Thus, neither the result of the prosecution nor the nature of the offence, in which he had been involved, has any bearing on the case. Principles of natural justice are not attracted in such as fact situation.

32. No fault can be found with the impugned termination order dated 20.1.1988. As his termination was not based on pendency of the criminal case, his representation for reinstatement has rightly been rejected vide impugned order dated 3.6.1999.

Petition is devoid of any merit, and is accordingly dismissed. No order as to costs. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2006

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No. 44755 of 2003

Bhanu Pratap Pandey ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Raj Narain Pandey
Sri K.D. Tripathi

Counsel for the Respondents:
Sri. B.N. Singh
Sri Dhirendra Kumar Dwivedi
S.S.C.

Constitution of India, Art.226-Removal from Service-Scope of interference by writ court-Petitioner while posted in Nagaland as Constable in C.R.P.F.-without permission-deserted the duty-remain absent for 36 day-despite of three opportunity to explain his conduct-failed to explain-before disciplinary, appellate as well before revisional authority-if retained in force-wrong signal will go to other members of force-whose prime duty to protect the Nation and its citizens-Held-deserves no sympathy-punishment of dismissal fully justified.

Held: Para 13

I am firm in my mind that a member of any disciplined Force has to confirm to discipline even to the extent of making sacrifices for the nation which he takes a responsibility to serve. The petitioner was a member of the disciplined Force was posted in a sensitive area, failed to maintain the discipline and the trust imposed upon him. I am of the opinion that he deserves no sympathy and I am also finn1y of the opinion that he has been given a fair opportunity at three stages for defending himself. The three orders passed against him are well considered and in my opinion are correct and deserve no modification from this Court. The punishment imposed upon the petitioner is fully justified in the-facts and circumstances of the present case.

(Delivered by Hon'ble Bharati Sapru. J.)

1. Heard learned counsel for the petitioner Shri R.N. Pandey and also learned counsel for the Union of India Shri D.K. Dwivedi at length.

2. The present writ petition has been filed by the petitioner against three orders dated 18.4.02 (Almexure-3), order dated 12.11.02 (Annexure-5) and the order dated 17.7.03 (Annexure- 7) passed by the respondents No.2,3 & 4. The first order is an order passed by the disciplinary authority. The second is an order passed by the appellate authority and the third order is passed by the Revisional Authority, by which, the punishment of removal of service has been imposed against the petitioner under the C.R.P.F. Act, 1945.

3. The facts of the case are that the petitioner was posted as a Constable at Dimapur (Nagaland) which is a sensitive and terrorist affected area.

4. The petitioner was charged with desertion on 8.11.01 for having left and deserted his duties without due permission and leave from the competent authority. A departmental enquiry was

held against the petitioner on the following charges:-

"That No. 900240065 C1 (Bug) Bhanu Pratap Pandey of A/123 BN, CRPF at Dimapur, Nagaland committed an act of misconduct in the discharge of duties in his capacity as a member of the Force under Section 11 (1) of CRPF Act, 1949 in that he deserted on 08.11.2001 at 18.30 Hrs, without any permission/leave from the competent authority."

5. The plea as set-up by the petitioner before the departmental enquiry was that the petitioner received information from his home that his wife was very seriously ill and on receiving this information, he applied for leave but even though leave was not granted he had to reach, because his wife was so sick. He also took a plea that he spoke to the Commandant over telephone to appraise him on the urgency.

6. It is a undisputed fact and not denied by the petitioner that he remained absent from duty for the period from 8.11.01 to 27.12.01, i.e., 36 days. Before the disciplinary authorities, the petitioner produced two medical certificates, one showed that his wife was suffering from spondylitis and the other showed that his wife was suffering from viral fever. A departmental enquiry was set -up in accordance with the rules and orders of the Force. During the enquiry, the charge framed against the petitioner was found proved beyond any shadow of doubt. Keeping in view of the fact that the petitioner belongs to a disciplined force and keeping in view of the gravity of offence committed by the petitioner, he was dismissed from service w.e.f. 18.4.02.

7. Being aggrieved with the order of the Commandant, the petitioner submitted an appeal on 24.5.02 to the D.I.G. of C.R.P.F., Allahabad. The D.I.G. of C.R.P.F. considered the appeal of the petitioner and rejected the appeal of the petitioner on 12.10.02.

8. Against the appellate order dated 12.10.02, the petitioner filed a revision which was also a remedy available to him under the Rules to the I.G.P. C.R.P.F., Central Sector, which was rejected by the order dated 17.7.03 of the authority aforesaid.

9. Learned counsel for the petitioner has argued that the punishment imposed on the petitioner is too harsh and a simpathetic view should be taken of the matter. The petitioner according to him had to rush to attend his wife who was seriously sick.

10. The second argument of learned counselor the petitioner was that before the pendency of the disciplinary proceeding, he was granted a transfer to Allahabad and was permitted to join on 13.12.01 from Nagaland, which implied that his act of desertion was condoned by the authorities concerned. However, it is not denied by the learned counsel for the petitioner that the transfer order was subsequently cancelled once the disciplinary proceedings ensued.
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11. Learned counsel for the respondent has argued that the petitioner belonged to a disciplined force and the act of desertion, which the petitioner was charged, was found proved against him by not one but by three authorities who gave him due opportunity of hearing and examined the matter thoroughly before

coming to the conclusion that a person who was found guilty of an act of desertion in a disciplined force could not be retained in the Force as that would no doubt, send a wrong signal to the other members of the disciplined Force and it would also break the morale of the disciplined Force whose prime duty is to protect the nation and its citizens.

12. Having heard both the parties and having gone through all the pleadings and material evidence on record as well as three orders impugned by the petitioner, I am of the opinion that the impugned orders do not contain any error. In fact, the impugned orders have been passed after giving to the petitioner not one but three good opportunities to explain his conduct. All the three orders are well considered. All the three orders have considered each and every submission made by the petitioner in his defense. The orders clearly reveal that firstly the illness of the wife of the petitioner was not such a serious one. Secondly, it reveals without doubt that the petitioner left without taking due permission. The orders also reveal that on no stage, permission was granted to the petitioner and he remained absent for 36 days. The medical certificates which have been appended by the petitioner and on the record do not reveal that the illness of the wife was so serious as it was a matter of life and death which had to be attended immediately. Even, if it had been a matter of life and death, then too the petitioner who belonged to a disciplined force should have awaited permission for a minimum period before leaving his duty.

13. I am firm in my mind that a member of any disciplined Force has to confirm to discipline even to the extent of making sacrifices for the nation which he takes a responsibility to serve. The petitioner was a member of the disciplined Force and was posted in a sensitive area, failed to maintain the discipline and the trust imposed upon him. I am of the opinion that he deserves no sympathy and I am also firma1y of the opinion that he has been given a fair opportunity at three stages for defending himself. The three orders passed against him are well considered and in my opinion are correct and deserve no modification from this Court. The punishment imposed upon the petitioner is fully justified in the-facts and circumstances of the present case.

14. The writ petition is devoid of merits and dismissed. There will be no order as to costs. Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2006

BEFORE
THE HON'BLE BARKAT ALI ZAIDI, J.

First Appeal No. 179 of 2001

(Arising out of Suit no. 41 of 1997 Smt. Manju Rai and another Vs. Vinod Kumar Rai, decided on 23.4.2001 by Ist Addl. District Judge, Ghazipur)

Vinod Kumar Rai ...Appellant-Defendant
Versus
Smt. Manju Rai ...Respondents-Plaintiffs

Counsel for the Appellant:
Sri Faujdar Rai
Sri C.K. Rai
Sri S.K. Upadhayay
Sri Brij Raj Singh
Sri R.P. Singh

Counsel for the Respondents:
Sri Atul Srivastava

Hindu Minority & Guardianship Act 1956 S-18 (2)(3)-Right of Maintenance-Trial Court granted Rs.1500 per month to the divorced wife and one daughter-Appellate Court can sue motu-enhanced amount husband earning Rs.7800/- per month salary-daughter about 16 years old girl-may be illegitimates one-held-Rs.500/- much meager-enhanced much meager-enhanced from Rs.500 to 2500/- per month-similarly the amount of wife also enhanced Rs.2500/- appellant to bear the expenses of marriage of the daughter-appeal dismissed.

Held: Para 13

In the other First Appeal No. No. 182 of 2001 (Vinod Kumar Rai Vs. Smt. Manju Rai) by the husband which has been allowed by this Court, a decree of divorce has already been granted in his favour. It is now well settled that a Court may suo-moto grant maintenance, even if it has not been claimed. Reference may be made in this connection of the case of *Chandrika Vs. M. Vijaykumar* (1996-1) 117 Mad. L.W., 695 where it has been so held. There is as such, no legal bar in the court raising the amount of maintenance. In a case one judge may grant Rs.5000/- per month while another judge may grant Rs.10,000/- per month and both may be right because no specific guidelines for determination of quantum have been provided in the Act. In the case in hand, we have to notice that the girl is around 16-17years old and the provision has to be made for her marriage also besides her education and other living expenses. The amount granted by the trial court is, therefore, manifestly meager and needs to be multiplied 5 times, amounting to Rs.25,00/- per month. The amount granted to the wife also needs to be raise a little so as to Rs.2500/- per month instead of Rs.15,00/-. The husband/ appellant will ofcourse bear the expenses of the marriage of his daughter when the time comes.

Case law discussed:
(1996-1) 117 Mad. LW 695-relied on

(Delivered by Hon'ble Barkat Ali Zaidi, J.)

1. A wife's suit for maintenance has been decreed by the Addl. District Judge, Ghazipur in her and daughter's favour which brings her husband in appeal here.

2. From time immemorial, the husband has been recognized as a bread earner of the family and Section 18 of the Hindu Minority and Guardianship Act, 1956, hereinafter called the "Act' incorporates the said principle. It may be noted that unlike section sections 125 of Criminal Procedure Code, the "Act' recognizes only the husband as the maintainer of the family irrespective of the consideration whether the wife is able to maintain herself or not.

3. The only obstruction in granting of maintenance is provided in various sub clauses of Sub-Clause (2) of Section 18 of the Act, which is as follows:-

(2) A Hindu wife shall be entitled to life separately from her husband without forfeiting her claim to maintenance;-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wishes , or of willfully neglecting her;
(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to life with her husband;
(c) if he is suffering from a virulent from of leprosy;

(d) if he has any other wife living;
(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;
(f) if he has ceased to be a Hindu by conversion to another religion;
(g) if there is any other cause justifying her living separately."

4. In the case in hand what has to be seen is whether any of the circumstances enumerated therein exist as to bar the respondent (Smt. Manju Rai) right to receive the maintenance.

5. The evidence in the case consists merely the oral statement of the husband and the wife who have reiterated their respective contentions.

6. In this case, there is little difficulty in holding that the husband has treated the wife with cruelty because he has hurled the charges of infidelity against her and that is conduct cruel enough to justify the wife's demand to live separately and to receive maintenance.

7. The only other thing which has to be examined is whether the wife is unchaste as provided in Clause- 3 of Section 18 of the Act as noted below:-

"(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion".

8. It is for the husband to prove that the wife is unchaste because it is he, who levels the allegations and in accordance with Section 101 of the Evidence Act, it is on him to prove the same. It is no doubt true that it is difficult to prove unchastity but it is also true that it is easy to level such allegations.

9. When a matter comes to the Court, proof is required because proof is the corner-stone of the Court Procedure. It is not possible to the Court to accept any such allegation without proof. In the case in hand, there is no proof whatsoever except a bare allegation. It is not possible, therefore, for the Court to accept the husband's contention of unchastity against the wife-respondent. The hitch placed by sub Clause (3) of Section 18 of the Act, cannot, therefore, obstruct the grant of maintenance to the wife.

10. The controversy, whether the daughter is a legitimate child of the husband-appellant is irrelevant for the purposes of the case because Section 20 of the Act makes no discrimination between a legitimate or illegitimate child for the grant of maintenance.

11. The only question, which therefore, remains is that of quantum of maintenance to be granted to the wife. The trial Court has granted Rs. 1500/- per month to the wife-respondent and Rs.500/- per month to minor daughter.

12. Section 23 of the Act provides some guidelines for determination of question of maintenance. In the present case, wife has no source of income. We have only to see the income of the husband for determining the amount of maintenance. The husband is a Sepoy in the Army. He has not produced any document with regard to the amount of his salary, which he could and should have done and has only stated that he gets Rs. 5000/- per month as salary. The wife-

respondent on the contrary says that his salary Rs. 7800/- per month. The trial court accepted the wife's contention that his salary is Rs. 7800/- and that seems to be the right in view of these circumstances. Without any specific percentage or proportion been prescribed the fixing of the amount of maintenance has, of necessity to be a little arbitrary.

13. In the other First Appeal No. No. 182 of 2001 (Vinod Kumar Rai Vs. Smt. Manju Rai) by the husband which has been allowed by this Court, a decree of divorce has already been granted in his favour. It is now well settled that a Court may suo-moto grant maintenance, even if it has not been claimed. Reference may be made in this connection of the case of ***Chandrika Vs. M. Vijaykumar*** (1996-1) 117 Mad. L.W., 695 where it has been so held. There is as such, no legal bar in the court raising the amount of maintenance. In a case one judge may grant Rs.5000/- per month while another judge may grant Rs.10,000/- per month and both may be right because no specific guidelines for determination of quantum have been provided in the Act. In the case in hand, we have to notice that the girl is around 16-17years old and the provision has to be made for her marriage also besides her education and other living expenses. The amount granted by the trial court is, therefore, manifestly meager and needs to be multiplied 5 times, amounting to Rs.25,00/- per month. The amount granted to the wife also needs to be raise a little so as to Rs.2500/- per month instead of Rs.15,00/-. The husband/ appellant will ofcourse bear the expenses of the marriage of his daughter when the time comes.

O R D E R

The result is that the appeal of the husband-appellant stands dismissed and he is directed to pay Rs.25,00/- per month as maintenance to the respondent- Manju Rai till she survives and Rs.25,00/- per month to his daughter till she is married by him. The amount, at this rate, shall be deducted, from his monthly salary from the date of this order because fixation of any earlier date for the same will cause adjustment problem. Necessary directions shall be issued to the authorities responsible for the payment of salary to the appellant-husband.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2006

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

Special Appeal No.614 of 2006

Rajesh Singh and others ...Appellants
Versus
Vidyadhiraj Pandey & others ...Respondents

With

Special Appeal No. 615 of 2006, Special Appeal No.616 of 2006,Special Appeal No. 640 of 2006, Special Appeal No.730 of 2006

Counsel for the Appellants:
Sri A.K. Gupta
Sri R.K. Jain
Sri G.P. Singh
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Sri R.N. Singh
Sri V.S. Sinha
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Sri Shailendra

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Sri K.R. Sirohi
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S.C.

Constitution of India-Art.-226-Right to appointment-Selection of 4 Posts of Stenographer and 19 posts of Clerk in Judgeship Kaushambi-great irregularities committed-not possible to find out the beneficiaries of such illegalities-although four candidates found fairly selected-but considering the impossibilities of separation of truth from falsehood-No direction can be given for appointment.

Held: Para 31

It is possible to weed out the beneficiaries of irregularities or illegalities, there could be no justification to deny appointment to those selected candidates whose selection was not vitiated in any manner. The learned Single Judge held that as the mass-irregularities in case of the others was of such a magnitude that it was not possible to find out that if the selection had been held in fairly, these three persons could have been appointed and as such no relief could be granted to them. We agree with the findings recorded by the learned Single Judge on this count as it was not possible in the facts and circumstances of the case to separate truth from falsehood and, thus, the learned Single Judge rightly rejected their claims for appointment.
AIR 1992 SC-1555, 1996 (1) AER-341, 1994 (1) SCC-I, 1995 SCC (Suppl) 4-100, 1990 (3) SCC-655,
AIR 2000 SC-1165, AIR 1970 SC-1269, AIR 2000 SC-1039, AIR 1994 SC-2166, AIR 2002 SC-2023, AIR 2004 SC-2100, 2000 Lab.I.C.-735, AIR 2001 SC-2196, 2005 (8) SCC-180, AIR 1996 SC-2523, 2002 (4) SCC-503, 2004 (6) SCC-299, 2004 (8) SCC-129, 2005 (3) SCC-409, 2005 SCC (5) 337, AIR 2004 SC-2371, AIR 2003 SC-2041, AIR 1994 SC-1074, AIR 2002 SC-1119, AIR 1996 SC-2552, 1994 (2) UPLBEC 745,
2003 (7) SCC-284
1975 (Suppl) SCR-129

(B) Constitution of India-Art. 226-Regularisation-appointment purely on Ad-hoc basis for specified period of 89 days-continued for more than 3 years without extension order-appointment that without made without advertisement-without following the procedure for selection-in contravention of service Rules-No statutory provision for regulation nor any scheme produced held-can not be regularised.

Held: Para 55

In view of the fact that the Hon'ble Apex Court has consistently been reiterating that even ad hoc appointments are to be made in accordance with the mandate of Articles 14 and 16 of the Constitution of India and even where the names are being requisitioned from the Employment Exchange, the advertisement in the newspapers having wide circulation is mandatory, we are of the considered opinion that no relief can be granted to the appellant herein nor there is any occasion for the Court to save such an illegal appointment. The appeal is liable to be dismissed.
Case law discussed:
1987 (Suppl) SCC-497, 1991 SCC (1) 28, AIR 1996 (10 SC-565, AIR 1997 SC-1628, 1996 (9) SCC-217, 1996 (11) SCC-341, AIR 1996 SC-708, 1996 (1) SCC-793, 1991 LIC-944, 2004 (8) SCC-353, 2005 (2) SCC-470, 2002 (4) SCC-726, 1992 (2) SCR-799, 2003 (10) SCC-405, AIR 2004 SCW 5546, 2006 (2) SCC-545, 1997 SC-2685, 1998 (1) SCC-183

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

1. All these five Special Appeals have been filed against the common judgment and order of the learned Single Judge dated 25.05.2006, by which large

number of writ petitions have been disposed of.

2. The facts and circumstances giving rise to all these Special Appeals are that the new District Kaushambi was carved out from District Allahabad and in District Judgeship Kaushambi, appointments were made on various posts including the posts of Driver, Stenographer in 1998 and 1999. Subsequently, appointments were made on the post of Clerks on 15.01.2001 for a period of three months on ad hoc basis. While making ad hoc appointments for a period of three months, neither the advertisement was issued inviting applications nor names had been requisitioned from the Employment Exchange. There had been no extension of the services of such ad hoc appointees. However, persons appointed for three months vide order dated 15.01.2001 continued to serve for a period of about two years. The District Judge sought permission from the High Court for extension of their services and also for regularization of those persons who had completed three years, vide letter dated 11.12.2002. The Court vide letter dated 01.05.2003 pointed out that no ad hoc appointment would be made nor the period of services of ad hoc appointees would be extended. However, if the ad hoc appointees had been continuing for a long period and regularization is permissible in accordance with the Rules, their cases may be considered. The Court further directed to fill up the then existing vacancies by making regular appointments in accordance with law. In pursuance of the said letter, the services of ad hoc appointees were terminated vide order dated 20.05.2003. The said termination order was challenged by filing Civil Misc. Writ Petition No. 23939 of 2003 before this Court and an interim relief was granted keeping the order of termination dated 20.05.2003 in abeyance, vide order dated 28.05.2003. The said order stood modified by this Court vide order dated 09.07.2003 issuing directions to fill up vacancies by regular selection and the persons working on ad hoc basis were also permitted to participate in the regular selection. For filling up four posts of Stenographers and 19 posts of Clerks on regular basis, an advertisement dated 28.05.2003 was issued. The appointments were to be made under the provisions of the U.P. Subordinate Civil Court Ministerial Establishment Rules, 1947, which provided, for the post of Stenographers, that a candidate must possess the qualification of Intermediate or equivalent examination, Hindi Shorthand speed of 100 words per minute, Hindi Typing speed of 35 words per minute. The knowledge of English Shorthand and English typing was prescribed as an additional qualification. The candidates were also required to possess Diploma or certificate in Hindi Shorthand and Hindi Typing from a recognized institution. For the post of Clerks, minimum qualification was Intermediate or equivalent examination, Hindi and English Typing knowledge was prescribed as an additional qualification. A large number of candidates appeared in the examination and the result was declared on 29th September, 2004. Appointments were made of some of the appellants herein. The said selection was challenged by some unsuccessful candidates including some of the ad hoc appointees, who were continuing in services under the interim order of the Court and had participated in the regular selection, on large number of

grounds, and particularly, that there had been no proper examinations; selection stood vitiated because of the illegality and fraud played by the Appointing Authority; answer sheets were not examined properly; if a question carried maximum 10 marks, candidates had been awarded more than 10 marks in that question. Considering the seriousness of the allegations made in the writ petitions, the learned Single Judge summoned the original records, i.e. answer books of the selected candidates and also called the Appointing Authority, i.e. the then District Judge and also the Additional District Judge, who was one of the Members of the Selection Committee. The learned Single Judge took pain to examine the answer sheets and the District Judge, i.e. the Appointing Authority and the Additional District Judge, Member of the Selection Committee were asked to explain their conduct and furnish an explanation as to how such discrepancies and that too on such a large scale, occurred. No satisfactory explanation could be furnished by either of them. The successful candidates, who were duly represented by their Counsel, were also asked to verify the discrepancies, which were apparent on the face of the record and after giving opportunity of hearing to all concerned including the ad hoc appointees, who had challenged the termination order and were seeking regularization, the learned Single Judge disposed of all the writ petitions recording large number of findings of fact including the following:-

I. The answer to a particular question had been scored out, yet marks had been awarded on that question.

II. The answers given by the candidates made absolutely no sense but even then marks had been awarded.

III. There were serious discrepancies in the grand total recorded on the first page of the answer sheets and no explanation could be furnished either by the Appointing Authority, the then District Judge or by Member of the Selection Committee for the same.

IV. In some of the copies, marks on particular questions have been awarded double the maximum marks, fixed for the said question.

V. In some of the copies, marks were awarded twice or thrice subsequently, scoring out the initially given marks.

VI. In some of the answer sheets, marks had been awarded in double digits and both the digits had been written in different inks. For example, if 11 marks had been awarded, both figure "1' were found in different inks. The explanation furnished by the Member of the Selection Committee had been that the ink of the Pen might have dried up after recording of the first digit.

VII. Marks in answer sheets had been awarded in different inks. In one case, the total marks was 137 out of 300, however, his grand total had been shown as 146 out of 300 and he stood selected.

VIII. Total number of marks recorded in the first page did not tally with the total marks secured by the candidates, if calculated correctly.

IX. Shorthand answer sheets had been examined without noticing any mistake/error, whatsoever.

X. In one case, zero mark had been given in respect of Shorthand and Typing test, however, figure "5' was added before the digit "zero' and while

preparing the result, 50 marks in that respect had been taken into consideration and that too without noticing any error therein.

XI. In many cases, candidates had disclosed their identity, in full, while answering the questions. Large number of such candidates, i.e. 800 had been disqualified for disclosing their identities but in some cases not only the answer sheets had been examined but such candidates also stood selected.

XII. In case of some candidates, questions had been assessed giving zero mark, subsequently the digit "one' had been added in a different ink before the figure "zero' making it 10 marks though the answers given by the candidate did not make any sense. No explanation could be furnished, either by the then District Judge or the Member of the Selection Committee on such illegalities/irregularities.

XIII. In one copy, five grand totals have been recorded on the first page of the answer sheets and subsequently, two totals had been scored out. No explanation could be furnished for the same either by the then Appointing Authority, or by the Member of the Selection Committee.

XIV. Similar discrepancies were found in the case of answer sheets of Clerks, as in some cases where the candidates even did not make an attempt to solve a large number of questions, full marks, i.e. 50 out of 50 had been awarded.

XV. Where the maximum marks to a particular question were 10, candidates had been awarded 12 or 15 marks.

XVI. In some cases, questions had been answered in different hand-writings in different inks scoring out the earlier answers. The scored out answers were admittedly incorrect.

XVII. In some cases, lesser marks had been awarded scoring out the initially awarded marks. No explanation could be furnished by the then Appointing Authority or the Member of the Selection Committee for such an illegality.

XVIII. In one case, the same questions had been answered twice and 50 marks were awarded for that but subsequently, marks stood reduced to 35. No explanation could be furnished for the same.

XIX. In some cases, marks given had been subsequently enhanced by adding some more marks and the explanation furnished by the then Appointing Authority was that re-evaluation was done though he could not furnish any explanation as to who had made the re-evaluation and as to whether re-evaluation was permissible.

XX. In some cases, zero mark had been awarded to a particular question while the answer given by the candidate was correct.

XXI. There were serious interpolations in some of the answer sheets, as answers had been given in different hand-writing and in different inks.

3. All these Special Appeals have been filed challenging the aforesaid findings of fact. Special Appeal No. 614 of 2006 has been filed by the 17 selected candidates for the post of Clerks, whose appointments have been quashed by the learned Single Judge holding that there had been irregularity in awarding marks to them. Special Appeal No.615 of 2006

has been filed by three duly selected candidates, whose appointment orders have been quashed by the learned Single Judge, though recording a finding of fact that there has been no irregularity or illegality in awarding the marks to them. But as there was irregularity of a very high magnitude, their appointments could not be saved. Special Appeal No. 616 of 2006 has been filed by the Stenographers, whose appointments have been quashed by the impugned judgment and order. Special Appeal No. 640 of 2006 has been filed by the then District Judge upon whom a cost of Rs. 25,000/- has been imposed. A cost of Rs.25,000/- was also imposed upon the Chairman of the Selection Committee, but he has not filed any appeal against the said order. Special Appeal No. 730 of 2006 has been filed by an ad hoc appointee whose claim for regularisation is also to be considered.

4. Shri Ravi Kiran Jain and Shri R.N. Singh, learned Senior Counsel duly assisted by Shri A.K. Gupta and Shri Shailendra, appearing for the appellants have vehemently submitted that irregularities and illegalities were not of such a nature or of magnitude which could warrant the quashing of the entire selection; where the learned Single Judge recorded a finding of fact, at least in case of appellants in Special Appeal No. 615 of 2006, that there had been no irregularity, their appointments could not have been quashed. In the case of one of the appellants, i.e. a selected candidate, the grand total of marks were lesser than the actual marks awarded to him. The learned Single Judge had examined the original records of selection but had not given an opportunity of hearing to the candidates individually or their counsel to verify the facts of such irregularity. The impugned judgment and order, being in violation of principles of natural justice, is liable to be set aside.

5. Shri Gajendra Pratap Singh, learned counsel appearing for the appellant in Special Appeal No. 640 of 2006, has submitted that the appellant, the then District Judge, Appointing Authority had constituted a Selection Committee headed by one of the Additional District Judges and, therefore, he could not be held exclusively responsible for any irregularity and there was no justification for imposing the cost upon him. Thus, it is liable to be set aside.

6. Shri V.S. Sinha, learned Counsel appearing in Special Appeal No. 730 of 2006, has submitted that as the appellant had been offered ad hoc appointment and he continued for a long period, he was entitled to be considered for regularisation and the impugned judgment and order suffered from serious infirmities in law and, deserves to be set aside.

7. Shri Yashwant Verma, learned counsel appearing for the High Court and Shri C.K. Rai, learned Standing Counsel appearing for the respondents/State, have vehemently opposed these Special Appeals contending that in case of mass irregularities of such a high magnitude, where it is not possible to find out as which candidate could have passed, the entire selection stands vitiated. In such an eventuality, once it is proved that there were irregularities of this nature, principles of natural justice are not attracted. However, in the instant case, opportunity had been given to the counsels duly representing the appellants to check the answer sheets etc. The

appeals lack merit and are liable to be dismissed.

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

Special Appeals No. 614 of 2006, 615 of 2006 and 616 of 2006

9. These Special Appeals involve the same controversy and are taken together.

The basic contentions raised herein had been that irregularity was not of such a grave magnitude which could warrant quashing of the entire selection. At least the appellants in Special Appeal No. 615 of 2006 were entitled for an appointment as no irregularity had been found in their answer books. None of the learned counsel appearing for the appellants in any of these cases, have raised the grievance regarding the findings of fact recorded by learned Single Judge, referred to hereinabove.

The Hon'ble Supreme Court in Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers AIR 1992 SC 1555 observed as follows:-

"Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence.....It has been identified as an act of trickery or deceit. In Webster fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Oxford, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice... .....

From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true."

In Lazarus Estates Ltd. V. Beasley, (1956) 1 ALL ER 341 the Court of Appeal stated the law thus:

"I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever;"

10. In S.P. Chengalvaraya Naidu V. Jagannath & Ors., (1994) 1 SCC 1 the Supreme Court stated that fraud avoids all judicial acts, ecclesiastical or temporal.

In Union of India & Ors. Vs. M. Bhaskaran, 1995 Suppl. (4) SCC 100, the Supreme Court, after placing reliance

upon and approving its earlier judgment in the case of District Collector & Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram & Anr. Vs. M. Tripura Sundari Devi, (1990) 3 SCC 655, observed as under:-

"If by committing fraud any employment is obtained, the same cannot be permitted to be countenanced by a Court of Law as the employment secured by fraud renders it voidable at the option of the employer."

11. In United India Insurance Co. Ltd. Vs. Rajendra Singh & ors., AIR 2000 SC 1165, the Supreme Court observed that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant) and it is a pristine maxim which has never lost its temper over all these centuries.

12. The Hon'ble Supreme Court in The Bihar School Examination Board Vs. Subhas Chandra Sinha & Ors., AIR 1970 SC 1269, while considering the cancellation of the entire examination because of the use of mass copying, considered the scope of the principles of natural justice in such a matter and observed:-

"This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging any one individually with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go....."

13. After referring to the aforesaid decision, the Supreme Court in Chairman J&K State Board of Education Vs. Feyaz Ahmed Malik & Ors., AIR 2000 SC 1039 emphasised that the Board is entrusted with the duty of proper conduct of examinations.

14. In Krishan Yadav & Anr. Vs. State of Haryana & Ors., AIR 1994 SC 2166, the Hon'ble Supreme Court observed as follows:-

"It is highly regrettable that the holders of public offices both big and small have forgotten that the offices entrusted to them are sacred trust. Such offices are meant for use and not abuse. From a Minister to a menial everyone has been dishonest to gain undue advantages. The whole examination and the interview have turned out to be farcical exhibiting base character of those who have been responsible for this sordid episode. It shocks our conscience to come across such a systematic fraud. It is somewhat surprising the High Court should have taken the path of least resistance stating in view of the destruction of records it was

helpless. It should have helped itself. Law is not that powerless.

In the above circumstances, what are we to do? The only proper course open to us is to set aside the entire selection. The plea was made that innocent candidates should not be penalised for the misdeeds of others. We are unable to accept this argument. When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place as "Fraud unravels everything". To put it in other words, the entire selection is arbitrary. It is that which is faulted and not the individual candidates. Accordingly, we hereby set aside the selection of Taxation Inspectors."

15. In B. Ramanjini & Ors. Vs. State of Andhra Pradesh & Ors., AIR 2002 SC 2023 the Supreme Court enlightened what approach the Courts should adopt while dealing with matters relating to cancellation of examination and after referring to The Bihar School Examination Board (supra) observed:-

"The facts revealed above disclose not only that there was scope for mass copying and mass copying did take place in addition to leakage of question papers which was brazenly published in a newspaper and the photocopies of the question papers were available for sale at a price of Rs.2,000/- each. These facts should be alarming enough for any Government to cancel the examinations whatever may be the position in regard to other centres..... Further, even if it was not a case of mass copying or leakage of question papers or such other circumstance, it is clear in the conduct of the examination, a fair procedure has to be adopted..... In such matters wide latitude should be shown to the Government and the courts should not unduly interfere with the action taken by the Government which is in possession of the necessary information and takes action upon the same. The courts ought no to take the action lightly and interfere with the same particularly when there was some material for the Government to act one way or the other."

16. In Delhi Development Authority & Anr. Vs. M/s. UEE Electricals Engg. (P) Ltd. & Anr. AIR 2004 SC 2100, the Hon'ble Supreme Court while describing the grounds on which administrative action is subject to control by judicial review observed:-

"Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by the authority of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the employee has to establish in this case, though this may sometimes be done. The difficulty is not lessened when one has to establish that a person apparently acting on the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. It is not law that mala fide in the sense of improper motive should be established only by direct evidence. But it must be discernible from the order impugned or must be shown from the established surrounding factors which preceded the order."

17. A Division Bench of this Court in the case of Union of India & Ors. Vs. Akchhay Kumar Singh & Ors., 2000 Lab. I.C. 735 considered the scope of

interference in such matters and held as follows:-

"In a matter like the one on hand, the competent authority, in our opinion, does not decide a lis between the complainant on one hand and candidates seeking appointment on the other so as to be obliged to hold an enquiry in consonance with the rules of natural justice. Its decision is not to be judged from judicial or even quasi judicial standards and since exercise of power to scrap recruitment is not regulated by objectively determinable factors, even "reasonable suspicion" as to the process of recruitment being vitiated by malpractices or corrupt means would suffice. Surrounding circumstances e.g. the necessity to scrap the recruitment for preservation of public faith in the recruitment process will also do. The competent authority, in our opinion, is not required to hold a formal enquiry in tune with the principles of natural justice and ascertain the truth or otherwise of the complaints as to malpractice in the recruitment process as condition precedent to cancelling the recruitment process. All that is expected of the competent authority in such a situation is that it would act in "good faith' and take a "bona fide' decision whether to scrap or not to scrap the recruitment. ..... Noting on the original file produced before us would show that the matter was examined and decision to scrap the recruitment was taken after due deliberation. Such decision, in our opinion is not open to challenge under Article 226 of the Constitution of India on the ground that there was no material to substantiate the allegations of malpractice..... Learned Single Judge, in our opinion, was not right in judging the impugned decision on the touchstone of the standards meant for judging judicial or quasi-judicial decision affecting vested rights of individuals."

18. In the appeal against the aforesaid decision, the Hon'ble Supreme Court in the case of Union of India & Ors. Vs. Tarun Kumar Singh & Ors., AIR 2001 SC 2196 while upholding the judgment observed as follows:-

".....in view of the allegation of malpractice, the departmental authorities has held an enquiry into the matter and the result of that enquiry has revealed gross irregularities and illegalities as referred to in the judgment of the Division Bench of Allahabad High Court. Consequently the process of selection which stands vitiated by adoption of large scale malpractice to a public office, cannot be permitted to be sustained by Court of Law."

19. In Union of India Vs. Joseph P. Cherian, (2005) 8 SCC 180, the Hon'ble Supreme Court reconsidered the whole issue and held that in case of mass-malpractice, there could be no scope of examining an individual's case. While deciding the said case, reliance had also been placed on the judgments of the Hon'ble Supreme Court in P. Ratnakar Rao & Ors. Vs. Government of Andhra Pradesh & Ors., AIR 1996 SC 2523; Kendriya Vidyalay Sangathan & Ors. Vs. Ajay Kumar Das & Ors., (2002) 4 SCC 503; and Union of India & Ors. Vs. O. Chakradhar, AIR 2002 SC 1119.

20. It cannot be doubted that the principles of natural justice cannot be put into a strait-jacket formula and that its application will depend upon the fact situation obtaining therein. It cannot be

applied in a vacuum without reference to the relevant facts and circumstances of the case. This is what has been held by the Supreme Court in K.L. Tripathi Vs. State Bank of India & Ors. AIR 1984 SC 273; N.K. Prasada Vs. Government of India & Ors. (2004) 6 SCC 299; State of Punjab Vs. Jagir Singh (2004) 8 SCC 129; Karnataka SRTC & Anr. Vs. S.G. Kotturappa & Anr., (2005) 3 SCC 409 and in Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. & Ors., (2005) 5 SCC 337.

21. In Union of India & Anr. Vs. Tulsiram Patel AIR 1985 SC 1416 the Hon'ble Supreme Court held:-

"Though the two rules of natural justice, namely, nemo judex in causa sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implications are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal straitjacket. They are not immutable but flexible."

22. It is equally well settled that the principles of natural justice must not be stretched too far and in this connection reference may be made to the decisions of the Supreme Court in Sohan Lal Gupta & Ors. Vs. Asha Devi Gupta & Ors., (2003) 7 SCC 492; Mardia Chemicals Ltd. Vs. Union of India AIR 2004 SC 2371 and Canara Bank Vs. Debasis Das AIR 2003 SC 2041.

In Hira Nath Mishra & Ors. Vs. The Principal, Rajendra Medical College, Ranchi & Anr. AIR 1973 SC 1260 the Hon'ble Supreme Court held as follows:-

"The High Court was plainly right in holding that principles of natural justice are not inflexible and may differ in different circumstances. This Court has pointed out in Union of India Vs. P.K. Roy, (1968) 2 SCR 186 at page 202 that the doctrine of natural justice cannot be imprisoned within the strait-jacket of a rigid formula and its application depends upon the several factors. ..... Rules of natural justice cannot remain the same applying to all conditions."

23. It has rightly been observed that it is not possible to lay down rigid rules as to when the principles of natural justice are to apply and nor as to their scope and extent. Everything depends on the subject-matter. The application of principles of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. In the application of the concept of fair play there must be real flexibility. There must also have been some real prejudice to the complainant; there is no such thing as a mere technical infringement of natural justice. The requirements of natural justice must depend on the facts and the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth. (Wade "On Administrative Law' 5th Edition).

24. The Constitution Bench of the Supreme Court in Managing Director ECIL, Hyderabad Vs. B. Karunakar AIR

1994 SC 1074 made reference to its earlier decisions and observed:-

"In A.K. Kraipak v. Union of India, AIR 1970 SC 150 it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why, they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice."

25. In Chairman, Board of Mining Examination Vs. Ramjee AIR 1977 SC 965 the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference of the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures.

26. In Biswa Ranjan Sahoo & Ors., Vs. Sushanta Kumar Dinda & Ors,. AIR 1996 SC 2552 the Hon'ble Supreme Court had the occasion to examine whether principles of natural justice were required to be followed in a matter where because of mass scale malpractice in the selection process, the selection was cancelled and in this context it was observed:-

"A perusal thereof would indicate the enormity of mal-practices in the selection process. The question, therefore, is: whether the principle of natural justice is required to be followed by issuing notice to the selected persons and hearing them? It is true, as contended by Mr. Santosh Hegde, learned senior counsel appearing for the petitioners, that in the case of selection of an individual his selection is not found correct in accordance with law, necessarily a notice is required to be

issued and opportunity be given. In a case like mass mal-practice as noted by the Tribunal, as extracted hereinbefore, the question emerges: whether the notice was required to be issued to the persons affected and whether they needed to be heard? Nothing would become fruitful by issuance of notice. Fabrication would obviously either be not known or no one would come forward to bear the brunt. Under these circumstances, the Tribunal was right in not issuing notice to the persons who are said to have been selected and given selection and appointment."

27. In Union of India & Ors. Vs. O. Chakradhar AIR 2002 SC 1119 the Hon'ble Supreme Court considered the question whether it was necessary to issue individual show cause notices to each selected person when the entire selection was cancelled because of widespread and all pervasive irregularities affecting the result of selection and it was observed:-

"All norms are said to have been violated with impunity at each stage viz. right from the stage of entertaining applications, with answer-sheets while in the custody of Chairman, in holding typing test, in interview and in the end while preparing final result. In such circumstances it may not be possible to pick out or choose any few persons in respect of whom alone the selection could be cancelled and their services in pursuance thereof could be terminated. The illegality and irregularity are so intermixed with the whole process of the selection that it becomes impossible to sort out right from the wrong or vice versa. The result of such a selection cannot be relied or acted upon. It is not a case where a question of misconduct on the part of a candidate is to be gone into but a case where those who conducted the selection have rendered it wholly unacceptable. Guilt of those who have been selected is not the question under consideration but the question is could such selection be acted upon in the matter of public employment? We are, therefore, of the view that it is not one of these cases where it may have been possible to issue any individual notice of misconduct to each selectee and seek his explanation in regard to the large scale widespread and all pervasive illegalities and irregularities committed by those who conducted the selection which may of course possibly be for the benefit of those who have been selected but there may be a few who may have deserved selection otherwise but it is difficult to separate the cases of some of the candidates from the rest even if there may be some."

28. In the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. V. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853 the Hon'ble Supreme Court refused to interfere on the ground of breach of principles of natural justice by observing:-

"The court of law are meant for imparting justice between the parties. One who comes to the court, must come with clean-hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

29. Following the aforesaid decision of the Supreme Court, this Court in the case of Bharat & Ors. Vs. Nagarpalika, Azamgarh & Ors. (1994) 2 UPLBEC 745 observed:-

"Learned counsel for the appellants also submitted that no opportunity of hearing was given to the appellants before passing the impugned orders. We have seriously considered this aspect of the matter too and, in our opinion, where the benefit accrued to the person complaining breach of the principles of natural justice is the result of fraud, unfairness, arbitrariness or misconduct at the source of such benefit, the principles of natural justice cannot be invoked..... In our opinion, the facts and circumstances of the present case also do not give a different picture. The appellants are in fact beneficiaries of the selection process which has already been held to be unfair and non-existent. In the circumstances, they are not entitled to any relief on the ground of violation of the principles of natural justice which cannot be pressed in service without there being equity on the side of the appellants."

30. Thus, in view of the above, it is not permissible in law to examine the case of an individual person, if it stands established that it was a case of mass-irregularities.

31. Undoubtedly, the learned Single Judge has categorically held that in case of three selected candidates, namely, Ashish Pandey (Roll No. 1413), Chandra Prakash Asthana (Roll No.1639) and Ravindra Singh (Roll No. 4555), no irregularity has been found. However, the learned Single Judge considered the case of Union of India & Ors. Vs. Rajesh P.U., Puthuvalnikathu & Anr., (2003) 7 SCC 285, wherein it has been held that where from out of the selectees, it is possible to weed out the beneficiaries of irregularities or illegalities, there could be no justification to deny appointment to those selected candidates whose selection was not vitiated in any manner. The learned Single Judge held that as the mass-irregularities in case of the others was of such a magnitude that it was not possible to find out that if the selection had been held in fairly, these three persons could have been appointed and as such no relief could be granted to them. We agree with the findings recorded by the learned Single Judge on this count as it was not possible in the facts and circumstances of the case to separate truth from falsehood and, thus, the learned Single Judge rightly rejected their claims for appointment.

32. In Balka Singh & Ors. Vs. State of Punjab, 1975 Supp. S.C.R. 129, the Hon'ble Supreme Court considered a similar issue, placing reliance upon its earlier judgment in Zwinglee Ariel Vs. State of Madhya Pradesh, AIR 1954 SC 15 and held as under:-

"The Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the true is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation, the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply."

In view of the above, we find no force in the submissions made by Shri R.N. Singh, learned Senior Counsel.

33. The learned Single Judge has taken care while deciding the case that the principles of natural justice be observed strictly and it is evident from the said judgment that selected candidates, who were represented by counsel Shri M.D. Singh Shekhar, were also specifically afforded an opportunity to check the answer sheets, in original, in the Court itself. In this respect and with reference to the discrepancies noticed by the learned Single Judge, it has been observed that counsel appearing for the selected candidates had specifically stated that "records have already been examined by the Court and, therefore, the facts which are apparent on record cannot be explained".

34. In view of the above, there is no scope of any argument that the selected candidates had not been given any opportunity to find out as to whether the discrepancies pointed out by the learned Single Judge were correct or not. In order to do complete justice, we gave full opportunity to Shri Shailendra, learned counsel appearing for the appellants before us that the records examined by the learned Single Judge was available in the Court and he could inspect the same in the Court and point out any error in respect of the discrepancies recorded by the learned Single Judge. Either Shri Shailendra did not consider it proper to check the record and verify the facts himself or he did not consider it proper to report the matter back to the Court saying that he had seen the records and he had found that the findings recorded by the Court are not in accordance with record available in the Court.

35. Special Appeal No. 616 of 2006 is in respect of appointment on the post of Stenographers. Under the advertisement as well as the procedure prescribed, achievement of the minimum prescribed speed in shorthand and typing was a mandatory condition before which any selection could be made on the post of Stenographers. None of the learned counsel did attempt to challenge the finding recorded by the learned Single Judge in this regard. The speed of a candidate has to be worked out only after noting the mistakes, half mistakes, error in punctuations and paragraphing etc. Admittedly, the aforesaid procedure has not been followed at all in respect of any of the candidates. We, therefore, affirm the findings recorded by the learned Single Judge in this respect as well.

In view of the above, we do not find any merit in the submissions made by learned counsel for the appellants and the appeals are liable to be dismissed.

Special Appeal No. 730 of 2006

36. Shri V.S. Sinha, learned counsel appearing for the appellant in this appeal has submitted that the appellant had been appointed on ad hoc basis for a period of 90 days and continued in service for about two years. His services had been dispensed with, though he was entitled to be regularized.

37. The question as to whether the services of certain employees appointed on ad hoc basis should be regularised relates to the condition of service. The power to prescribe the conditions of

service can be exercised either by making Rules under the proviso to Article 309 of the Constitution of India or any analogous provision and in the absence of such Rules, under the instructions issued in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights and statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of Law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the haplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the Directive Principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. A perusal of the authorities would show that appointments are as a rule to be made in accordance with statutory rules, giving equal opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/Scheduled Tribes and other backward classes. Whenever the employees are appointed on ad hoc basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. Where the appointment on ad hoc basis has continued for long and the State has made rules for regularisation, case for regularisation of employee has to be considered in accordance with the said rules. Where, however, no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and their weak position has been exploited by keeping them ad hoc for a long spell of time. However, it is a question of fact whether in the given situation, they were treated arbitrarily. (Vide Dr. A.K. Jain & Ors. Vs. Union of India & Ors., (1987) Supp SCC 497; Jacob M. Puthuparambil & Ors. Vs. Kerala Water Authority & Ors., (1991) 1 SCC 28; J & K. Public Service Commission etc. Vs. Dr. Narinder Mohan & Ors., AIR 1994 SC 1808; E. Ramakrishnan & Ors. Vs. State of Kerala & Ors., (1996) 10 SCC 565; and Ashwani Kumar & Ors Vs. State of Bihar & Ors., AIR 1997 SC 1628).

38. In Khagesh Kumar Vs. Inspector General of Registration, & Ors., AIR 1996 SC 417, the Hon'ble Supreme Court did not issue direction for regularisation of employees who had been appointed on ad hoc basis or on daily wages after the cut off date, i.e., 1.10.1986 as was required by the provisions of U.P. regularisation of Ad hoc Appointment (On posts Outside the Purview of the Public Service Commission) Rules, 1979. The same view has been taken by the Supreme Court in Inspector General of Registration, U.P. & anr. Vs. Avdesh Kumar & ors., (1996) 9 SCC 217. Moreover, in the above referred cases it has been laid down that for the purpose of regularisation, various pre-requisite conditions are to be fulfilled, i.e., the temporary/as hoc appointment of the employee should be in consonance with the statutory rules and it should not be a

back-door entry. The service record of the employee should be satisfactory; the employee should be eligible and/or qualified for the post at the time of his initial appointment. There must be a sanctioned post against which the employee seeks regularisation and on the said sanctioned post, there must be a vacancy. Moreover, regularisation is to be made according to seniority of the temporary/ad hoc employees. The regularisation should not be in contravention of the State Policy regarding reservation in favour of Scheduled Castes/Scheduled tribes and other backward classes and other categories for which State has enacted any Statute or framed rules or issued any Government Order etc.

39. Similar view has been reiterated by the Hon'ble Supreme Court in Union of India Vs. Bishamber Dutt, (1996) 11 SCC 341; and State of Uttar Pradesh Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh, AIR 1996 SC 708. In the case of State of Himachal Pradesh Vs. Ashwani Kumar & Ors., (1996) 1 SCC 773, the Apex Court held that if an employment is under a particular Scheme or the employee is being paid out of the funds of a Scheme, in case the Scheme comes to closure or the funds are not available, the Court has no right to issue direction to regularise the service of such an employee or to continue him on some other project, for the reason that "no vested right is created in a temporary employment."

40. In Prabhu Dayal Jat Vs. Alwar Sahkari Bhumi Vikas Bank, 1991 Lab.& IC 944, the Court rejected the case of an employee, for regularisation as his services stood terminated on the ground that he had been appointed without any authorisation of law.

41. The question of regularisation does not arise by merely working for 240 days or any particular number of days, unless it is so long that his continuation on ad hoc basis becomes arbitrary as no such ad hoc employee can derive any benefit for working for particular number of days or even for years under the interim order of the Court. More so, his appointment should be directly in accordance with law. (Vide M.D. U.P. Land Development Corp. Vs. Amar Singh, AIR 2003 SC 2357; Pankaj Gupta Vs. State of J & K, (2004) 8 SCC 353 and Dhampur Sugar Mills Ltd. Bhola Singh, (2005) 2 SCC 470).

42. In Vinodan T. Vs. University of Calicut (2002) 4 SCC 726 and Mahendra L. Jain & Ors Vs. Indore Development Authority & Ors., (2005) 1 SCC 639, it has categorically been held by the Hon'ble Apex Court that the appointees appointed irregularly can be regularised but illegally appointed employees cannot be regularised. As illegal appointments are void ab initio being opposed to public policy and violative of Articles 14 and 16 of the Constitution, and all such authorities and instrumentalities which are State within the meaning of Article 12 of the Constitution, must give strict observance to the mandate of the Constitution. Regularisation can never be claimed as a mater of right. A daily wager in absence of statutory provisions in this behalf cannot claim entitlement for regularisation.

43. In A. Umarani Vs. Registrar, Co-operative Societies & Ors., (2004) 7 SCC 112, a large number of employees of

the Co-operative Societies in the State of Tamil Nadu had been appointed without notifying the vacancies through the Employment Exchanges and without following the other mandatory provisions of the Act and the Rules framed thereunder relating to recruitment. With a view to condone the serious lapses on the part of the Co-operative Societies in making such appointments the State Government issued various orders from time to time for regularizing such appointments. The Supreme Court held that such orders could not have been passed with retrospective effect condoning the actions on the part of the Co-operative Societies which were in flagrant violation of the provisions of the Act and the Rules. While holding that the provisions of the Act and the Rules reflect the Legislative Recruitment Policy and the provisions were mandatory in nature, the Supreme Court after referring to a number of earlier decisions held that an appointment made in violation of the mandatory provisions of the Statute would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization. While deciding the said case, reliance was placed on its earlier judgment in State of H.P. v. Suresh Kumar Verma and another, (1996) 7 SCC 562.

44. The Supreme Court in R.N. Nanjundappa Vs. T. Thimmaiah & Anr. (1992) 2 SCR 799 held:

"If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regulation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

45. In Jawaharlal Nehru Technological University Vs. T. Sumalatha (Smt.) & Ors., (2003) 10 SCC 405, the Supreme Court rejected a similar contention stating:

"8.....The learned counsel, therefore, contends that there is every justification for absorbing the respondents concerned on regular basis in recognition of their long satisfactory service. The learned counsel further contends that the ad hoc arrangement to employ them on consolidated pay should not go on forever. The contention of the learned counsel cannot be sustained for more than one reason and we find no valid grounds to grant the relief of regularisation. There is nothing on record to show that the employees concerned were appointed after following due procedure for selection. Apparently, they were picked and chosen by the University authorities to cater to the exigencies of work in the Nodal Centre."

46. The aforesaid decision in the case of A. Umarani (supra) was approved by the Supreme Court in the case of Executive Engineer, Z P Engg. Divn. & Anr. Vs. Digambara Rao etc. etc. 2004 AIR SCW 5546.

In State of West Bengal & Anr. Vs. Alpana Roy & Ors., (2005) AIR SCW 4920, the Hon'ble Supreme Court held

that if someone's name is included in the list of unapproved employees for a long time, mere empanelment would not give any right of regularisation in service if the appointment at the initial stage had been made de hors the recruitment rules.

47. In State of U.P. Vs. Neeraj Awasthi, (2006) 1 SCC 667, the Hon'ble Apex Court considered a similar case and held that the expression "regularization" has a definite connotation. Regularisation of services must be preceded by a legislative act or in the absence of legislation, Rules framed in terms of the proviso appended to Article 309 of the Constitution of India. The concept of regularization presupposes irregular appointments at the first instance so as to enable the employer to regularize the same.

48. In State of Bihar & Ors. Vs. Project Uchcha Vidya Shikshak Sangh & Ors., (2006) 2 SCC 545, the Hon'ble Apex Court held that question of regularization of services does not arise if the appointment has been made at initial stage in violation of the provisions of Article 14 and 16 of the Constitution of India.

49. It is also settled legal proposition that a retrenched employee cannot claim the relief of regularisation unless his termination from service is found to be illegal. Thus, only an employee who is continuing in service for a long time is eligible for seeking such a relief. (Vide H.P. Housing Board Vs. Om Pal & Ors, AIR 1997 SC 2685 and Ramchander & Ors Vs. Additional District Magistrate & ors, (1998) 1 SCC 183).

50. Thus, it is evident from the above settled legal proposition that a person who had been appointed on daily wages and worked for a period of 1 or 2 years, cannot claim regularisation in absence of any statutory provisions. He must possess the eligibility for the post on the date of initial appointment and the appointment should be made in consonance with the statutory provisions. Regularisation is not permissible ignoring the policy framed by the State providing for reservation in favour of certain classes. A retrenched employee cannot claim regularisation without asking for quashing his termination order. More so, regularisation may be either under a scheme framed by the employer or under the statutory provision framed by the State for this purpose.

51. In the instant case, it has fairly been conceded by Shri V.S. Sinha, learned counsel appearing for the appellant that his appointment had been made initially for a period of 90 days without advertising any vacancy or calling for names from the Employment Exchange. No order had ever been passed extending his services after expiry of 90 days. However, he was allowed to continue in service till it stood terminated vide order dated 1st May, 2003. He along with others filed the writ petition and obtained an interim order. Shri Sinha could not point out any provision or any Government Order providing for regularization of services of employees appointed illegally nor could he satisfy us that even if he had been illegally appointed, he had completed the period which might warrant consideration for regularization of his services. Contrary to this, the High Court had clarified its position vide letter dated 20th May, 2003 that no extension was permissible to the services of such persons nor appointment

could be made on ad hoc basis and the District Judge was directed to initiate proceedings for regular appointment. Shri Sinha could not assail the findings recorded by the learned Single Judge on any ground, whatsoever, and miserably failed to establish that any right had accrued in favour of such an illegally appointed person, which may warrant consideration for regularisation of his services.

52. It is a settled legal proposition that appointment to any public post is to be made by advertising the vacancy and any appointment made without doing so violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered.

53. In Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors., AIR 1992 SC 789, the Hon'ble Apex Court held that calling for names from Employment Exchange may curb to certain extent the menace of nepotism and corruption in public employment.

In State of Haryana Vs. Piara Singh, AIR 1992 SC 2130, the Hon'ble Supreme Court held as under:-

"Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly."

54. Any appointment made on temporary or ad hoc basis in violation of the mandate of Articles 14 and 16 of the Constitution of India is not permissible, and thus void as the appointment is to be given after considering the suitability and merit of all the eligible persons who apply in pursuance of the advertisement. In Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216, the larger Bench of the Hon'ble Supreme Court reconsidered its earlier judgment in Union of India & Ors. Vs. N. Hargopal & Ors., AIR 1987 SC 1227, wherein it had been held that insistence of requirement through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution, and held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the provisions of Articles 14 and 16 of the Constitution and even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the Employment Exchange does not meet the requirement of the said Articles of the Constitution. Same view has been reiterated in Arun Tewari & Ors. Vs. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331; Kishore K. Pati Vs. District Inspector of Schools, Midnapore & Ors., (2000) 9 SCC 405 and Subhash Chand Dhrupta & Anr. Vs. State of H.P. & Ors.,

(2000) 10 SCC 82. Therefore, it is settled legal proposition that no person can be appointed even on temporary or ad hoc basis without inviting applications from all eligible candidates and if any such appointment has been made or appointment has been offered merely inviting names from the Employment Exchange that will not meet the requirement of Articles 14 and 16 of the Constitution.

55. In view of the fact that the Hon'ble Apex Court has consistently been reiterating that even ad hoc appointments are to be made in accordance with the mandate of Articles 14 and 16 of the Constitution of India and even where the names are being requisitioned from the Employment Exchange, the advertisement in the newspapers having wide circulation is mandatory, we are of the considered opinion that no relief can be granted to the appellant herein nor there is any occasion for the Court to save such an illegal appointment. The appeal is liable to be dismissed.

Special Appeal No. 640 of 2006

56. This Special Appeal has been filed by the then District Judge, the Appointing Authority for setting aside the cost imposed upon him to the tune of Rs.25,000/-.

57. Shri Gajendra Pratap Singh, learned counsel for the appellant has submitted that the appellant has constituted a Selection Committee making one of the Additional District Judges as Member. Therefore, he cannot be fastened with any liability, whatsoever and the cost so imposed is unreasonable and is liable to be set aside.

58. On the one hand, Shri Yashwant Verma, learned counsel appearing for the High Court and Shri C.K. Rai, learned Standing Counsel appearing for the State have opposed the Special Appeal contending that even if the appellant has not committed any error or even if he was not involved in any fraud, he was solely responsible being the Appointing Authority and was guilty of supervisory negligence. Thus, the relief claimed cannot be granted.

59. In the writ petitions pending before learned Single Judge, appellant had been impleaded by name and was present in the Court on 4th April, 2006 and made a statement that he had not examined any of the answer sheets and, thus, was not in a position to explain the discrepancies noticed by the Court. He further suggested to the Court that the Chairman of the Selection Committee be asked to explain the aforesaid discrepancies and on his request Shri Vijay Kumar Agrawal, who had been one of the Members of the Selection Committee had filed an affidavit stating that "the entire records pertaining to the selections, after the examination, were kept under the direction of the District Judge at his residence, till the declaration of the result, i.e. 29th September, 2004". There is no rebuttal by the appellant to this affidavit filed by Shri Vijay Kumar Agrawal. The appellant was given time to produce the original cross-list prepared in respect of the selection and for that purpose, the matter had been adjourned but the same was not produced nor any explanation was furnished by the appellant as to why the same was not produced by him. However, the appellant produced a Photostat copy of the cross-list which had been prepared by the Chairman of the

Committee. No explanation was furnished regarding the non availability of the original cross-list on record by the appellant. Therefore, the authenticity of the Photostat copy of the cross-list produced by the appellant was also doubted. The original cross-list could have given a clue for arriving at a conclusion as to whether interpolation in the marks of the selected candidates had been done subsequent to the preparation of the original cross-list or not and as to what were the original marks awarded to the selected candidates. Shri Gajendra Pratap Singh was not in a position to rebut the statement made by the Member of the Selection Committee that the entire record of the examinations including the answer sheets was kept at the residence of the appellant from the date of the examinations nor could he furnish any explanation as to who had examined the copies and why the original cross-list was not available. The aforesaid facts not only raise a clear presumption against the appellant but also establish that the appellant has failed to dislodge the same and as such the only inference that can be drawn is that the findings recorded by the learned Single Judge cannot be doubted and deserve to be affirmed. Considering the magnitude of the malpractice in this case, there can be no justification for any indulgence, whatsoever, in this appeal. The learned Single Judge has been lenient while dealing with the appellant as we are of the considered opinion that it was a fit case for issuing directions for his criminal prosecution. At this juncture, Shri Verma suggested that this Court may even issue such directions. Considering the facts and circumstances of the case and taking into account the subsequent developments that the appellant has already been put under suspension and the disciplinary proceedings have been initiated against him, we are not inclined to issue direction for his criminal prosecution. However, it will be open for the High Court on the administrative side to take recourse to such proceedings.

60. In view of the above, we do not find any force in these Special Appeals. They are accordingly dismissed. Interim order passed in Special Appeal No. 640 of 2006, staying the recovery of the cost stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.10.2005

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.10944 of 2002

Rais Ahmad ...Petitioner
Versus
The Commissioner Allahabad Division, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Haider Hussain

Counsel for the Respondents:
C.S.C.

Indian Stamp Act 1998-S. 47-A-(9)-Limitation for taking action-four years-if the collector takes suo-moto collector bounds to give finding about market value circle rate fixed under the Act held prima facie evidence of market value-Order based on audit report-subsequent to impugned order-passed in violation of principle of Natural justice-illegal.

Held: Para 9 & 10

Under Section 47-A of the Stamp Act as amended by Act No. 22 of 1998 the Collector was bound to make enquiry

and also to give a finding on the market value of the property. He has merely referred to the audit objection in his order, which is no evidence of market value and has not applied his mind in determining market value of the property. The circle rate fixed under the Stamp Act is prima-facie evidence of market value of the area where the property is situated.

The mention in the impugned order that notice had been sent to the petitioner but no objection was filed appears to be incorrect. No notice or opportunity appears to have been given to the petitioner and the Collector has based his judgment on the audit report which was filed subsequently, as such the impugned orders dated 29.4.2002, 10.9.2001 and the order of reference passed in violation of the principles of natural justice are liable to be set aside.

Case law discussed:

1998 (1) U.P.L.B.E.C.-437

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

1. Heard learned counsel for the parties.

This writ petition is preferred against the order of reference dated 22.11.1999 made by the Sub-Registrar I, Chail, Allahabad and orders dated 29.4.2000 and 10.9.2001 passed by the Additional Collector, Sadar, Allahabad and the Commissioner Allahabad Division, Allahabad respectively appended as Annexures 2, 3 and 5 respectively to the writ petition.

2. The case of the petitioner is that one Hira Lal resident of Mundera Bazar, Allahabad was the owner of House No. 8 (New No. 12), Bara situate in the New Market, Bamrauli, Pargana & Tehsil Chail, Allahabad. He executed a registered sale-deed on 28.11.1994 in favour of the petitioner Rais Ahmad for a sale consideration of Rs. 3,60,000/- and paid Rs. 66,000/- as stamp duty on the valuation of Rs. 4,55,000/-. The sale-deed executed was in respect of a construction said to be 45 to 50 years old consisting of 4 Kotharies 8 feet X 8 feet; one thatched (Khaprail) verandah 10 feet X 15 feet; 2 thatched (Khaprail) Kotharis 10 feet X 15 feet; and Latrine, Bathroom and Sehan. The annual assessment of the construction was Rs. 1320/-.

3. The Collector, Allahabad had fixed the market value at circle rate of the said property for the purposes of stamp duty and valuation of the property itself according to the rates given in Annexure 1 to the writ petition. According to the aforesaid notification appended as Annexure 1 to the writ petition though the value of the property at the circle rate of Rs.600/- per square meter comes to Rs.4 Lacs but the petitioner paid stamp duty on the valuation of Rs.4,55,000/- in order to avoid any complication. The stamp duty paid on the valuation of Rs.4,55,000/-was Rs.66,000/-.

4. It is submitted by the learned counsel for the petitioner that after the sale-deed was executed the name of the petitioner was recorded in the revenue records in accordance with law after due publication in newspapers but no objection whatsoever was raised by the authority concerned. The Sub-Registrar, however, made a Reference to the Collector for enquiry on 22.11.1999 after a gap of more than 4 years of the execution of sale-deed on wholly incorrect facts alleging that there was deficiency of Rs. 96,947.50p in the stamp duty without showing the valuation of the property and the stamp duty paid thereon showing a deficiency of Rs. 96,947.50p. It

is urged that the Additional Collector, Sadar, Allahabad without issuing any notice to the petitioner and without inviting any objection or hearing the petitioner, approved the report of the Sub-Registrar on wholly irrelevant consideration without making any inquiry as required under Rules 340 (3), 341, 346, 347, 348, 349 and 350 of the Stamp Act and incorrectly mentioned in the order that notice was sent to the petitioner but he has not filed any objection. The petitioner has vehemently denied the allegations as wholly incorrect.

5. Aggrieved by the aforesaid order the petitioner filed a revision under Section 56 of the Stamp Act before the Commissioner, Allahabad Division, Allahabad wherein specific ground taken was that the sale-deed was executed on 28.11.1994 but the Reference was made on 28.11.1999, i.e., after a gap of more than 4 years. It was also a ground taken by the petitioner in the revision that no notice whatsoever was served upon him and the order was passed by the Collector without jurisdiction and without giving any opportunity of hearing to the petitioner. The petitioner also took a ground regarding valuation of the property at the circle rate of market value. The learned counsel for the petitioner has relied upon Section 47-A of the Stamp Act as applicable in the State of U.P., which provides as under: -

"The Collector may also, suo muto, or on a reference from any Court or from the Chief Inspector of Stamps Uttar Pradesh or any officer of the Stamp Department of the Board of Revenue within four years from the date of registration of any instrument mentioned in Rule 340, call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property forming the subject-matter thereof and shall follow the same procedure as laid down in Rules, 347, 349, 350 and 351 and, after taking such action as may be necessary, return the instrument to the authority from which it was received."

6. On the basis of the aforesaid provisions of Section 47-A as amended by Act No. 22 of 1998 w.e.f. 1.9.1998 it is urged that the Collector has failed to make any enquiry as required under the law. By amendment in Section 47-A a proviso has been added as under: -

"Provided that with the prior permission of the State Government and action under this sub-section may be taken after a period of 4 years from the date of registration of the instrument on which duty is chargeable on the market value of the property."

7. It is further submitted by the learned counsel for the petitioner that in the instant case the Collector on the reference of the Sub-Registrar **took cognizance after four years of the execution of the sale-deed but without obtaining any permission from the State Government** and thus the reference as well as the order of the Collector is wholly illegal and without jurisdiction. Reliance in this regard has been placed on a Full Bench decision of this Court rendered in ***Girjesh Kumar Srivastava & another Vs State of U.P. & Others, (1998) 1 U.P.L.B.E.C. 437***, wherein it is held that the limitation of four years contained in Section 47-A (4) applies to action which may be initiated by Collector and not to reference from any

Court or authorities enumerated therein. Starting point of limitation is registration of instrument and Rule 346 cannot be read in isolation but has to be read with Rule 352. Rule 346 cannot change the meaning of Section 47-A (4).

This point is dealt with in Paragraph 10 of the decision as under: -

"10. There is no dispute from either side that the starting point of limitation is the date of registration of the instrument and the period of limitation is four years. According to learned Chief Standing Counsel if a reference from any Court or Commissioner of Stamps or Addl. Commissioner of Stamps or a Dy. Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf is made within four years from the date of registration of the instrument, whether any action is taken by the Court or not, the proceedings would be within limitation. Shri Rajiv Joshi, learned counsel for the applicants has, on the other hand, contended that the limitation of four years is for the Collector to initiate action and the date on which a reference is made by a Court or authorities enumerated in the opening part of sub-section (4) of Section 47-A is irrelevant. The question which arises for consideration is whether the period of four years qualifies the action of the Collector or the making of reference. Under Sub-section (1) of Section 47-A the registering officer is required to make a reference to Collector before registering the instrument, while under sub-section (2) a discretion has been given to him to register the instrument and then make a reference to the Collector for determination of market value. In normal course of events this reference would be made immediately after registering the instrument and, therefore, the enquiry under sub-section (3) is likely to commence soon as the persons in whose favour the instrument has been executed would forthwith come to know about the reference and would be interested to get the matter concluded. In the first case the instrument would remain unregistered and in the second case he will not get back the instrument after registration on account of it having been referred to the Collector. Therefore, in cases covered by sub-section (1) and sub-section (2) at least the factum of reference would be immediately known to the person in whose favour instrument has been executed and he is bound to take all proceedings expeditiously in order to secure his title or get the benefits of the instrument. Under Sub-section (4) power has been conferred on the Collector to call for and examine the instrument after it has been registered for the purpose of satisfying himself as to the correctness of the market value of the property which is subject of such instrument and the duty payable thereon. The action can be taken either suo motu or on a reference from any Court or any one of the authorities enumerated in the sub-section. In our opinion, the language of the sub-section shows that the period of four years qualified the action which may be taken by the Collector. If the interpretation suggested by learned Chief Standing Counsel was correct, the sub-section would have read like this:

"The Collector may, suo motu or on a reference from any Court or from the Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in

that behalf made within four years from the date of registration of any instrument."

8. The learned Standing Counsel has denied the assertions made by the learned counsel for the petitioner and states that there has been an amendment in the Act by which the limitation is now eight years instead of four years and that the Collector has rightly accepted the auditors report for the purpose of market value. The provisions of Stamp Act do not empower auditors to determine market value or stamp duty payable under the Stamp Act.

CONCLUSIONS

9. Under Section 47-A of the Stamp Act as amended by Act No. 22 of 1998 the Collector was bound to make enquiry and also to give a finding on the market value of the property. He has merely referred to the audit objection in his order, which is no evidence of market value and has not applied his mind in determining market value of the property. The circle rate fixed under the Stamp Act is prima-facie evidence of market value of the area where the property is situated. No reasons have been given in the impugned order for holding market value above the circle rate. From the language of the Sub-section it is not possible to hold that the period of four years qualifies the reference made by the authorities of the Stamp Department and this question has been decided in the Full Bench decision in Girjesh Kumar Srivastava (Supra).

10. The mention in the impugned order that notice had been sent to the petitioner but no objection was filed appears to be incorrect. No notice or opportunity appears to have been given to the petitioner and the Collector has based his judgment on the audit report which was filed subsequently, as such the impugned orders dated 29.4.2002, 10.9.2001 and the order of reference passed in violation of the principles of natural justice are liable to be set aside.

11. For these reasons the petition is allowed and the impugned orders are quashed. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.05.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 1678 of 2006

Pradeep Kumar & others ...Applicants
Versus
The State of U.P. and another ...Opposite Parties

Counsel for the Applicants:
Sri Ram Babu Sharma

Counsel for the Opposite Parties:
Sri Tahabin Islam
Sri M.K. Gupta
A.G.A.

Code of Criminal Procedure-S-204-Summoning order-Power of Magistrate-offence under section 147/148/149/323/504/506 IPC-disclosed from statement, under section 200 and 202-held Magistrate can not travel beyond that independent witness not examined have no any substance unless prejudice caused to the accused/applicant.

Held: Para 10

At the stage of summoning under section 204 Cr.P.C. the Magistrate is required only to see as to whether any triable offence is made out from the complaint and the statements recorded u/s 200 and 202 Cr.P.C. or not? At that stage his power does not travel beyond that scope. This view is no longer res integra and has been cemented by volumes of decisions of both by this court as well as apex court. The contention of the learned counsel for the applicants thus is de horsed the law and is hereby rejected.

Case law discussed:

2005 (53) ACC-218
2000 (40) ACC-444

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

1. The present application has been filed by Pradeep Kumar, Rajeev Kumar, Vinay Kumar, Dharma Veer and Rajesh, with the prayer to set aside the judgment and order dated 4.2.2006, passed by Additional Sessions Judge/Special Judge, E.C. Act, Bulandshash, in criminal revision no. 482/05, Pradeep Kumar and others versus State of U.P. the applicants have also prayed for setting aside the order dated 16.8.2005 passed by Judicial Magistrate Ist, Bulandshahr in case no. 1765/05 u/s 147,148,149,323,504, 506 and 395 IPC P.S. Dibai, district Bulandshahr. By the aforesaid order dated 16.8.2005, the Judicial Magistrate has summoned the applicants for offences u/s 147,148,149,32,504,506 and 395 IPC and vide impugned order dated 4.2.2006 the Additional Sessions Judge/Special Judge, E.C. Act, Bulandshahr has rejected the revision filed by the accused challenging the aforesaid summoning order passed by the Judicial Magistrate. As the present applicants were summoned as an accused and their revision before the lower revisional court was also rejected, hence this application u/s 482 Cr.P.C. for quashing of both the orders.

2. The facts encapsulated are that a FIR was lodged on 9.3.2002 at 4 P.M. by the informant respondent no. 2 Manoj Kumar in respect of an incident alleged to have taken place on 10.1.2002 at 10.30 A.M., which was registered as crime no.145/05, u/s 147, 148, 149, 323, 504, 506 and 395 IPC, at P.S. Dibai, district Bulandshahr. In the aforesaid FIR the informant Manoj Kumar had made the present applicants an accused. It is important to note that the two applicants Rajeev Kumar and Vinay Kumar are the real brothers of the informant. The thumbnail sketch of the fact mentioned in the FIR was that the informant was also a partner in Kailash Gyan Talkies, which is situated on plot no. 203 Railway Road, Dibai. On 10.1.2002 at 10.30 A.M. he had gone to the accused Rajeev and Vinay Gupta who are his real brothers to inquire about the illegal construction over the plot as well as regarding the sale of the two generator sets, both belonging to the said Talkies. There, he was assaulted by the applicants with kicks, fists, *lathi* and *dandsa* and was also vituparised and threatened for life by the accused who were variously armed. Rajeev Kumar had a Katta in his hand and rest of the accused persons were armed with *lathi* and *danda.* Rajeev Kumar and Vinay broke the lock of the godown of the informant, looted his 687 bottles of Pepsi soft drink, snatched away his golden chain and Rs.213/- from the pocket of his shirt. The informant received injuries in the incident and got himself medically examined at PHC on 10.1.2002. On alarm being raised by the informant Hari Om, Titu and many others rushed to the spot and saved the informant. As the report of the informant

was not recorded by the police hence he filed an application before the higher officers alongwith his injury report but all in vain, therefore, he filed an application before the SSP, Bulandshahr and at his instance the FIR of the informant was registered against the culprits. A copy of the said FIR is annexure 1 to the affidavit filed in support of this application. The medical examination report of the informant has not been annexed alongwith the present application by the applicants. The police of Police Station Dibai, after the investigation submitted a Final Report in the crime vide annexure 2 to this application. The protest petition of the informant dated 17.9.2002 in the said F.R. Case No. 17 of 2002 was treated as complaint by the Additional CJM, Anoop Shahar titled as Manoj Kumar Versus Rajeev Kumar and others. The statement of the informant was recorded u/s 200 Cr.P.C. and that of his witnesses Hari Om, Dr. Awadh Bihari, Hari Shankar Varshney and constable Deep Chand Singh u/s 202 Cr.P.C. All the above witnesses supported the informant's version in all material particulars. Dr. Awadh Bihari stated that he had examined the injured Manoj Kumar on 10.1.2002 at 4 P.M. and he had received four injuries. Additional Chief Judicial Magistrate vide his order dated 29.8.2003 summoned the present applicants for the offences mentioned above. Accused filed an application for granting time but their application was rejected on 15.12.2003. Aggrieved by the both the above orders dated 29.8.2003 and 15.12.2003, the applicant accused Pradeep Kumar filed a revision before the Sessions Judge, Bulandshahr being criminal revision no. 71/04. Additional Sessions Judge, Bulandshahr vide his judgment and order dated 25.7.2005 (annexure 8) remanded the matter back with a direction that one of the offences was triable by court of sessions and the Magistrate had not followed the procedure provided under proviso to section 202 (2) Cr.P.C. therefore, he directed the Magistrate to record the statement of witness Titu s/o Danveer and then pass a reasoned order in accordance with law on the complaint of the respondent no. 2. After the receipt of the record, the trial court by his order-dated 16.8.2005 (annexure 9) again summoned the applicants as accused for the offences u/s 147,148,149323,504,506 and 395 IPC. In the summoning order the Magistrate has observed that after receiving the record from the lower revisional court, witness Titu had filed an application alongwith an affidavit that he had been wrongly named as a witness in the aforesaid case and the informant had also filed an application that since Titu had connived with the accused persons, therefore, the informant respondent no. 2 did not rely on his testimony and therefore, Titu be discharged. In this backdrop since the complainant did not rely upon the witness Titu, therefore the Magistrate, on the material available on the record, had passed the summoning order on 18.6.2005 (annexure 9). Aggrieved by the summoning order (annexure 9) the present accused applicants preferred a revision being criminal revision no. 482/05 which was heard and rejected by the Additional Sessions Judge/Special Judge E.C. Act, Bulandshahr vide order dated 4.2.2006 (annexure 10). Therefore this application for setting aside the impugned orders as is mentioned in the opening part of this judgment.

3. I have heard Sri Ram Babu Sharma learned counsel for the applicant,

Sri T.B. Islam and Sri M.K. Gupta learned counsels for the respondent no. 2 complainant and learned AGA at great length and have gone through the record.

4. Sri Ram Babu Sharma learned counsel for the applicants contended that the Magistrate must examined all the witnesses and since the evidence of Titu was not recorded by him, therefore the impugned summoning order as well as revisional court's order, deserves to be quashed. He further contended that at the stage of summoning the Magistrate must look into the evidence of witnesses, who had not support the complainant and since the independent witness did not come forward to support the complainant respondent no. 2, therefore, proceedings should be quashed. He lastly but half-heartedly contended that proceedings are malafide and deserves to be quashed.

5. Learned counsel for the respondent no. 2 and learned AGA, contrarily, submitted that there was no need for the Magistrate to record the statement of Titu since he was not the witness of the complainant and the complainant had discharged him. They contended that under the proviso to section 202 (2) Cr.P.C. the complainant is obliged to examine only those witnesses, on whom he places reliance. They further contended that since proceeding is not malafide and in any view of the matter cognizable offences are disclosed against the present applicants, therefore, they must be prosecuted. They also contended that the prosecution cannot be nipped into the bud as cognizable offences are disclosed and disputed question of facts can not be adjudicated upon u/s 482 Cr.P.C. to thwart the legitimate prosecution. They further contended that the present application is devoid of merit and deserves to be rejected.

6. Considering the first contention of the learned counsel for the applicants I find no merit in it. The proviso to section 202 (2) Cr.P.C. reads thus:-

"Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the court of Sessions, he shall call upon the complainant to produce all ---------- witnesses and examine them on oath."

7. A bare reading of the said proviso indicates that u/s 202 (2) Cr.P.C. the complainant is obliged to examine all his witnesses if the offence is triable by court of Sessions. The connotation "all his witnesses" means only those witnesses on whom the complainant places reliance. If he does not place reliance on any witness, then he is not obliged to examine that witness under the aforesaid proviso. Any witness on whom the complainant does not places reliance is not "his witness". It is not the mandate of law that the complainant should examine even those witnesses on whom he does not rely and to whom he does not want to produce before the court in support of his allegations made in the complaint.

8. Learned counsel for the applicants has placed reliance on the judgment reported in **2005 (53) ACC page 218 Sat Pal and others versus State of U.P. and others.** In the aforesaid judgment it has nowhere been held that the complainant is obliged to examine even those witnesses, on whom he does not place reliance and which are not his witnesses. The apex

court in **2000 (40) ACC 444 Rosy and another versus State of Kerala and others** has held:

I wish to add that the Magistrate in such a situation is not obliged to examine witnesses who could not be produced by the complainant when asked to produce such witnesses.....I reiterate that if the Magistrate omits to comply with the above requirement that would not, by itself, vitiate the proceedings."

9. Further, in the case of Satpal (supra), this court has also held that unless and until prejudice is caused to the applicant no proceeding can be quashed, merely because of non-examination of some of the witnesses by the complainant on whom he does not repose trust and does not want to examine during the trial. Thus the aforesaid judgment is of no help to the present applicants and the first contention of the learned counsel for the applicant being contrary to the enactment itself is merit less and is consequently rejected.

10. Considering to the second contention of the learned counsel for the applicants that the Magistrate, at the stage of summoning, should also take into consideration the fact that the independent witness had not supported the complainant's version and therefore he should not summon the accused is concerned, the same also does not have any substance in it. At the stage of summoning under section 204 Cr.P.C. the Magistrate is required only to see as to whether any triable offence is made out from the complaint and the statements recorded u/s 200 and 202 Cr.P.C. or not? At that stage his power does not travel beyond that scope. This view is no longer res integra and has been cemented by volumes of decisions of both by this court as well as apex court. The contention of the learned counsel for the applicants thus is de horsed the law and is hereby rejected.

The last contention of the learned counsel for the applicants is that the proceeding is malafide and deserves to be quashed. This submission also does not hold good. Since cognizable offence is disclosed by the evidence produced by the complainant respondent no. 2, in the present case, therefore, there is no reason to dub the prosecution as malafide. The disclosure of the cognizance offence on the facts of the case by itself is an ample proof of the fact that the prosecution is not malafide. Thus this argument of the learned counsel for the applicants is also merit less and is rejected. There was no other point, which has been urged by the learned counsel for the applicants.

In view of what has been stated above, I do not find any merit in this application, which is liable to be rejected.

This application is rejected. Stay order granted by this court on 20.2.2005 is hereby vacated.

Let a copy of this order shall be sent to the trial court within a period of one week from today for further action.

Application Rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.07.2006

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.K. MISRA, J.

Criminal Jail Appeal No. 4263 of 2004

Raju Tyagi ...Appellant (In Jail)
Versus
State ...Respondents

Counsel for the Appellant:
Sri Samit Gopal

Counsel for the Respondent:
Miss. N.A. Moonis
A.G.A.

Indian Penal Code-offence under section 394,302,411 and 25 Arms Act-Trail Court acquitted the co-accused but held guilty to the appellant under Section 394 IPC-Punishment to undergo life imprisonment awarded-eye witness himself is informant-who supported the prosecution version-can not be discarded as the other eye-witnesses turned hostile. Held-conviction can not be assailed.

Held: Para 13

It is well settled that if an eye-witness who himself was the informant of the case supports the prosecution case as given in the F.I.R., his evidence cannot be discarded only due to the fact that all other eye-witnesses named in the F.I.R. have turned hostile. Moreover, the statement of the hostile witness is not always to be discarded in totally. The statement of the hostile witnesses can be taken for corroboration of the evidence given by the other witnesses. In the present case, we find that the statement of P.W. 4 Goving finds corroboration from the statement of the hostile witnesses in great deal as to time, place and manner of happening. The conviction of the appellant, therefore, cannot be assailed on the ground of the hostility of some witnesses.

(Delivered by Hon'ble K.K. Misra, J.)

1. This appeal arises out of the judgment and order dated 17.3.2004 passed by Sri Vishram Singh, Addl. District & Sessions Judge, Bulandshahr convicting the appellant Raju Tyagi under section 394 IPC and sentencing him to undergo life imprisonment.

2. As per the F.I.R. lodged by Subhash Chandra Verma on 18.8.2000 at 9.05 A.M. there was a shop of jewellery comprised in his house in town Gulaothi. On 18.8.2000 at about 8.30 A.M., his nephew Sachin was cleaning the shop. Three miscreants came at the shop armed with country made pistols and started looting the ornaments. When he resisted, the miscreants assaulted him with the butts of the pistols and also fired a shot. On hearing the sound of the firing and cries, Sachin's mother rushed to the shop. The miscreants also gave her beating and escaped with the gold and silver ornaments and Rs.3000/- in cash. On hearing the cries, a mob chased them. When the miscreants reached near the Bus Stand, the miscreants opened fire and shot-dead Manohar Lal. The mob killed a miscreant and caught hold of another (Raju Tyagi present appellant) and handed him over to police. One miscreant succeeded in escaping. The looted material consisted of ornaments made of 2 Kgs. Silver and 5 gms. gold. Besides this, Rs.3000/- case was also looted.

3. Another F.I.R. was lodged by Govind stating that his brother Manohar

Lal was going towards his hotel in Gulaothi when he saw the miscreants running. Manohar Lal struck a miscreant with his cycle and the miscreant fell down upon which the miscreant fired a shot at his brother by country made pistol. Manohar Lal fell down and died at the spot. One of the miscreants was killed by the public. The present appellant Raju Tyagi was apprehended by public and handed over to the police. The third miscreant ran away. This second report was lodged on 18.8.2000 at 9.15 A.M.

4. S.I.P.C. Bharti, P.W. 6 started investigation of the case on the first F.I.R. and the papers of second F.I.R. were also handed over to him. He inspected the place of robbery and prepared the site plan. Thereafter, he reached at Dholana Bus Stand and inspected that spot, prepared site plan where he found the corpse of Sanavvar miscreant. He collected three live cartridges of 315 bore from the side of the corpse. He collected blood stained earth and plain earth. He prepared the inquest reports of the dead bodies of miscreant Sanavvar and Manohar Lal deceased and sent the same for post mortem examination. The investigation of the case was then taken over by S.O. V.P. Singh.

5. After completion of the investigation charge-sheet against the accused Raju Tyagi under sections 394,302 IPC and against the accused Munavvar under sections 394, 302/411 IPC and u/s 25 Arms Act was submitted.

The accused in their statements under sections 313 Cr.P.C. denied the prosecution story and claimed trial.

6. The prosecution in order to prove its case against the accused examined six witnesses, namely, P.W. 1 Subhash Chandra, the first informant, P.W. 2 Smt. Poonam, P.W. 3 Sachin, P.W. 4 Govind, P.W. 5 Deepak and P.W. 6 S.I.P.C. Bharti.

7. P.W. 1 Subhash Chandra, the first informant of the case was the owner of goldsmith shop. He deposed in his evidence that on the date of the incident, his nephew Sachin Kumar (P.W. 3) was cleaning the shop at about 8.30-45 A.M. Three miscreants came at the shop armed with country made pistols. He narrated the story as given in the F.I.R. He further deposed that he could not catch up with the mob in chasing the miscreants. He heard that the miscreants fired a shot at Manohar Lal as a result of which he died. He further deposed that when he reached at the But Stand, he found a miscreant and the deceased Manohar Lal dead. He came to know there that one miscreant was handed over to the police and another ran away. Some jewellery and one country made pistol were lying near the dead body of the miscreant. He further deposed that he did not see the incident and he could not recognise the accused Raju Tyai and Munavvar. He further deposed that he came to know about the incident from his sister-in-law Smt. Poonam (P.W. 2). The witness was declared hostile.

8. P.W. 2 Smt. Poonam, who, as per the F.I.R., had seen the incident did not recognise the two accused and turned hostile.

9. P.W. 3 Sachin in his deposition narrated the story of the F.I.R. and further stated that when the miscreants after loot ran away towards the Hospital, he did not

chase them and remained at his shop. He denied having seen that the miscreants had killed someone. This witness also did not recognise the two miscreants as accused and he could also not recognise the looted articles. He was also declared hostile.

10. P.W. 4 Goving deposed in his evidence that on 18.8.2000 at about 8.40 A.M., he was sitting at his brother Rajendra's shop near the shop of the first informant Subhash Chandra Varma. Three miscreants came at the shop of the first informant and after looting, fired a shot. A mob gathered there. Then the accused Raju Tyagi, Sanavvar and Munavvar flaunting their country made pistol ran away. The mob chased them and so chasing the mob reached at Bus Stand. He was also one of the chasers. He further deposed that his brother Manohar Lal struck his cycle against accused Sanavvar and he caught hold of him. The accused Raju Tyagi fired a shot at his brother which hit him in the chest and he died at the spot. The mob killed the miscreant Sanavvar. The miscreant Munavvar ran away from the spot. The mob caught hold of the accused Raju Tyagi and handed him over to the police.

11. The trial court acquitted Munavvar of the charges punishable under sections 394,302,411 IPC and section 25 Arms Act but found accused Raju Tyagi guilty under section 394 IPC and sentenced him to undergo life imprisonment. He was also acquitted of the charge under section 302 IPC.

12. We have heard Sri Samit Gopal for the appellant who was appointed as amicus curiae by this Court's order dated 23.9.05 and learned A.G.A. for the State.

13. Firstly, learned counsel for the appellant argued that the three eyewitnesses in the case turned hostile and did not support the prosecution case. Therefore, the conviction of the present appellant on the basis of the statement of P.W. 4 Govind is not sustainable, more so when accused Munavvar was acquitted of all the charges. It is well settled that if an eye-witness who himself was the informant of the case supports the prosecution case as given in the F.I.R., his evidence cannot be discarded only due to the fact that all other eye-witnesses named in the F.I.R. have turned hostile. Moreover, the statement of the hostile witness is not always to be discarded in totally. The statement of the hostile witnesses can be taken for corroboration of the evidence given by the other witnesses. In the present case, we find that the statement of P.W. 4 Goving finds corroboration from the statement of the hostile witnesses in great deal as to time, place and manner of happening. The conviction of the appellant, therefore, cannot be assailed on the ground of the hostility of some witnesses.

14. The main plank of argument of the learned counsel for the appellant is that the co-accused Munavvar was acquitted of all the charges on the same set of evidence whereas the present appellant has been convicted under section 394 IPC on the same set of evidence. This, according to him, is bad in law and cannot be sustained.

15. On the other hand, learned A.G.A. argued that there is clear cut distinction between the case of the acquitted accused Munavvar and the present appellant and on the facts of the case, the conviction of the present

appellant is perfectly legal being based on sterling evidence against him.

16. It is important to not that the other accused Munavvar was not arrested at the spot. His name came to light by the testimony of P.W. 4 Govind. He was not put up for identification. There is no evidence of any recovery of looted article from his possession. It has come in the evidence of P.W. 1 Subhas Chandra that no property was recovered from the accused Munavvar in his presence. It has come on record that when the accused Munavvar had produced the looted property of his share to the police on the patri of Bamba, P.W. 1 Subhash Chandra reached there and identified the looted property but later on in his evidence, he deposed that no property was recovered from the accused Munabbar in his presence. There is no evidence on record to this effect that any recovery of looted property was made from the possession of accused Munavvar. That recovery memo has also not been proved. The other police personnel have also not been examined by the prosecution in whose presence accused Munavvar allegedly produced the looted articles.

17. The facts found by the trial court in support of the conviction of the present appellant are that the accused-appellant Raju Tyagi was arrested at the spot by the mob while running away with the looted property. There is no evidence to infer that Raju Tyagi was arrested by the mob while he was waiting for the bus. On the other hand, there is sufficient evidence that he was among the miscreants, who committed robbery and voluntarily caused hurt and death of Manohar Lal. The present appellant has admitted his arrest by people in his statement under section 313 Cr.P.C. The factum of robbery at the given time, date and place has been established by the three eyewitnesses also who turned hostile. It has also been established that some of the looted articles were recovered from the side of the dead body of one of the miscreants and that property was taken in custody by the police after preparation of recovery memo. This fact has been corroborated by P.W. 6 S.I.P.C. Bharti.

18. P.W. 4 Govind is real brother of the deceased Manohar Lal. He specifically deposed that appellant Raju Tyagi caused death of his brother Manohar Lal when he struck his cycle against Sanavvar. When these miscreants were running towards Dholana Bus Stand and were being chased by the people, he fired a shot which hit his brother who died on the spot. Sanavvar was killed by the public and Raju Tyagi (present appellant) was arrested by the public on spot and some of the looted articles were also lying besides the dead body of one miscreant. In the written report lodged by P.W. 4 Govind Singh ate P.S. Gulaothi, it is stated that at Dholana Bus Stand one miscreant was struck down by his brother Manohar Lal and then he caught hold of the miscreant. Then the miscreant fired a shot with his country made pistol at his brother who died on the spot. The miscreants also attempted to fire at the gathering and in the meanwhile one of the miscreants was killed by the public and another miscreant was apprehended by the people and handed over to the police.

19. It has come in the testimony of P.W. 1 Subhash Chandra that some of the looted ornaments were recovered that were lying beside the dead body of one miscreant. They were taken in possession

by the police and memo (Ex.Ka. 2) was prepared. P.W. 6 P.C. Bharti has also corroborated this fact. In our view, the trial court rightly held that one of the miscreants opened fire and voluntarily caused deatrh of Manohar Lal for the purpose of carrying away the looted property. Therefore, in view of the provision of section 394 IPC, even if it was assumed that it was Sabavvar who had opened shot, Raju Tyagi would also be held guilty under Section 394 IPC as he was also jointly concerned in committing robbery.

20. Thus, from the above, we find that the followings facts have been proved beyond doubt:

(a) that a robbery was committed by the three miscreants at the shop of the first informant Subhash Chandra.

(b) that while committing robbery the miscreants fired shots from their country made pistols;

(c) that on hearing the cries and sound of firing a mob gathered there and the miscreants ran away taking looted articles with them;

(d) that on the way to Bus Stand, when the deceased Manohar tried to catch them, one of them fired a shot which hit him and he died on the spot;

(e) that the mob still chased them and killed one of the miscreants Sanavvar and caught hold of another, namely, the present appellant and handed him over to the police;

(f) that the third miscreant escaped and ran away;

(g) that the looted articles and country made pistols were found lying near the dead body of miscreant and the deceased Manohar Lal; and

(h) that all the above facts were seen by P.W. 4 Govind.

21. From the above, it is clearly established that the prosecution well succeeded in proving its case against the appellant Raju Tyagi under section 394 IPC beyond any reasonable doubt. The factum of death of Manohar Lal is covered by the charge under section 394 IPC and it has been rightly held by the trial court that the charge framed under section 302 IPC was redundant.

22. In the last, learned counsel for the appellant argued that the sentence of appellant be reduced to the period undergone. He further argued that the appellant was not earlier involved in any criminal case.

23. In the result, the appeal is partly allowed. The order of conviction passed by the court below against the accused appellant Raju Tyagi is upheld but his sentence of life imprisonment under section 394 IPC is reduced to that of ten years' rigourous imprisonment. The appellant is in jail. The C.J.M. Bulandshahr, shall ensure that he undergoes the awarded sentence of ten years' rigorous imprisonment.

24. Sri Samit Gopal amicus curiae who argued this appeal shall get Rs.1000/- as his fee.

25. Let original record of the trial court be returned along with a copy of this judgment for compliance. Compliance be reported by the concerned Chief Judicial Magistrate to this Court within two months. Appeal Partly Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2006

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 5652 of 2006

Lakesh Mehta ...Petitioner
Versus
Sri S.K. Jha, Asstt. General Manager-I, State Bank of Patiala and others ...Respondents

Counsel for the Petitioner:
Sri G.C. Saxena

Counsel for the Respondents:

Constitution of India, Art. 226- Departmental proceeding and Criminal proceeding for the same charges-going on-petitioner being cashier-found guilty of shortage of Rs.2,11,09,500/- criminal proceeding for offence under section 120-B, 409, 13 (2) 13 (1) (C)(d) of prevention of corruption Act-as well as the disciplinary proceeding with allegations about not following prescribed procedure for maintenance of cash chest-simultaneously going on-both charges in both proceeding are quite distinct and different in nature-disciplinary proceeding can not be stayed.

Held: Para 5

A perusal of the departmental charge sheet, which is annexed with the petition, shows that the charge leveled against the petitioner in the domestic enquiry is that he failed to perform his duties effectively resulting in shortage of cash inasmuch as he did not follow the prescribed procedure for maintaining the cash chest. Other charge relates to non-filing and noting down the details of the currency notes held in various bins in separate register for tallying with the currency chest register. As already observed above, charge before Criminal Court is dishonestly misappropriating the money of the bank and using it to his own benefit by making investments and speculations in stock market. Both the charges are entirely different and the evidence to prove the two charges would obviously be different.

Case law discussed:
1992 (82) FLR 627
2004 LLR-950
W.P. 36479 of 05 decided on 4.5.05

(Delivered by Hon'ble D.P. Singh, J.)

Heard counsel for the petitioner.

1. This petition is directed against the orders dated 11.11.2005 and 17.1.2006. By the former order, the departmental proceedings have been initiated against the petitioner and, by the latter order, his request for stay of proceedings has been rejected.

2. At the relevant time the petitioner was Head Cashier of the State Bank of Patiala at Ghaziabad and was also joint custodian of the cash Chest, Bins etc., wherein the cash of the Reserve Bank of India is kept. On 3.5.2005 the Currency Verification Officer was deputed for verifying the cash held in the chest as a part of structured cash verification exercise. He found a shortage of Rs.2,11,09,500/- in the cash chest. A First Information Report was lodged against the petitioner and another joint custodian and a departmental enquiry was initiated where charges were framed on 13.10.2005. After investigation in the criminal case, a charge sheet under sections 120-B, 409 IPC read with section 13 (2), 13 (1) (c) (d) of Prevention of Corruption Act was submitted to the Court with the allegation that the petitioner dishonestly misappropriated

and utilized for his own use the aforesaid cash of the Reserve Bank of India by making investments and speculation in stock market in his own name or in the name of his family members or fictitious persons from June, 2003 onwards through M/s Citi Capital Services, Meerut.

3. The petitioner approached this Court on a earlier occasion claiming that both the charges were the same and so was the evidence and therefore the domestic enquiry should be stayed. A Learned Single Judge of this Court vide his order dated 16.12.2005 remitted the matter to he Disciplinary Authority stating that if the charges were same and the evidence was same, the authority may consider the stay of departmental enquiry. By the second impugned order, the claim has been rejected by the Disciplinary Authority which is now also under challenge.

4. Learned counsel for the petitioner has again repeated the same argument that since the charges before the Criminal Court and Disciplinary Authority were same, the disciplinary enquiry should be stayed.

5. The Apex Court in the case of **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and another [1999 (82) FLR 627** and **State Bank of India and others Vs. R.B. Sharma (2004 LLR 950)** has held that the departmental proceedings and the criminal case can go on simultaneously except where the departmental proceedings and the criminal case area based on the same set of facts and evidence in both the proceedings are common. A perusal of the departmental charge sheet, which is annexed with the petition, shows that the charge leveled against the petitioner in the domestic enquiry is that he failed to perform his duties effectively resulting in shortage of cash inasmuch as he did not follow the prescribed procedure for maintaining the cash chest. Other charge relates to non-filing and noting down the details of the currency notes held in various bins in separate register for tallying with the currency chest register. As already observed above, charge before Criminal Court is dishonestly misappropriating the money of the bank and using it to his own benefit by making investments and speculations in stock market. Both the charges are entirely different and the evidence to prove the two charges would obviously be different.

6. The petitioner has then sought parity on the basis of an interim order passed in **writ petition no.36479 of 2005 (Prafulla Kumar Vs. Sri S.T. Mukkawar, Inquiring Authority and others)** dated 4.5.2005. No doubt, a Division Bench of this Court has stayed departmental proceedings due to pendency of the criminal case but the petitioner has neither annexed copies of the charge sheet of the criminal case nor of the departmental enquiry to demonstrate as to whether both the charges were identical. Thus, this contention of the petitioner can also not be accepted.

7. For the reasons given hereinabove, I do not find that this is a fit case for interference under Article 226 of the Constitution of India. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.7.2006

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

Civil Misc. Writ Petition No. 44799 of 2000

Shashi Kant Tiwari ...Petitioner
Versus
Senior Superintendent of Police, Gorakhpur ...Respondent

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Sanjiv Kumar

Counsel for the Respondent:
Sri Wasim Alam
Sri J.P. Singh
S.C.

U.P. Police Officer of the Subordinate Ranks (Punishment and Appeal Rules, 1991-rule-8 (2)(b)-Petitioner being posted as Police constable-on picket duty-by giving wrong information about his ailment got leave on 28.8.98-caught traveling on India Nepal border with some foreign cell phone-on the basis of preliminary inquiry-charge sheet served on 13.5.2000-based upon which straightway order of dismissal passed dispense of enquiry procedure without recording any reason-can not said bonafide-order can not sustained.

Held: Para 11

So far the case in hand is concerned it is not a case covered under Rule 8(2) (c) of the Rules and admittedly according to own submission of the learned State Counsel the matter is covered under Rule 8 (2)(b) of the Rules and thus this Court is to be satisfied that the disciplinary authority has recorded reasons in writing to the effect that proceeding with the normal procedure is not reasonably practicable. On examination of the facts as has come on record and averments as contained in the counter affidavit this Court is not satisfied that any reasons has been recorded by the disciplinary authority that holding of the normal enquiry procedure as prescribed III law is not reasonably practicable. To the contrary the facts reveal that at all stages petitioner co-operated with the enquiry i.e. in respect to the preliminary enquiry and even thereafter when the charge sheet was given to him and thus this Court is convinced that only in view of nature of charge as submitted by Sri Alam that it appears to be of some grave nature the dispensation of the enquiry can not be said to be justified. The power to dispense the normal enquiry procedure is not to depend on the whims of the disciplinary authority. There is a purpose behind conferring of the power to dispense with the enquiry procedure and thus that is to be exercised III a bonafide manner. The reasons in writing are to recorded and the reasons which are to be indicated has to be in consonance with the grounds so mentioned in the Rule. Even if the reasons have been recorded by the concerned authority and if that cannot be substantiated/justified from the facts and circumstances and record then the reasons even if is recorded can be safely termed to be arbitrary and whimsical. As indicated above, so far the case in hand is concerned, in view of the fact that evidence of several witnesses have been collected during the preliminary enquiry and petitioner promptly moved in response to the charge sheet by submitting his reply, this Court has already observed that dispensation of the normal procedure of enquiry cannot be said to be just and proper. To support the aforesaid view, reliance as has been placed by the learned counsel for the petitioner on the decision as has been given in the case of Simarjeet Kaur (Supra) can be safely referred. In the decided case by this Court as referred above on this short ground the impugned action of the respondent was quashed with the liberty to take fresh decision in

the matter in accordance with law with the further r direction that as petitioner was placed under suspension prior to passing of the impugned order that suspension was permitted to continue till the respondent takes fresh decision as directed. This Court has clearly ruled in the decision in the case of Simarjeet Kaur (Supra) that decision if is taken to hold departmental enquiry against the petitioner then is to be completed within a reasonable time and if the respondents feel that the departmental proceeding in the facts and circumstances of the case is not practicable a clear reason has to be recorded.

Case law discussed:

2006 ALR 433

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

1. Heard Sr:i Shashi Nandan, Senior Advocate in support of this petition and Sri Wasim Alam, Standing Counsel in opposition thereof.

2. By means of this writ petition, petitioner has challenged the order of dismissal from service dated 25.9.2000 (annexure no. 1 to the writ petition) passed by the S. S. P., Gorakhpur.

3. There appears to be no dispute about certain facts and, therefore, by giving brief summary the writ petition can be conveniently disposed of.

4. Petitioner was working as Constable in U. P. Police and he was posted at Police Station Tiwaripur, district Gorakhpur. On the ground that on 27.8.1998, petitioner was posted on a picket duty but by giving a wrong information about his ailment he got leave and on 28.8.1998 he was caught travelling with another man at India Nepal Border along with some foreign cell phones having its value about Rs. 14.75 lakhs, he was placed under suspension by order dated 3.9.1998 and thereafter a preliminary enquiry report was submitted on 17.2.2000 and a charge sheet was served on the petitioner on 13.5.2000 and thereafter straightway the impugned order of dismissal from service dated 25.9.2000 came to be passed by the respondent which is under challenge in this petition.

5. Learned counsel for the petitioner submits that the charges leveled against the petitioner, as replied by him pursuant to the charge sheet are totally wrong, baseless and on some misconception of the facts petitioner has been proceeded and In any view of the matter the submission is that petitioner was entitled to get an opportunity to participate in the regular enquiry and the impugned order could have been passed by the disciplinary au thority only after resorting to the fu 11- fledged procedure of the enquiry so provided in the rules. Submission is that petitioner has not been afforded any opportunity in the enquiry proceedings which can be said to have taken place After issuance of the charge sheet and after getting the reply no enquiry proceeded and straigh taway the order has been passed. Submission is that the shelter as has been taken by the respondent to the provisions as contained in Rule 8(2)(b) of the U.P. Police Officers Of the Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the Rules) have absolutely no application to the facts of the present case and, therefore, dispensation of the enquiry as provided under the Rule 8(2)(b) of the Rules cannot be said to be justified. Submission is that neither any proper reasons has been recorded for dispensing the enquiry nor otherwise on the facts its dispensation can be said to be

justified and, therefore, on this short ground the impugned action is liable to be quashed. In support of the aforesaid, learned counsel placed reliance on a judgment given by this Court in the case of Smt. Simarjeet Kaur Vs. State of U. P. reported in 2006 A.L.R. 433.

6. In response to the aforesaid Sri Alam, learned Standing, Counsel submits that the reasons have been given in the impugned order for dispensing the enquiry which is to the effect that as the petitioner is involved in a major crime/offence and there is every apprehension that on account of his fear the witnesses will not give any evidence, resorting to the regular enquiry may not be possible and, therefore, the impugned order has been passed by the disciplinary authority on the basis of preliminary enquiry report. Sri Alam on the basis of various details as has been given in para 4 and 6 of the counter affidavit submits that as the past conduct of the petitioner has also not been good, as at present he was found to be involved in grave offence keeping the petitioner in force was found to be not sati factory, the disciplinary authority has rightly, on a consideration of these facts dismissed the petitioner from service by dispensing the regular procedure of enquiry to which no exception can be taken.

7. In view of the aforesaid, the court has examined the'matter.

8. There is no dispute about the fact that the charge on which the petitioner was placed under suspension is dated 28.8.1998 and thereafter quite long time passed and the department has been able to collect the statement of several witnesses on the basis of which a preliminary report was submitted on 17.2.2000. Preliminary enquiry report contains the statements of five witnesses namely S/Sri Mohd. Asjad, Akshybar Yadav, Mahatam and Jhinak besides that of the petitioner. It is on the basis of the statements and other evidence so collected by the Enquiry Officer preliminary enquiry report was submitted on 17.2.2000 and charge sheet was given to the petitioner on 13.5.2000. There is no allegation whatsoever in the counter affidavit that at any point of time either at the stage when the occurrence/arrest is said to have taken place on 28.8.1998 or even thereafter at the time of collecting the evidence for the purpose of submitting the preliminary enquiry i.e. while getting the statement of the witnesses, any threat was given by the petitioner to any of the witnesses or he ever prevented any official from getting any evidence collected rather the facts as has come on record clearly reveals that statement of large number of witnesses have been recorded by the enquiry officer in which the statement of the petitioner was also recorded and thus on the facts this Court is not convinced that it was a case of there being any threat/prevention from the side of the petitioner in collection of any evidence if the enquiry officer so desired. On the basis of the preliminary. enquiry report, a charge sheet was given to the petitioner on 13.5.2000 to which he promptly replied on 22.5.2000 i.e. within a couple of days which also clearly indicates bonafides on the part of the petitioner to co-operate in the enquiry proceedings.

9. Needless to say that provisions as contained in Rule 8(2)(b) of the Rules clearly mandates the disciplinary authority that before dismissal, removal or

reduction of rank of a police officer proper enquiry and disciplinary proceeding as contemplated by Rules is to be undertakel}, The dispensation of the enquiry is just by way of exception and that is permitted only if the disciplinary authority records reasons in writing to the effect that it is not reasonable to hold such enquiry or where authority is satisfied that holding of enquiry is not in the interest of the security of the State and thus is not expedient to hold such enquiry.

10. For convenIence relevant provISIOn as contained In Rule 8 (2)(b) (c) of the Rules can be quoted at this place:

> "8(2)(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or
> 8(2) (c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry"

11. So far the case in hand is concerned it is not a case covered under Rule 8(2) (c) of the Rules and admittedly according to own submission of the learned State Counsel the matter is covered under Rule 8 (2)(b) of the Rules and thus this Court is to be satisfied that the disciplinary authority has recorded reasons in writing to the effect that proceeding with the normal procedure is not reasonably practicable. On examination of the facts as has come on record and averments as contained in the counter affidavit this Court is not satisfied that any reasons has been recorded by the disciplinary authority that holding of the normal enquiry procedure as prescribed III law is not reasonably practicable. To the contrary the facts reveal that at all stages petitioner co-operated with the enquiry i.e. in respect to the preliminary enquiry and even thereafter when the charge sheet was given to him and thus this Court is convinced that only in view of nature of charge as submitted by Sri Alam that it appears to be of some grave nature the dispensation of the enquiry can not be said to be justified. The power to dispense the normal enquiry procedure is not to depend on the whims of the disciplinary authority. There is a purpose behind conferring of the power to dispense with the enquiry procedure and thus that is to be exercised III a bonafide manner. The reasons in writing are to recorded and the reasons which are to be indicated has to be in consonance with the grounds so mentioned in the Rule. Even if the reasons have been recorded by the concerned authority and if that cannot be substantiated/justified from the facts and circumstances and record then the reasons even if is recorded can be safely termed to be arbitrary and whimsical. As indicated above, so far the case in hand is concerned, in view of the fact that evidence of several witnesses have been collected during the preliminary enquiry and petitioner promptly moved in response to the charge sheet by submitting his reply, this Court has already observed that dispensation of the normal procedure of enquiry cannot be said to be just and proper. To support the aforesaid view, reliance as has been placed by the learned counsel for the petitioner on the decision as has been given in the case of Simarjeet Kaur (Supra) can be safely referred. In the decided case by this Court as referred above on this short ground the impugned

action of the respondent was quashed with the liberty to take fresh decision in the matter in accordance with law with the further r direction that as petitioner was placed under suspension prior to passing of the impugned order that suspension was permitted to continue till the respondent takes fresh decision as directed. This Court has clearly ruled in the decision in the case of Simarjeet Kaur (Supra) that decision if is taken to hold departmental enquiry against the petitioner then is to be completed within a reasonable time and if the respondents feel that the departmental proceeding in the facts and circumstances of the case is not practicable a clear reason has to be recorded.

12. Be as it may, on the facts and discussion as made above, this court being convinced that the impugned order as on today cannot be sustained proposes to quash the same. Writ petition is hereby allowed. The impugned order passed by the respondent dated 25.9.2000 (annexure no. 1) is hereby quashed with the liberty to the respondents to proceed in the matter in terms of the judgment of this Court as contained in para 9 in the case of Simranjeet Kaur (Supra).

Accordingly the writ petition is allowed/ disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.10.2005

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

Civil Misc. Writ Petition No. 19746 of 2001

Ram Briksha Singh ...Petitioner
Versus
Deputy Director Consolidation, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri Ram Prakash Rai
Sri Satyendra Narayn Singh

Counsel for the Respondents:
Sri L.K. Tripathi
S.C.

Constitution of India, Art. 226-Practice & Procedure-necessity to recording the reasons-No reasons recorded-while setting a side the order passed by the S.O.C.-impugned order passed by D.D.C. not supported by any reason-held-liable to be quashed.

Held: Para 8

Reverting to the decision impugned herein, from a careful consideration of the judgment rendered by Deputy Director Consolidation, it is amply clear that no reasons have been recorded by the authority while accepting the case of the revisionist. It is also clear that the authority concerned h as not reckoned into consideration the case of the petitioner while allowing the revision and setting aside the order of Settlement Officer Consolidation. In the circumstances, I have no hesitation to hold that the judgment impugned herein is not supported by any reason and therefore, the same is bad in law on account of non-consideration of the grievances of both the parties and by

this reckoning, the same is liable to be quashed.

Case law discussed:

AIR 1978 SC-851
2005 (2) SCC-235

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

1. Challenge in this petition is directed against judgment dated 31.3.2001 passed by Deputy Director, Consolidation.

2. The dispute in the instant petition revolves round chak no. 82 belonging to the petitioner. According to the averments in the petition, the respondent no. 3 staked claim for allotment of this Chak before the Deputy Director Consolidation by filing a revision. The case of the petitioner is that the Deputy Director Consolidation allowed the revision without regard being had to the background of the facts and without reckoning with the objection filed by the petitioner.

3. The chequered history of the pendency of this writ petition from 2001 onwards in this Court may be noticed before proceeding further. The writ petition having been instituted, the Court granted six weeks' time on 21.5.2001 to file counter affidavit. Sri L.K. Tripathi who filed power to represent Opp. Party no. 3 was further granted two weeks' time to file counter affidavit. On 18.2.2003, the case had to be adjourned the illness slip having been put in on behalf of the learned counsel for the Opp. Party no. 3. On 17.7.2003, the case again suffered adjournment on account of illness slip of learned counsel appearing for Opp. Party no. 3 on 18.12.2003, two weeks and no more time was granted to the learned counsel for the Opp. Party no.3 to file counter affidavit. Again on the request of the learned counsel appearing for Opp. Party no.3, the case was adjourned on 5.2.2004. The case was again adjourned on 10.5.2004 on account of illness slip of the learned counsel representing Opp. Party no. 3. The petition came to be admitted on 15.7.2004 granting three weeks' time to the counsel for the Opp. Party to file counter affidavit. On 30.9.2004 the court was compelled to direct listing of the case peremptorily. Even thereafter on 30.10.2005, the case was adjourned on the illness slip of the learned counsel for the Opp. Party no. 3. In the above perspective, this Court does not view with equanimity the temporizing attitude of the counsel in the matter and is constrained to decline request for further time to file counter affidavit and rules that the matter be heard today.

4. Learned counsel for the petitioner assailed the judgment rendered by Deputy Director Consolidation arguing that it suffers from an error of law apparent on the face of record inasmuch as there is complete non-application of mind to the case of the petitioner in the impugned order and further that no reason is embolied in the impugned order and ultimately, it has been argued that the impugned order has occasioned great irreparable injury to the petitioner. Per contra, learned counsel appearing for Opp. Party urged that although no reason has been assigned for conclusion by the authority concerned but the same can be supplied by way of counter affidavit. He further submitted that it brooks no dispute that the respondent no. 3 was repeatedly granted time in the last four years to file counter affidavit and even once, stop order was passed by the Court on 18.12.2003 but it remains a fact that no counter affidavit has been filed and

therefore, it is not open to the petitioner at this stage to assail the decision on the solitary ground that the impugned order is bereft of reasons.

5. I have heard learned counsel for the parties and perused the materials on record with the assistance of the learned counsel for the parties.

6. Coming to grips with the contention of the learned counsel for the respondent no.3 that the reasons could be supplied by counter affidavit, I feel called to refer to the decision of the Apex Court in Mohinder Singh v. Chief Election Commissioner[1]. The Apex Court in this decision was dealing with the amplitude of powers and width of functions to be exercised by Election Commission under Art. 321. In this decision, the substance of what the Apex Court held is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and the same cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. It was further observed that otherwise, an order bad in the beginning may, by the time, it comes to court on account of a challenge, get validated by additional grounds later brought out. The Apex court also referred to observations made in Gordhandas Bhanji (AIR 1952 SC 16 (at p. 18) which is quoted below.

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

7. In another recent decision in MMRDA Officers Association Kedarnath Rao Ghorpade v. Mumbai Metropolitan Regional Development Authority[2] the Apex Court held that reasons substitute subjectivity by objectivity. Right to reason is an indispensable part of a sound judicial system. The affected party can know why the decision has gone against him. In the ultimate analysis, the Apex Court remitted the matter to the High Court for fresh consideration on merits observing that the High Court shall pass a speaking order recording reasons in support of its conclusions. In its decision (supra), the Apex Court referred to various foreign decisions including (1971) I All ER 1148 and 1974 ICR 120. The crux of what has been held in the aforesaid decisions is that "Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at." Taking into reckoning the aforesaid decision, the Apex Court observed as under:

"Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the inscrutable face of the sphinx, it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the

[1] AIR 1978 SC 851

[2] (2005) 2 SCC 235

decision. Right to reason is an indispensable part of a sound judicial system. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirement of natural justice is spelling out reasons for the order made, in other words, a speaking out. The inscrutable face of the sphinx is ordinarily incongruous with a judicial or quasi judicial performance."

8. Reverting to the decision impugned herein, from a careful consideration of the judgment rendered by Deputy Director Consolidation, it is amply clear that no reasons have been recorded by the authority while accepting the case of the revisionist. It is also clear that the authority concerned has not reckoned into consideration the case of the petitioner while allowing the revision and setting aside the order of Settlement Officer Consolidation. In the circumstances, I have no hesitation to hold that the judgment impugned herein is not supported by any reason and therefore, the same is bad in law on account of non-consideration of the grievances of both the parties and by this reckoning, the same is liable to be quashed.

9. By various decisions, while sitting in this jurisdiction, the Court has been stressing on the need of giving reasons by these authorities under the U.P. Consolidation of Holdings Act but even thereafter, cases have come to fore which gives appearance that the decisions of this Court have not been enforced in obedience. The Court should be concerned with actual implementation of its order and cannot remain a passive pronounce of the judgment.

10. It is hoped that the authority concerned will be visited with condign chastisement for not observing in compliance the earlier pronouncements of the Court in this regard.

11. As a result of foregoing discussion, the writ petition succeeds and is allowed. The order dated 31.3.2001 passed by Deputy Director, Consolidation is quashed. In consequence, the Deputy Director Consolidation, Gorakhpur is directed to pass appropriate orders attended with reasons in accordance with law after affording opportunity of hearing to the parties. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 11.07.2006

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No. 34488 of 2006

Santosh Kumar Goel ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Goel

Counsel for the Respondents:
Sri Vishnu Pratap
S.C.

U.P. Minor Minerals (Concession) Rules, 1963-Rule 6-A-Renewal of Mining lease-application for renewal by 7 days-beyond time-instead of rejecting the same-D.M. once referred the matter before State Government-Rejection on the ground of delay-held-not proper-D.M. ought to have either rejected or give opportunity to remove the defect-order quashed-necessary direction issued to give

opportunity to explain the delay-process the application for renewal accordingly.

Held: Para 12

The said Rule 7 of Rules, 1963 uses the expression 'application' in the case of 'application for renewal' of mining lease. Rule 8 of Rules, 1963, which requires State Government to process the application for renewal of mining lease subject to satisfaction of requirement of the other Rules and also after making such other inquiry as it may consider necessary. If application to 'renew mining lease' is not filed before six month (as contemplated under Rule 6-A of Rules, 1963) the application was certainly not in order and in absence of an application for condonation of delay it should be treated as defective or incomplete. To this extent, the District Magistrate had no jurisdiction to entertain the applications of the petitioner and refer it to the State Government. The fact that application without condonation of delay, was entertained and referred to the State Government, if the provisions of Rules 6 (2) are kept in mind the District Magistrate was supported to have given notice requiring applicant (petitioner) to complete the application in this respect also. If application for condonation of delay was essential the District Magistrate should have rejected the application himself on the ground of being incomplete (instead of recommending to the Government for condoning the delay).

(Delivered by Hon'ble A.K. Yog, J.)

1. Heard learned counsel for the petitioner and Shri Vishnu Pratap learned standing counsel on behalf of the respondents and perused the record.

2. The petitioner, who held earlier mining lease, which was to expire, submitted an application for renewal, as contemplated under Rule 6-A, U.P. Minor Minerals (Concession) Rules, 1963. The said application was found in order under Rules 6-A read with Rule 6 of the said Rules, 1963. There was no application/prayer to condone delay in filing this application.

3. The District Magistrate/District Mines Officer, however, found that there was delay of 7 days in submitting the application, i.e. 7 days beyond six months as referred to in Rule 6-A of the Rule 1963. The District Magistrate referred the matter to the State Government with the recommendation to condone the delay as provided under Rule 6-A (2) of Rules, 1963. The State Government rejected application of the petitioner vide impugned order dated May 19, 2006/annexure- 9to the writ petition on the ground that the petitioner has failed to show cause for the delay in submitting application for renewal of mining lease in his favour.

4. The petitioner has prayed for issuing a writ order or direction in the nature of certiorari quashing the impugned order dated 19.5.2006 passed by respondent no.1/State of U.P. (annexure-9 to the writ petition) and also a writ of mandamus commanding the respondents-authorities to condone the delay of 7 days in filing the lease and another writ of mandamus to direct the respondent Nos. 1 and 2 to sign the lease deed and other usual lease deed.

5. Vide our order-dated 6.7.2006, this Court required the respondents to produce original record containing applications of all the applicants (including the petitioner) in the matter for

renewal of lease. Consequently, original record has been placed before us.

6. We have perused the report/order dated 3.12.2005 passed by the District Magistrate wherein he found that the application was in accordance with rules but 7 days delay be condoned by the State Government.

7. It is conceded by the learned standing counsel that there is no provision in Rules, 1963 requiring an applicant to submit an application for condonation of delay or give explanation or disclose the cause of delay and give justification to satisfy that ground given is sufficient to warrant condonation of delay.

8. It is argued by the Standing Counsel that unless application is filed giving cause for delay, the State Government is not in position to assess/adjudicate the sufficiency of cause of the delay.

9. The petitioner submitted that applications for condonation of delay in the case of others (even though the delay in submitting application by those applicants was for larger period) were allowed by the State Government.

10. Learned counsel for the petitioner submitted that before application for renewal is rejected an opportunity ought to have been given to submit reasons/cause for seeking condonation of delay. In support of his argument, reference is made to Rules 6, 6-A, 7 and 8 of the Rules, 1963 which are reproduced for convince:

6. Application fee and deposit for grant of mining lease.-

(1) Every application for grant of a mining lease shall be accompanied by-

(a) a fee one thousand rupees,
(b) a deposit of two thousand rupees for meeting the preliminary experiences, others than those specified in Rule 17, and
(c) four copies of the cadastral survey map on which the area applied for is clearly marked and in case such area is not covered by cadastral survey, four copies of topographical surrey on a scale at least 4" =1 mile, on which the area applied for is accurately marked.
(d) a certificate, issued by the District Officer or by such officer as may be authorised by the District Officer in this behalf, showing that no mining dues are outstanding against the applicant:

Provided that further that such certificate shall not be required where the applicant has furnished an affidavit to the satisfaction of the State Government, stating that he does not hold or had not held any mining lease or any other mineral concession in the territory of the State.

(e) a certificate of caste and residence of the applicant, where the application is for mining lease of sand or morrum or bajri or boulder or any of these in mixed state.
(f) a character certificate given by the District Officer of the District, where the applicant permanently resides.

(2) If the application is not complete in any respect or is not accompanied by the

fee deposit or the documents mentioned in sub rule (1) the District Officer or the officer authorised by the State Government in this behalf, shall, by fifteen days notice require the applicant to complete the application in all respect or, to deposit the fee or furnish the documents within such time as may be specified in the notice and if the applicant to do so within the specified time such application shall not be considered.

6-A. Application fee etc. for renewal of mining lease-

(1) An application for renewal of mining lease may be made at least six months before the date of expiry of the mining lease along with four copies of the map of lease hold area showing clearly the area applied for renewal and the provisions of clause (a) and (b) of sub rule (1) of Rule 6 shall mutatis mutandis.

(2) The State Government may condone the delay caused in making the application for renewal of mining lease after the period specified in sub rule (1).

7. Enquiry and Report- The District Officer shall, unless he is authorize to grant or renew the mining lease, cause an enquiry to be made into all relevant masters and, within two months from the date of receipt of application or mining lease, forward two copies of the application along with his report to the State Government or to such other authority as the State Government may have authorised in this behalf.

8. Disposal of application-

(1) The State Government or the authority authorised by it in this behalf may subject to the provisions of these rules and after making such further enquiry as it may consider necessary-

(a) in case of application for grant of a mining lease refuse or grant the mining lease for the whole or part of the area applied for and for such period as it may consider proper.

(b) in the case of application for renewal of a mining lease, refuse or renew the mining lease for the whole or part of the are applied for and for such period, not exceeding the period of the original lease, as it may consider proper.

Provided that where an application for grant or renewal of a mining lease is refused or the area is reduced, reasons therefore shall be recorded and communicated to the applicant.

11. Learned counsel for the petitioner referred to Rule 6 (2) of Rules, 1963 and pointed out that District Officer is required for giving 15 days notice in case application is not complete in any respect of Rules 6 (1) of Rules, 1963. It is contended that application for renewal is also an application and, therefore, if 'application for renewal' is not complete, District Magistrate ought to have given opportunity in this respect to remove the defect. In support of his argument, learned counsel for the petitioner referred to Rule 7, which requires District Officer to cause an inquiry to be made into all relevant matters and within two months from the date of receipt of application of mining lease forward two copies of application

(along with his report to the State Government).

12. The said Rule 7 of Rules, 1963 uses the expression 'application' in the case of 'application for renewal' of mining lease. Rule 8 of Rules, 1963, which requires State Government to process the application for renewal of mining lease subject to satisfaction of requirement of the other Rules and also after making such other inquiry as it may consider necessary. If application to 'renew mining lease' is not filed before six month (as contemplated under Rule 6-A of Rules, 1963) the application was certainly not in order and in absence of an application for condonation of delay it should be treated as defective or incomplete. To this extent, the District Magistrate had no jurisdiction to entertain the applications of the petitioner and refer it to the State Government. The fact that application without condonation of delay, was entertained and referred to the State Government, if the provisions of Rules 6 (2) are kept in mind the District Magistrate was supported to have given notice requiring applicant (petitioner) to complete the application in this respect also. If application for condonation of delay was essential the District Magistrate should have rejected the application himself on the ground of being incomplete (instead of recommending to the Government for condoning the delay).

13. In this view of the matter, we find that the impugned order dated 19.5.2006 (annexure-9 to the writ petition) cannot be sustained and is liable to be set aside.

14. The impugned order dated 19.5.2006 is hereby set aside with a direction to the respondent no. 1 to consider the application afresh after giving full opportunity to the petitioner to submit explanation for condonation of delay to avoid delay as matter is quite old. We further direct the petitioner to file certified copy of this Judgment along with an application for condonation of delay before respondent no. 1 within four weeks from today and if the petitioner files an application for condonation of delay, as stipulated, respondent no. 1 shall decide the same in accordance with law within one month of receipt of such application.

15. While dealing with the instant case, we are of the opinion that the rules framed are inadequate and it is advisable that specific provision be made requiring the applicant, in the case of renewal of mining lease, to file an application for condonation of delay and adequate admendment be incorporated in rules to avoid ambiguity in future. For this purpose, a copy of this Judgment shall be sent to the Principal Secretary, Industrial Development for consideration of the State Government to take steps, in order to avoid unnecessary litigation in Court on this issue, if so advised.

16. Petition stands allowed. No order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2005

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 44671 of 2004

Shri Kishore and another
...Defendant/Petitioner
Versus
Roop Kishore ...Plaintiff/Respondent

Counsel for the Petitioners:
Sri Amit Saxena

Counsel for the Respondent:
Sri Sudhir Dixit

Code of Civil Procedure-Order 41 Rule 27-Additional evidence-application for taking opinion from expert hand writing-field after 11 months after filing the Appeal-held-can not be allowed-case not covered under 3 clauses of rule 27 of Order 41.

Held: Para 9

The appellate court can thus direct a party to adduce additional evidence only if the conditions under Rule 27 of Order 41 C.P.C. are satisfied. Additional evidence in appeal cannot be filed by any party to the appeal as of right. Since the case of the respondent for adducing additional evidence is not covered under any of the three clauses of Rule 27 of Order 41 C.P.C., the appellate court has erred in law in passing the impugned order dated 27.9.2004, allowing the application of the respondent to produce additional evidence.

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

1. Petitioners Shri Kishore and Bacchan Babu as well as respondent Roop Kishore are all real brothers having their landed properties situated in the village. After the death of their father, they inherited the property in the ratio of 1/3rd share each. According to the petitioners, on 27.2.2001 a family partition took place between the three brothers in presence of the Panchayat and other witnesses, in which the respondent Roop Kishore left his 1/3rd share in favour of the petitioners, after taking a sum of Rs. 22,000/- in lieu of his share in the property. Thereafter, on 12.3.2001, respondent Roop Kishore filed Original Suit no. 126 of 2001 against the petitioners in the court of Civil Judge (Junior Division), Aligarh for partition of his 1/3rd share in the joint property. The said suit was contested by the defendant-petitioners. The trial court, vide its Judgment and Order dated 16.11.2002, dismissed the suit of the plaintiff-respondent with cost. Against the said Judgment and Order of the trial court, the plaintiff-respondent Roop Kishore filed appeal on 24.12.2002, which was registered as Civil Appeal No. 10 of 2003 in the court of District Judge, Aligarh. After lapse of more than 15 months of filing of the appeal, the respondent Roop Kishore filed an application under Order 41 Rule 27 C.P.C. before the appellate court for obtaining the opinion of a Hand-writing expert with regard to his signatures on the partition deed dated 27.2.2001. Petitioners filed objections to the said application and after hearing the learned counsel for the parties, the appellate court, vide its order dated 27.9.2004, allowed the said application of the respondent. Aggrieved by the said order, the petitioners have filed this writ petition.

2. I have heard Sri Amit Saxena, learned counsel for the petitioners, as well as Sri Sudhir Dixit, learned counsel for the respondent and have perused the record. Counter and rejoinder affidavits have been exchanged and with the consent of the learned counsel for the parties, this writ petition is being disposed of at this stage.

3. The respondent can adduce additional evidence at the appellate stage only under the provisions of Order 41 Rule 27 C.P.C., which reads as under:-

"27. Production of additional evidence in Appellate Court.- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –
(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or
(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,
the Appellate Court may allow such evidence or document to be produced or witness to be examined.
(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

4. The contention of the defendant-petitioners is that the application for adducing additional evidence at the appellate stage could have been entertained only if the same was within the ambit of the provisions of Order 41 Rule 27 C.P.C. It was submitted that since in the present case, the conditions of the said rule were not fulfilled, the appellate court has erred in law in allowing the same and that, accordingly, the impugned order was liable to be quashed.

5. Sri Sudhir Dixit, learned counsel for the plaintiff-respondent, has however submitted that the burden of proving the document (partition deed dated 27.2.2001) was on the defendant-petitioners, as they had filed the said document and thus it was the duty of the defendant-petitioners to have called for a report from the Hand-writing expert; and since the same was not done before the trial court, the respondent had filed the application for calling for such a report from the hand-writing expert to verify the signature of the plaintiff-respondent on the said partition deed, which has rightly been allowed, being covered by the provisions of sub-rule (1) (aa) of Rule 27 of Order 41 C.P.C. Learned counsel for the respondent has further submitted that to meet the ends of justice, the appellate court can always require any document to be produced or any witness to be examined, to enable it to pronounce judgment or for any other substantial cause, and thus case of the respondent would also be covered under the provisions of Order 41 Rule 27 (1) (b) C.P.C.

6. Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view, the appellate court has erred in allowing the application of the plaintiff-respondent and as such the said order deserves to be set aside. It is not the case of the respondent that he was not given sufficient opportunity to produce evidence before the trial court. In the facts of the present case, the submission of the learned counsel for the respondent that under section 103 of the Indian Evidence Act, the burden to prove a particular fact would lie on the person who wishes the court to believe in its existence, does not

have much force. It is true that the defendant-petitioners had filed the document dated 27.2.2001 and it was their duty to prove the same. However, it is evident from a perusal of the order of the trial court that for such purpose the petitioner no.1, besides producing himself as witness, had also produced the scribe of the document as well as an attesting witness of the document, who were duly cross examined by the plaintiff. It has been categorically observed by the trial court that the plaintiff-respondent was given ample opportunity to produce evidence in his favour but instead, the plaintiff-respondent did not produce any of the eight signatories of the document in question, nor did he make any application for getting the document examined by any hand-writing expert. Thus it cannot be said that the defendant-petitioners did not discharge their duty to prove the authenticity of the document which they were relying upon. The real test in the present case would be to see as to whether what the respondent is wanting to do by filing an application under Order 41 Rule 27 C.P.C. before the appellate court, could have been done by him before the trial court or not. The answer to the same, in the present case, would be that the respondent could have called for a report of a hand-writing expert even before the trial court, for which he had sufficient opportunity. As such, since he did not avail such opportunity, he cannot thereafter be granted a fresh chance to adduce additional evidence before the appellate court.

7. The next submission of the learned counsel for the respondent is that even after exercising due diligence, the respondent could not adduce such evidence before the trial court because it was only after the judgment of the trial court that he realised that the duty was cast on him to disprove the document and he thus contended that the case would be covered under clause (aa). The said submission is not tenable in law as in case if after the judgment of the trial court, a person is permitted to better or improve upon his case, then the entire purpose of Order 41 Rule 27 C.P.C. would be defeated. When the defendants-petitioners had adduced evidence to prove the document before the trial court, it was open to the plaintiff-respondent to produce adequate evidence in support of his case to disprove the said document (partition deed). The Apex Court in the case of **Natha Singh vs. The Financial Commissioner** AIR 1976 S.C. 1053 has observed as follows:-

"So far as the application of the appellants for additional evidence is concerned, it cannot be allowed in view of the well settled principles of law that the discretion given to the appellate court to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations prescribed in Order 41 Rule 27 of the Code of Civil procedure. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored. The true test to be applied in dealing with applications for additional evidence is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced."

8. In the present case also, the prayer for adducing the additional evidence has been made by the respondents merely to fill up the gaps in this case. In my view, the case of the respondent would thus not be covered under clause (b) also, as it is only in exceptional and extraordinary circumstances that the appellate court may, on its own, direct production of any document or witness only to enable it to pronounce the judgment or for any other substantial cause. There is no substantial cause placed before me on the basis of which, on its own, the appellate court could have directed the additional evidence to be adduced. As observed by the Apex Court in the case of Nathu Singh (supra), the true tests in such a case would be as to whether the appellate court is able to pronounce the judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced. In the present case, in my view, the appellate court could have pronounced the judgment without the additional evidence sought to be produced by the respondent, as evidence regarding proof of the document had already been adduced by the parties before the trial court. The parties cannot be given opportunity to better the case or adduce additional evidence only to fill up gaps left out in the case before the trial court, or else this would be a never ending process, and the parties would continue to move applications for adducing additional evidence at every stage of the proceedings.

9. The appellate court can thus direct a party to adduce additional evidence only if the conditions under Rule 27 of Order 41 C.P.C. are satisfied. Additional evidence in appeal cannot be filed by any party to the appeal as of right. Since the case of the respondent for adducing additional evidence is not covered under any of the three clauses of Rule 27 of Order 41 C.P.C., the appellate court has erred in law in passing the impugned order dated 27.9.2004, allowing the application of the respondent to produce additional evidence.

10. Accordingly, this writ petition is allowed. The order dated 27.9.2004 passed by the Additional District Judge, Aligarh in Civil Appeal No. 10 of 2003 is quashed. Both the sides have submitted that as the appeal is pending since 2003, it may be disposed of at the earliest. Accordingly, it is provided that the lower appellate court shall decide the appeal expeditiously, preferably within six months from the date of filing of a certified copy of this order before it, without granting any unnecessary adjournment to either party.

No order to cost. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2005

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Contempt Application/Petition No.2140 of 2004

Deo Narain Gupta ...Applicant
Versus
Mohammad Ahmad Saleem and another ...Opposite Party

Counsel for the Applicant:
Sri J.P. Singh
Sri Dhirendra Singh

Counsel for the Opposite Parties:
Sri Nurul Hude

S.C.

Contempt of Court Act. S-12 practice and procedure proceeding initiated for non compliance of final judgment contemnor taken plea about pending of special appeal even section 5 application not decided- in the eye of law no stay application pending hearing of contempt proceeding can not be deferred.

Held-Para 9

In my opinion, the filing of a belated appeal by the opposite party was to circumvent the order passed by the Court. Till date, nothing has been indicated as to what steps, the opposite party has taken to get the application under Section 5 of the Limitation Act decided or get the appeal decided on merit. At the present moment, the present appeal filed by the opposite party is defective and the stay application does not exist in the eyes of law. Consequently, deferring the hearing of the contempt application cannot be granted to the Opposite party.

Case law discussed

Crl. Appeal no. 841/01 decided on 20.08.01
1995 Suppl. (4) SCC 465
1992 (4) SCC-164
2004 (7) SCC-261
2005 SCC (Crl.) 1357

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

1. This Court finally allowed the writ petition No.21103 of 1999 by a judgment dated 26.3.2004 quashing the impugned order dated 28.6.95 and holding that the petitioner would be deemed to be in service till 30.6.97 and would be entitled to all consequential benefits including salary and retirement benefits. The respondents were further directed to pay the entire arrears of salary within 8 weeks from the date of the submission of a certified copy of the order. The respondents were also directed to pay the retirement benefits treating the applicant to be in service till 30.6.1997.

2. The judgement of this Court was not complied by the opposite party and accordingly the present contempt application was filed on 28.7.2004. Notices were issued to the opposite party No.1 on 29.7.2004 and one more opportunity was granted to the opposite party to comply with the order of the Court. On 17.9.2004, the opposite party No.1 filed a counter affidavit indicating that the opposite party has sought instructions from the higher authorities for the compliance of the order and prayed that the hearing of the contempt petition be adjourned for two months· to enable the opposite party to take a decision and comply with the orders of the Court.

3. During the pendency of the contempt application, it transpires that the opposite party No.1 was transferred and an impleadment application was filed to implead the opposite party No.2, who was subsequently impleaded by an order dated 21.7.2005. The opposite party No.2 has also filed a counter affidavit indicating that the State Government by a letter dated 18.3.2005 granted permission to file a Special Appeal, pursuant to which a Special Appeal No. 289 of 2005 was filed and, therefore has prayed that the contempt proceedings be deferred till the disposal of the Special Appeal.

4. Sri Nurul Huda, the Standing Counsel appearing for the opposite party contended that since the Special Appeal is pending consideration before this Hon'ble Court, the contempt proceedings should be kept in abeyance till the disposal of the Special Appeal. In support of his

submission, the learned counsel placed reliance upon a decision of the Supreme Court in **Ram Avadh Singh vs. Lalji Yadav and others, in Criminal Appeal No.841 of 2001** decided on 20.8.2001, in which it was held that the contempt proceedings should have not been continued in view of the appeal having been filed against the said judgment. Further reliance was placed in the case of **Modern Food, Industries (India) Ltd. And another vs. Sachidanand Dass and another, 1995 Supp (4) SCC 465** and in the case of **State of J & K vs. Mohd. Yaqoob Khan and others, 1992(4) SCC 167.**

5. In my opinion, the aforesaid judgements are distinguishable. No doubt if an appeal or stay vacating application is pending which has not been considered by the writ Court, in that event, it is always appropriate that the contempt proceedings should remain in abeyance till the disposal of the appeal or of the stay vacating application. But that does not mean that in each and every case, the contempt proceedings should remain in abeyance merely because an appeal has been filed or that a stay vacating application was pending. The opposite party must show their bonafides and place before the Court that the appeal was filed within the period of limitation; that the department or the Government agency was pursuing the matter deligently before the appropriate Court.

6. In **Prithawi Nath Ram vs. State of Jharkhand and others, 2004(7) SCC 261**, the Supreme Court held that the Court is only concerned with the question as to whether the earlier decision which had received finality had been complied with or not. Similar view was again reiterated by the Supreme Court in **Director of Education, Uttaranchal and others vs. Ved Prakash Joshi and others, 2005 SCC (Cri)1357**.

7. In the present case, the judgment in writ petition was delivered on 26.3.2004. After almost one year, the State Government granted permission to file an appeal on 18.3.2005. As per the information given by the learned counsel, the Special Appeal was filed on 17.5.2005 along with a stay application, in which a Division Bench of this Court only issued notices on the application filed under Section 5 of the Limitation Act. Notice on the stay application has not been issued by the Division Bench.

8. The law of limitation is the same for a private citizen as well as for the Government Authority. The Government like any other litigant must take responsibility for the act or omission of its officers. The expression "sufficient cause" under the Limitation Act must receive a liberal construction. A certain amount of latitude can be given to the State Authorities on account of its impersonal machinery, but it does not mean that the State and its authorities would get away by filing a belated appeal and create a legal alibi for the non compliance of the order on the sole ground that the Special Appeal has now been filed.

9. In my opinion, the filing of a belated appeal by the opposite party was to circumvent the order passed by the Court. Till date, nothing has been indicated as to what steps, the opposite party has taken to get the application under Section 5 of the Limitation Act decided or get the appeal decided on merit. At the present moment, the present

appeal filed by the opposite party is defective and the stay application does not exist in the eyes of law. Consequently, deferring the heariJ:!L0f the contempt application cannot be granted to the Opposite party.

10. In the present case, the judgement of the Court is with regard to the payment of post retirement benefits. The applicant has served the opposite party and it is his right to get the post retirement benefits.

11. In view of the aforesaid, in the interest of justice, and as a last resort I grant six weeks further time to the opposite party Nos. 1 and 2 to comply with the order and judgment of the Court passed in the writ petition, failing which, the opposite party Nos. 1 and 2 would appear in person for the framing of the charge/ charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2005

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 19431 of 2003

Yamuna Prasad Rai ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arun Kumar

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

Constitution of India, Art. 311 (2)-readwith-U.P. Financial Hand Book-Vol. II Part II to VI-Rule 18-Dismissal of Service-provision of automatic dismissal-Five year or more absence dispite of final direction-No disciplinary proceeding initiated for long period of 4 years-nor challenged in special Appeal-nor availed the opportunity even on direction of the court by order dated 6.5.2003-it would be futile exercise-if respondents are permitted to hold a disciplinary proceeding-direction for reinstatement by forthwith given-in absence of specific pleading about no where gainfully employment-held of the salary treating the disputed period-as spent on leave.

Held: Para 14 and 15

Now more than four years have passed since this Court directed the respondents, while quashing the orders dated 4.9.1998 to initiate disciplinary proceedings against the petitioner, and to take appropriate decision in accordance with law. No such decision has been taken so far. Further the respondents did not avail the opportunity given by this Court all over again dated 6.5.2003, to consider petitioner's leave application, along with fitness certificate dated 5.1.1989. It will now be a futile exercise now to allow the respondents to hold a disciplinary enquiry after four and half years as the respondents have failed to avail the opportunity.

In view of the special facts and circumstances of the case, the writ petition is allowed. The respondents are directed to reinstate the petitioner in service forthwith without any further delay. The entire absence shall be treated as spent on leave. The petitioner has not stated anywhere that he was not gainfully employed during the period of his absence and as such he will only be entitled to half of the back wages. The petitioner shall also be entitled cost of Rs.25,000/- from the respondents as costs of litigation. The order shall be complied with within six weeks of its communication to Respondent Nos. 1 & 2.

Case law discussed:
AIR 1961 SC-1457
AIR 1965 SC-1153
AIR 1990 SC-1607
1991 (1) SCC-243
AIR 1966 SC-492
1975 (3) SCC-108

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

1. Heard Sri Arun Kumar, learned counsel for the petitioner, and learned Standing Counsel. The parties have exchanged pleadings and with their consent the writ petition has been heard at the admission stage.

2. On 6.5.2003, following orders was passed issuing interim mandamus to the State Government to consider and decide petitioner's leave application dated 5.1.1998 along with Chief Medical Officer's fitness certificate.

"This is the fifth writ petition filed by the petitioner praying for joining and for arrears of salary. Petitioner was appointed as Junior Engineer in 1974 in Public Works Department. On 17.1.1981 he joined his duty at Azamgarh. On 8.2.1981 he fell ill, vomitted blood and suffered from dysentery. He was admitted in the Government Hospital and was subsequently shifted to Ballia. It is alleged that he sent several leave applications. On 5.1.1989, after 8 years he made an application to Executive Engineer to join along with a fitness certificate from Chief Medical Officer who certified that petitioner was suffering from 'Ulcerative Colitis associated with Haemorrhoids with Anaemia'. The Executive Engineer referred the matter to Chief Engineer. In first writ petition decided on 10.5.1994, the Chief Engineer was directed to look into the matter and take appropriate decision. A contempt petition was filed and after bailable warrants an order was passed on 26.4.1995 rejecting his application. In second writ petition, on 26.4.1995, the order was quashed on the ground that no reasons have been given. The third writ petition was disposed of on 28.5.1998 to comply with the order passed in the second writ petition. This time the Engineer-in-Chief by is order dated 2.12.1998 rejected the application on the ground of his absence from duty on account of which his services stood automatically terminated after 5 years under the Fundamental Rule 18 Financial Hand Book, Volume 2, Part II to IV. The fourth writ petition was filed on 19.1.2001. The Court found that Fundamental Rule 18 has been amended in 1989 with the result that leave for more than 5 years can only be sanctioned by the State Government; and that the absence for more than 5 years attracts for disciplinary action. The writ petition was allowed quashing the order dated 2.12.1998 and leaving it open to the respondents to initiate disciplinary action.

3. Now the complain is that no one has acted upon the orders of this Court and that neither leave has been granted nor any disciplinary action has been initiated.

4. This Court does not want to again decide this writ petition without calling for counter affidavit. Let learned Standing Counsel file a counter affidavit within six weeks. Petitioner shall have two weeks thereafter to file rejoinder affidavit. List in the third week of August, 2003.

5. In the meantime, having regard to the facts and circumstances of the case, an

interim mandamus is issued to the State Government to consider and decide petitioner's leave application. The application dated 5.1.1989 along with Chief Medical Officer's fitness certificate shall be treated to be the leave application. An interim mandamus is also issued to the Chief Engineer, Public Works Department, Azamgarh Region, Azamgarh to consider and initiate proceedings against petitioner in view of the order dated 19.1.2001 in writ petition No. 8318 of 1999. Both the parties will carry out interim mandamus within two months or show cause by filing counter affidavit within the same period. In case the interim mandamus is not carried out, the Court shall consider to allow petitioner to join on the next date of hearing."

6. On 23.8.2005 a last opportunity was given to the Chief Engineer Public Works Department to carry out order dated 6.5.2003 failing which it was directed that he shall be held personally responsible for arrears of wages to be paid to the petitioner.

7. In the counter affidavit of Kunwar Satya Narain Singh Chandramani, Assistant Engineer, Nirman Khand-2 (S.R.P.-2) PWD, Azamgarh was filed on 11.8.2003 it is stated that the High Court has incorrectly interpreted the provisions of Fundamental Rule 18 of the Financial Hand Book Vol. 2 Part II to IV. The petitioner's services came to an end, and h ceased to be an employee of the State Government at the end of five years of his absence on 9.2.1986, and thus the Amendment to Rule 18, by notification dated 12.9.1989 was not applicable to the petitioner's case. In para 3 of the Counter affidavit he states that the judgment of this Court dated 19.1.2001 in Writ Petition No. 8318 of 1999 is incorrect. In para 4 of the counter affidavit it is stated that steps were taken to file special appeal against the judgment dated 19.1.2001 and that the Law Department had given its consent but since considerable time was lost in the procedure for filing appeal. In the meantime the present writ petition was filed, in which the matter is under consideration.

8. Learned Standing Counsel submits that now since the matter is being considered in this fifth 'Writ Petition, he may be permitted to submit that the interpretation given by this Court to Rule 18 is incorrect. In the alternative he submits that the department may be permitted to draw disciplinary proceedings in compliance with the provisions of the Rules.

9. Sri Arun Kumar, learned counsel for the petitioner submits that the judgment dated 19.1.2001 in fourth Writ Petition No. 8318 of 1999 filed by the petitioner has become final between the parties. The principles of rejudicatea are applicable to the present case. The matter cannot be re-agitated in this writ petition. The State Government did not chose to challenge the judgment and thus the petitioner cannot be deprived to the benefit of judgment between the parties by the court of competent jurisdiction, on the same issue. He submits that now more than five years have passed but the respondents have failed to initiate any disciplinary proceeding. The have not considered petitioner's leave application in pursuance of interim mandamus issued on 6.5.2003 and thus the respondents be directed to reinstate the petitioner with all

consequential benefits including arrears of salary with interest.

10. The issue that the petitioner's services came to an end and he ceased to an employee of the State Government at the end of five years of his absence was directly involved between the petitioner and the State Government and further Writ Petition No. 8318 of 1999 was decided in his favour by judgment dated 19.1.2001. The State Government did not challenge the judgment and thus allowed the issue to become final between the parties by the court of competent jurisdiction. The principle of res judicata applies to the writ petitions. In **Dharao Vs. State of U.P. AIR 1961 SC 1457**, the Supreme Court held that it is in the interest of public at large that a finality should attach to the binding decisions pronounced by courts of competent jurisdiction, and it is also in public interest that individual should not be vexed twice over with the similar kind of litigations. These two principles form the foundation of the general rule of res judicata and is equally relevant in dealing with the fundamental rights under Article 32 Constitution of India. These principles were made applicable to proceedings under Article 226 of Constitution of India. In **Gulab Chandra Vs. State of Gujarat AIR 1965 SC 1153; the Direct Recruitment Class II Engineering Officers Associations vs. State of Maharashtra AIR 1990 SC 1607 and Durg Raj Nandgaon Gramin Bank vs. Suresh Kumar (1991) 1 SCC 243**. The belief of the learned standing counsel as such to assail the finding recorded in Writ Petition No. 8318 of 1999 decided dated 19.1.2001 cannot be permitted.

11. The un-amended fundamental rule 18 of the financial hand book V. II to IV Chapter IV before its amendment provided for automatic cessation of service without giving any opportunity of hearing to such persons have remained absent for more than five years. The rule was declared ultra vires Article 14, 16 and 311 of Constitution of India and was subsequently amended by Notification dated 12.9.1989 which reads as follows:

"Unless the Government, in view of the Special circumstances of the case, otherwise determine, after five years continuous absence from duty elsewhere than on foreign service in India, whether with or without leave, no Government servant shall be granted leave of any kind. Absence beyond five years will attract the provisions of Rules relating to disciplinary proceedings".

12. In **Jai Shanker vs. State of Rajasthan AIR 1966 SC 492** the Supreme Court set aside the order of removal from service for setting aside leave without giving opportunity of show cause as violative of Article 111 Constitution of India, even though the service regulations provide that there is automatic termination of services for overstaying leave. In **Shahoodul Huq vs. Registrar, Cooperative Societies (1975) 3 SCC 108** the appellant applied for leave to go on pilgrimage to Muqqa. He left without grant of any leave. He applied for extension of leave for Muqqa which was never granted. He came back after a year and fell ill. He was removed from service. The order was challenged as contrary to constitutional guaranteed under Article 311 of Constitution of India inasmuch as he was dismissed without giving him any opportunity to show cause. The Supreme

Court did not doubt that Article 311 will apply and that the employee cannot be dismissed without giving him an opportunity of hearing. In that case, however, since show cause notice was given to the petitioner, the Supreme Court did not interfere.

13. The submission that Rule 18 was amended on 12.9.1989 and that under the un-amended Rule 18 the petitioner's services came to an end, after five years of his absence from 9.2.1986, ignores the fact that such termination of services will be violative of Article 14, and 311 (2) of Constitution of India. The continuous absence beyond five years amounts to misconduct. In law a person may explain even such circumstances which normally a person may not be realised. The case of a Japanese Soldier who went in hiding and came out after 18 years without having knowledge that the war have ended long ago is one of such example. A person may be mentally incapacitated or may be suffering from such ailment which may not allow him to apply or for extension of leave. In service matters there is nothing which happens automatically. Where an employer is required to give an opportunity to the person to explain the circumstances in which he remained absent, the period of absence is not material.

14. Now more than four years have passed since this Court directed the respondents, while quashing the orders dated 4.9.1998 to initiate disciplinary proceedings against the petitioner, and to take appropriate decision in accordance with law. No such decision has been taken so far. Further the respondents did not avail the opportunity given by this Court all over again dated 6.5.2003, to consider petitioner's leave application, along with fitness certificate dated 5.1.1989. It will now be a futile exercise now to allow the respondents to hold a disciplinary enquiry after four and half years as the respondents have failed to avail the opportunity.

15. In view of the special facts and circumstances of the case, the writ petition is allowed. The respondents are directed to reinstate the petitioner in service forthwith without any further delay. The entire absence shall be treated as spent on leave. The petitioner has not stated anywhere that he was not gainfully employed during the period of his absence and as such he will only be entitled to half of the back wages. The petitioner shall also be entitled cost of Rs.25,000/- from the respondents as costs of litigation. The order shall be complied with within six weeks of its communication to Respondent Nos. 1 & 2.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2006

BEFORE
THE HON'BLE G.P. SRIVASTAVA, J.

Criminal Misc. Bail Application No. 1859 of 2006

Rahul Kumar Yadav ...Applicant/Accused (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri R.K. Ojha
Sri Virendra Srivastava

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

N.D.P.S. Act-Section 37-Bail application-arrest of applicant with 800 gms. Diazepam tablets-in four packs recovered-chemical report shows-weight of 20 tablets as 100 mg.-accordingly 4000 tablets will come 800 gms.-nothing to infer-after released on bail such crime will not be repeated-held-No ground for bail.

Held: Para 5

In the instant case section 37 N.D.P.S. Act comes into play. There is nothing to presume that the accused has committed no offence. Moreover there is nothing to infer that if the applicant is released on bail he will not repeat the crime. There is no ground for bail. The bail application is rejected.

(Delivered by Hon'ble G.P. Srivastava, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. According to the prosecution case on 25.12.05 the applicant was arrested and from his possession 800 gms. diazepam tablets, in all 4000 tablets, kept in four packs were recovered. The packets were kept in a white polythene bag which was held in the hand of the applicant.

3. The learned counsel for the applicant has argued that the tablets are below the commercial quantity. He has argued that in the market diazepam tablets of only 2 mg., 5 mg. Are available. No tablet of 5 gm., 10 gm and 20 gm is available in the market. Besides that he has relied upon **Vijay Kumar Yadav @ Sachin Vs. State of U.P. 2003 (1) U.P.Crl. R. 561** wherein it was held that the recovery of 5000 tablets of diazepam which is less than the commercial quantity as mentioned in Government Notification.

4. In the instant case there is a chemical report from Vidhi Vigyan Prayogshala (Annexure-1 to the counter affidavit) which shows that the weight of 20 tablets of diazepam was 100 mg. Therefore the weight of 4000 tablets will come to 800 gms. which is above the commercial quantity, as the commercial quantity of diazepam is 500 gms. No such notification has been produced before me as mentioned in the above judgment. In the said judgment the weight of the each tablets recovered has not been mentioned.

5. In the instant case section 37 N.D.P.S. Act comes into play. There is nothing to presume that the accused has committed no offence. Moreover there is nothing to infer that if the applicant is released on bail he will not repeat the crime. There is no ground for bail. The bail application is rejected.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 4.4.2006

BEFORE
THE HON'BLE G.P. SRIVASTAVA, J.

Criminal Misc. Bail Application No.4649 of 2006

Poornima & another...Applicants (In Jail)
Versus
State of U.P. ...Opposite Party

With

Criminal Misc. Bail Application No.2752 of 2006, Criminal Misc. Bail Application No.1901 of 2006, Criminal Misc. Bail Application No.3340 of 2006, Criminal Misc. Bail Application No.3886 of 2006, Criminal Misc. Bail Application No.2683 of 2006, Criminal Misc. Bail Application No. 4946 of 2006.

Counsel for the Applicants:
Sri M.W. Siddiqui

Counsel for the Opposite Party:
Sri Mahendra Pratap
A.G.A.

Code of Criminal Procedure-S-439-Bail-offence under Section 3/4/5/6/8/9 Immoral Traffic (Prevention) Act 1956 Act read with 323,504,506,109,117,366A,373 I.P.C.-Applicant's not named in F.I.R.-even in statements of witness under Section 161-No description of the activities of applicants disclosed under section 164 Cr.P.C.-No specific evidence regarding inducing specific person for prostitution-held-entitled for Bail.

(Delivered by Hon'ble G.P. Srivastava, J.)

These are the applications by the applicants Lalita, Rajesh, Kali, Lalloo, Abdul Hameed, Tara, Poornima and Afsana who are involved in the offence under Sections 3/4/5/6/8/9. The Immoral Traffic (Prevention) Act 1956 Act and Section 323,504,506,109,117,366A, 373 I.P.C. P.S. Manduadeeh, District Varanasi.

According to the prosecution case on 25.10.2005 one Ajit Singh, Chairman, Swayam Sevi Sanstha Guria) received an information from his wife Smt. Santwanta Manju that in red light area of Shivdaspur some minor girls are detained by Rahmat, Tulsi and Lalloo. They induced the minor girls for the purpose of prostitution and use them for illicit intercourse and earn their livelihood. They recovered 31 girls from the house of Rahmat and Tulsi and got an FIR registered on 25.10.05 at 21.30 hours against Rahmat, Tulsi, Lallu and Afzal. Later on during the investigation the names of the applicants and some other persons came into light and they were involved in compelling to induce and seduce to illegal intercourse with some another person for prostitution under the management of brothel carried by the applicants.

It is argued by learned counsel for the applicants that the applicants were neither name in the First Information Report nor arrested on the spot nor there is any evidence against them.

It has been further argued by learned counsel for the complainant that the name of the applicants came in the statement of Raj Kumar, Rahisa Khatun, Manju and Chandra.

It is pertinent to mention that in the statement of the aforesaid witnesses though the name of some of the applicants emerged but no specific role have been assigned to them nor there is any description of their activities in the statement of the witnesses recorded under Section 161 Cr.P.C. Moreover no statement of these witnesses was got recorded under Section 164 Cr.P.C. which could give weight to their testimony. There is no allegation of keeping brothel against the applicants. There is no specific evidence regarding inducing or taking a specified person for the sake of the prostitution.

Besides that some legal pleas were also taken i.e. search of the premises can be made by a special police officer which is very relevant for the purpose of bail.

In the circumstances I am of the opinion that the applicants deserve to bail.

Let the applicants Poornima, Afsana, Tara, Abdul Hameed, Lalloo, Kali, Rajesh and Lalita be enlarged on bail their furnishing personal bonds with two sureties each in the like amount to the satisfaction of the Chief Judicial Magistrate/court concerned in Case Crime No.274 of 2005 under Section 3/4/5/6/8/9 The Immoral Traffic (Prevention) Act and Section 323, 504, 506,109117, 366A, 373 I.P.C. PS. Manduadeeh, District Varanasi.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.10.2005

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No.6135 of 2001

Imtiyaz Ahmad ...Petitioner
Versus
Additional District Judge, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Sri Farid Uddin
Sri Salamuddin Khan

Counsel for the Respondents:
Sri Akhilesh Misra
Sri Shrikant
S.C.

Code of Civil Procedure- as amended 2002-Ord. 6 rule 17-Amendment of Plaint-Suit for cancellation of sale deed and Injunction-petitioner was dispossessed in the year 1983-amendment application filed in the year 1996-highly belated-causing great prejudice-unnecessary harassment to the other side can not be allowed.

Held: Para 8

But in the present case admittedly, the suit was filed in the year 1982 and the petitioner was dispossessed from the land in dispute in the year 1983 but the amendment application was filed in the year 1996, which is highly belated and the Trial Court has wrongly allowed the application which clearly prejudice the case of the defendant and allowing the application will unnecessarily harass the respondents, therefore, the Revisional Court has considered the submissions that the application filed on behalf of the petitioner is highly belated after a lapse of 13 years and as such it cannot be allowed.

Case law discussed:
2001 (42) ALR-582, 2002 (93) R.J.-104, 2003 (4) AWC-2889, AIR 1957 SC-363, AIR 1960 SC-622,
AIR 1977 SC-680, AIR 1979 SC-551, AIR 1982 SC-824, 1996 (2) SCC-25, AIR 2000 SC-614, AIR 1992 SC-1604, AIR 1996 SC-2358, 2001 (8) SCC-115, J.T. 1998 (4) SC-484, AIR 2002 (2) SCC-445, AIR 2002 SC-665, AIR 1953 SC-235, AIR 1992 SC-1604, AIR 1974 SC-1126, 2001 (8) SCC-97, AIR 2002 SC-2394, 2002 (7) SCC-559, AIR 2003 SC-674

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

1. This writ petition has been filed for quashing the order-dated 6.12.2000 passed by the respondent No.1 (Additional District Judge, Fatehpur) by which the amendment application of the petitioner has been rejected.

2. The petitioner filed a suit No.6 of 1982 in the Court of District Judge, Fatehpur, for the relief of injunction and for cancellation of the sale deed. It has been alleged that during the pendency of the suit, the petitioner was dispossessed from the property in dispute on 20.3.1983. The petitioner filed an amendment application for amendment, claiming the relief of possession. The Learned Civil Judge (Senior Division), Fatehpur, heard

the amendment application and allowed the same by judgment and order dated 8.4.1997. The contesting respondents (defendants) filed a Revision No.46 of 1997 in the Court of District Judge, Fatehpur, which was allowed by the judgment and order dated 6.12.2000 and set aside the judgment and order dated 8.4.1997 and rejected the amendment application.

Aggrieved by the order-dated 6.12.2000 the petitioner has approached this Court.

3. The petitioner submits that as at the time of filing the suit, the petitioner was in possession of the property, as such, no relief for possession was sought in the relief claimed in the suit. Only relief of injunction and cancellation of sale deed was sought while filing the plaint before the Court. As the petitioner during the pendency of the suit has been dispossessed from the property, therefore, it was necessary to amend the plaint seeking relief of possession. It has also been submitted on behalf of the petitioner that the amendment application can be allowed at any stage and at the time of filing the suit the petitioner was in possession, therefore, no relief or possession was sought and immediately after dispossessing from the land in dispute the amendment application has been filed.

4. The petitioner has placed reliance upon a judgment of the Apex Court reported in 2001(42) ALR Page 582 ***Raghu Thilak D.John Vs. S.Rayappan and others*** and has placed reliance upon Para 5 of the said judgment that Court should not adopted hyper technical approach while considering the amendment application. Another judgment relied upon by the counsel for the petitioner is 2002 (93) Revenue Decision, Page 104, ***Prem Bakshi and others Vs. Dharam Dev and others***. The reliance has been placed upon another judgment of this Court reported in 2003(4) AWC 2889 ***Mishri Singh Vs. IIIrd Additional District Judge, Basti and others***.

5. On the basis of the aforesaid decisions the counsel for the petitioner submitted that the power to allow the amendment application is very wide and can be exercised at any stage of the suit in the interest of justice and the Court should not take very hyper technical view while considering the amendment application.

6. On the other hand the learned counsel for the respondents Sri Srikant, Advocate, has submitted that even assuming without admitting this fact that amendment application can be allowed at any point of time but there must be some reasonable explanation to this effect that the amendments sought and the relief sought in the amendment application was not in the knowledge of the plaintiff at the time when the suit was filed. It has further been submitted that according to the case of the petitioner, the petitioner was dispossessed from the land in dispute on 30.3.1983 but the petitioner has not taken any steps to file an amendment application for seeking the relief of possession up to 14.10.1996. It was only in the year 1996, the petitioner has filed an amendment application and the Court below has illegally without considering this aspect of the matter that the amendment sought by the petitioner was highly belated only to delay the proceedings. The Revisional Court had

recorded a categorical finding of fact regarding the question of limitation and has held that it is not disputed that the amendment can be allowed at any stage if it is established by the plaintiff that relief sought in the amendment was not in the knowledge when the plaintiff has approached the Court by way of filing the suit as such, no relief was sought at the time when the suit was filed. The Revisional Court has clearly recorded a finding that the present amendment application filed on behalf of the plaintiff-petitioner is a afterthought and only to change the nature of the suit after a lapse of about 13 years. As such, the writ petition filed on behalf of the petitioner is liable to be dismissed.

7. I have heard learned counsel for the petitioner and Sri Srikant, learned counsel for the respondents and have perused the record.

*"**Order 6 Rule 17** provides amendment of the pleadings. By Amendment of 2002, a proviso has been added that amendments should generally be allowed at this stage of pre-trial of the Suit. But subsequent thereto, the court must be satisfied as to why the pleadings could not be brought in, unless it was based on subsequent developments.*

The issue involved herein is being considered by the courts every day. Amendment in the pleadings may generally be allowed and the amendment may also be allowed at the belated stage. However, it should not cause injustice or prejudice to the other side. The amendment sought should be necessary for the purpose of determining the real question in controversy between the parties. Application for amendment may be rejected if the other party cannot be placed in the same position as if the pleadings had been originally correct, but the amendment would cause him injury which could not be compensated in terms of cost or change the nature of the suit itself as it cannot be permitted to create any entirely new case by amendment. A right accrued in favour of a party by lapse of time cannot be permitted to be taken away by amendment. Amendment can also be allowed at appellate stage. Introduction of an entirely new case, displacing even admission by a party is not permissible. (Vide Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil & ors., AIR 1957 SC 363; Nanduri Yogananda Laxminarsimhachari & Ors. Vs. Sri Agasthe Swarswamivaru, AIR 1960 SC 622; M/s Modi Spinning & Weaving Mills Co.Ltd. Vs. M/s Ladha Ram & Co., AIR 1977 SC 680; Ishwardas Vs. State of M.P., AIR 1979 SC 551; and Mulk Raj batra Vs. District Judge, Dehradun, AIR 1982 SC 24).

Similar view has been reiterated in G.Nagamma & Anr. Vs. Siromanamma & Anr., and (1996) 2 SCC 25; B.K.Narayana Pillai Vs. Parameshwaran Pillai & Anr., AIR 2000 SC 614. However, a party cannot be permitted to move an application under Order 6 Rule 17 of the Code after the judgment has been reserved. (Vide Arjun Singh Vs. Mohindra Kumar & Ors., AIR 1964 SC 993).

A Constitution Bench of the Hon'ble Supreme Court in Municipal Corporation of Greater Bombay Vs. Lala Pancham & Ors, AIR 1965 SC 1008, observed that even the court itself can suggest the amendment to the parties for the reason that main purpose of the court is to do

justice, and therefore, it may invite the attention of the parties to the defects in the pleadings, so that same can be remedied and the real issue between the parties may be tried. However, it should not give rise to entirely a new case.

In Jagdish Singh Vs. Natthu Singh, AIR 1992 SC 1604, the Hon'ble Supreme Court held that the Court may allow to certain extent even the conversion of the nature of the Suit, provided it does not give rise to entirely a new cause of action. An amendment sought in a plaint filed for specific performance may be allowed to be done without abandoning the said relief but amendment seeking for damages for breach of contract may be permitted.

In Union of India & Ors. Vs. Surjit Singh Atwal, AIR 1979 SC 1701, the Apex Court held that in case of gross delay, application for amendment must be rejected.

It is settled legal proposition that if a right accrued in favour of a party, as the order impugned has not been challenged in time, the said right cannot be taken away by seeking amendment in pleadings. (Vide Radhika Devi Vs. Bajrangi Singh, AIR 1996 SC 2358; and Dondapati Narayana Reddy Vs. Duggireddy Venkatanarayana Reddy, (2001) 8 SCC 115).

In G.Nagamma & Ors. Vs. Siromanamma & Anr., JT 1998 (4) SC 484, the Hon'ble Apex Court held that in an application under Order 6 Rule 17, even an alternative relief can be sought; however, it should not change the cause of action or materially affect the relief claimed earlier.

In Vineet Kumar Vs. Mangal Sain Wadhera, AIR 1985 SC 817, the Hon'ble Supreme Court held that normally amendment is not allowed if it changes the cause of action, but where the amendment does not constitute the addition of a new cause of action, or raises a new case, but amounts to not more than adding to the facts already on record, the amendment should be allowed even after the statutory period of limitation.

In Fritiz T.M.Clement & Anr.Vs. Sudhakaran Nadar & Anr., AIR 2002 SC 1148, the Hon'ble Supreme Court held that in case the original plaint is cryptic and amendment sought to incorporate about some undisputed facts elaborating plaintiff's claim is based on the said admitted facts, amendment should be allowed as it would place the defendant in a better position to defend and would certainly not prejudice his cause. More so, if the claim does not challenge the nature of the relief and rate of fee etc. is challenged without challenging the total amount claimed, such amendment may be allowed even at a belated stage.

In Gurdial Singh Vs. Raj Kumar Aneja, (2202) 2 SCC 445, the Hon'ble Supreme Court deprecated the practice adopted by the Courts entertaining the application under O. 6 R.17 of the Code containing very vague and general statements of facts without having necessary details in amendment application enabling the Court to discern whether the amendment involves withdrawal of an admission made either or attempts to introduce a time-barred plea or claim or is intended to prevent the opposite party from getting the benefit of a right accrued by lapse of time, as

amendment cannot be permitted to achieve the said purposes.

Similarly, in Om Prakash Gupta Vs. Ranbir B. Goyal, AIR 2002 SC 665, the Hon'ble Supreme Court reiterated the same view extending the scope of O. 6 R.17 of the Code, observing that amendment should not disturb the relevant rights of the parties those existed on the date of institution of a Suit, but subsequent events may be permitted to be taken on record in exceptional circumstances if necessary to decide the controversy in issue. The Court held as under:-

"Such subsequent event may be one purely of law or founded on facts. In the former case, the court may take judicial notice of the event and before acting thereon put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 C.P.C. Such subsequent event, the Court may permit being introduced in the pleadings by way of amendment as it would be necessary to do so for the purpose of determining real questions in controversy between the parties. In Trojan & Co. Vs. RM. N.N.Nagappa Chettiar, AIR 1953 SC 235, this Court hasd held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be founded; without the amendment of the pleadings the Court would not be entitled to modify or alter the relief. In Sri Mahant Govind Rao Vs. Sita Ram Kesho, (1988) 25 IA 195 (PC), Their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted."

In Muni Lal Vs. The Oriental Fire & General Insurance Co. Ltd., AIR 1996 SC 642, the Hon'ble Apex Court held that the relief of amendment should be granted to "render substantial justice without causing injustice to the other party or violating fair-play and the Court should be entitled to grant proper relief even at the stage of appellate forum." Similar view has been reiterated in Jagdish Singh Vs. Natthu Singh, AIR 1992 SC 1604.

In Smt. Gaga Bai Vs Vijay Kumar, AIR 1974 SC 1126, the Hon'ble Supreme Court observed as under:-

"The power to allow an amendment is undoubtedly wide and may, at any stage, be properly exercised in the interest of justice, the law of limitation notwithstanding, but the exercise of such far-reaching discretionary power is governed by judicial consideration and wider the discretion, greater ought to be the care and circumspection on the part of the Court."

In M/s Ganesh Trading Co. Vs. Maoji Ram (Supra), the Hon'ble Supreme Court observed that where amendment is found to be necessary for promoting the ends of justice and not for defeating it, the application should be allowed. Similar view had been reiterated in B.K.N. Pillai Vs. P.Pillai & Anr., AIR 2000 SC 614.

In Estrella Rubber Vs. Dass Estate (P) Ltd., (2001) 8 SCC 97, the Supreme

Court held that mere delay in making the amendment application is not enough to reject the application unless a new case is made out, or serious prejudice is shown to have been caused to the other side so as to take away any accrued right.

Similarly, in Siddalingamma & Anr. Vs. Mamtha Shenoy, (2001) 8 SCC 561, the Hon'ble Supreme Court held that the Doctrine of Relation Back applies in case of amendment for the reason that the amendment generally governs the pleadings as amended pleadings would be deemed to have been filed originally as such and the evidence has to be read and appreciated in the light of the averments made in the amendment petition. similar view has been reiterated in Raghu Thilak D.John Vs. S.Rayappan & Ors., AIR 2001 SC 699.

In Jayanti Roy Vs. Dass Estate (P) Ltd., AIR 2002 SC 2394, the Apex Court held that if there is no material inconsistency between the original averments and those proposed by the amendment, application for amendment should be allowed. However, the application should be moved at a proper stage. Application filed at unduly delayed stage should normally be rejected.

In Sampat Kumar Vs. Ayyakannu & Anr., (2002) 7 SCC 559, the Hon'ble Supreme Court held that any amendment seeking to introduce a cause of action, which arose during pendency of the Suit, may be permitted in order to avoid multiplicity of Suit. But, it should not change the basic structure of the Suit. More so, court should be liberal to allow amendment at the time of pre-trial of a Suit but must be strict and examine the issue of delay where the application for amendment is filed at a much belated stage of commencement of the trial.

In Nagappa Vs. Gurudayal Singh & Ors., AIR 2003 SC 674, the Hon'ble Supreme Court held that amendment can be allowed even at an appellate stage in a case where law of limitation is not involved and the facts and circumstances of the particular case so demands, in order to do justice with the parties. The case involved therein had been under the provisions of Sections 166, 168 and 169 of the Motor Vehicles Act, 1988 and as the Act does not provide for any limitation for filing the claim petition, the amendment at appellate stage was allowed.

In Hanuwant Singh Rawat Vs. Mos Rajputana Automobiles, Ajmer, (1993) 1 WLC 625 Rajasthan High Court summarized the legal position as under:-

(i) That the amendment of pleadings should ordinarily be allowed by the Court, once it is satisfied that the amendment is necessary for the just and proper decision of the controversy between the parties;
(ii) The amendment of the pleadings should not ordinarily be declined only on the ground of delay on the part of the appellant in seeking leave of the Court to amend the pleadings, if the opposite party can suitably be compensated by means of costs etc. Suitably be compensated by means of costs etc. Even inconsistent pleas can be allowed to be raised by amendment in the pleadings;
(iii) However, amendment of pleadings cannot be allowed so as to completely alter the nature of the Suit;
(iv) Amendment of the pleadings must not be allowed when amendment is not

necessary for the purpose of determining the real questions in the controversy between the parties;
(v) The amendment should be refused where the plaintiff's Suit would be wholly displaced by the proposed amendment;
(vi) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time or by operation of some law;
(vii) The amendment in the pleadings should not be allowed where the Court finds that amendment sought for has not been made in good faith or suffers from lack of bona fides; and
(viii) Ordinarily, the amendment must not be allowed where a party wants to withdraw from the admission made by it in the original pleadings."

In M/s Modi Spinning & Weaving Mills Co. Ltd. (Supra), the Hon'ble Supreme Court specifically held that amendment in the pleadings is not permitted if it seeks to "displace the plaintiff completely from the admissions made by the defendant in the written statement."

8. In view of the above it is well settled that amendment can be allowed at any stage but there must be some reasonable explanation by the person concerned who approached this Court by way to amend the pleadings with a specific case supported by the document that the amendment sought or the relief sought by way of amendment was not in the knowledge when the suit was filed. It is also well settled now that if the amendment does not change the nature of the suit and does not effect the rights of the parties, it can be allowed at any point of time. But in the present case admittedly, the suit was filed in the year 1982 and the petitioner was dispossessed from the land in dispute in the year 1983 but the amendment application was filed in the year 1996, which is highly belated and the Trial Court has wrongly allowed the application which clearly prejudice the case of the defendant and allowing the application will unnecessarily harass the respondents, therefore, the Revisional Court has considered the submissions that the application filed on behalf of the petitioner is highly belated after a lapse of 13 years and as such it cannot be allowed.

9. In view of the aforesaid fact, I find no merit in the writ petition. The writ petition lacks of merits and is hereby dismissed.

10. There shall be no order as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2006

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.8600 of 2006

Ram Pyare Singh ...Defendant/Petitioner
Versus
Ram Govind and others ...Plaintiffs/ Respondents

Counsel for the Petitioner:
Sri Manish Dev Singh

Counsel for the Respondents:

Code of Civil Procedure-Order I rule 10-Impleadment-by Subsequent purchasure-in a suit for arrears of rent-on the grand during pendancy of suit the applicants have purchased the accommodation in question-allowed by Trial Court-challenge on the grand-that

without prior notice of 106 T.P. Act-the suit for arrears of rent can not be maintained-held-as the suit was already pending-Notice u/s 106 T.P. Act not required.

Held: Para 2

By mere impleadment of respondents 2 and 3 it cannot be said that the defence which were available are waived. Petitioner's defence including that of notice are still open. Reading the application filed by respondents 2 and 3 and the order it appears that respondents 2 and 3 have sought impleadment on the ground that the suit for recovery of rent is pending. In this view of the matter I do not find any error in the orders passed by the trial court and affirmed by the revisional court whereby the courts have allowed the application for impleadment of the respondents.

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

Heard learned counsel for the petitioner.

1. The petitioner-tenant, aggrieved by an order passed by the trial court and affirmed by the revisional court whereby the revisional court has allowed an application filed by respondents 2 and 3 for impleadment, approached this Court by means of this writ petition under Article 226 of the Constitution of India.

2. The brief facts are that during the pendency of a suit for arrears of rent and eviction it appears that respondents 2 and 3 have purchased 2/3 share of the property in dispute by registered sale deed which is not disputed. An application for impleadment has been filed on behalf of these two persons which has been rejected by the trial court. Aggrieved thereby a revision was filed before the revisional court which is allowed and the matter is remanded back to the trial court decide afresh in case a fresh application is filed under Order 1 Rule 10. Secondly, an application was filed by respondents 2 and 3 for impleadment on the ground that they have purchased they came to know that a suit with regard to recovery of rent is pending, they prayed for their impleadment as respondent 2 and 3 are necessary parties. This application was allowed by the trial court by order dated 29th September 2005. Aggrieved thereby the petitioner preferred a revision before the revisional court which has been rejected by the impugned order dated 10th November 2005, respondent 2 and 3 are bona fide purchaser of the property in dispute, for filing a suit they ought to have served a notice on the petitioner under Section 106 of Transfer of Property Act and by their impleadment at this stage the position in law would be as if notice under Section 106 of Transfer of Property Act stood waved and it is settled law that without serving a notice under Section 106 of Transfer of Property Act no suit for eviction can be filed. Learned counsel, therefore, submitted that the view taken by the trial court and affirmed by the revisional court, therefore, suffers from manifest error.

I have given my considered thought to the aforesaid argument but I do not find any force. By mere impleadment of respondents 2 and 3 it cannot be said that the defence which were available are waived. Petitioner's defence including that of notice are still open. Reading the application filed by respondents 2 and 3 and the order it appears that respondents 2 and 3 have sought impleadment on the ground that the suit for recovery of rent is

pending. In this view of the matter I do not find any error in the orders passed by the trial court and affirmed by the revisional court whereby the courts have allowed the application for impleadment of the respondents.

3. In view of what has been stated above the writ petition has no force and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2006

BEFORE
THE HON'BLE UMESHWAR PANDEY, J.

Civil Misc. Writ Petition No. 13389 of 2006

President Shri Chaturbhuj Sharma Sikshan Sansthan Mahavidyalay Samit Orai, District Jalaun and another ...Petitioners
Versus
Awadh Bihari Tiwari @ Ram Babu and others ...Respondents

Counsel for the Petitioners:
Sri B.N. Agrawal
Sri Sanjay Agrawal

Counsel for the Respondents:
Sri M.C. Chaturvedi
Sri Dwivedi S.C.
S.C.

(A) Code of Civil Procedure-Order XI rule-12 readwith section 151-Application for discovery of certain documents-under heading of 151 C.P.C.-application otherwise full of merit-held-mention of wrong provision-can not be basis for rejection-petitioner/Defendant being president and Secretary of Society-direction for presenting those document can not be said erroneous.

Held: Para 5

The mere mention of provision on the heading of the application will not render the application liable for rejection. On the contrary the prayer made in the application if found to be sound and covered under some other provision of the Code, it will not be treated as one made under Section 151 C.P.C. Such application should usually be considered in the light of its otherwise merits by the court. In the present case, the application with the prayer, appears to be pure and simple under the provision of Order XI, Rule 12 C.P.C. for discovery of document. It is definitely an order passed under that provision only and the application is not liable to be rejected summarily because it wrongly mentions Section 151 C.P.C. in its heading. The aforesaid case law of N.I.M.H. & Neuro Sciences (supra) is not applicable with the facts of this case. The trial court has given its serious thoughts to the prayer made in the application of the respondents plaintiffs and has found that the documents, which were sought to be discovered, would definitely be in possession of the petitioners, who are President and Secretary of the society and who alone represent the society. Therefore, if a direction has been given to them for presenting those documents, the said order cannot be said to be erroneous.

(B) Code of Civil Procedure-Section 11-Resjudicata-application for production of document under order XI rule 12 rejected due to want of supporting affidavit in-subsequent application under section 151 duly supported with affidavit-held-proper any order whether interlocutory or not-passed ignoring merit will not operate as resjudicata.

Held:
1981 AWC-17
2005 (2) AWC-1865

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

Heard learned counsel for the parties.

1. This petition challenges the order dated 6.5.2005 passed by the trial court and order dated 19.12.2005 passed by the revisional court. The respondent No. 1 filed a suit for declaration against the petitioners- defendants in which the plaintiff presented an application under Order XI, Rule 12 C.P.C. for discovery of certain documents. Initially the said application was dismissed vide order dated 4.4.2005 (Annexure-6) stating that the application was not supported with affidavit and the defendants petitioners had denied possession of those documents sought to be discovered. Thereafter, a second application stated to be under Section 151 C.P.C. was moved with the same prayer, which has been allowed by the impugned order. This application was supported with affidavit. The revisional court has dismissed the revision of the petitioners stating that the revisional court would not go into the factual matters and thus, the revision was not found having merits.

2. Learned counsel appearing for the petitioners has tried to emphasise that the earlier order rejecting the application of the respondent-plaintiff will operate as res judicata and has also cited the case law of ***Ali Khan Vs. Ram Prasad & another, 1981 AWC 17***. The second argument of the learned counsel is that the present application, which has been allowed by the impugned order, is stated to be an application under Section 151 C.P.C. whereas it should be an application under Order XI, Rule 12 C.P.C. as specific provision for granting such prayer is provided under the Code. Therefore, if the application has been given the title of being a petition under Section 151 C.P.C. the same is not to be entertained in view of case law of ***N.I.M.H. & Neuro Sciences Vs. C. Parameshwara, 2005 (2) AWC 1865 (SC).***

3. As regards the first point of argument raised in the present case, the reply, which has been given from the side of the respondents, is that the order, which was passed earlier in Annexure-6, was not an order passed on merits and the application was summarily rejected for want of supporting affidavit. The merits of the matter whether the documents sought to be discovered are possessed by the petitioners-defendants are not gone into by the trial court in the earlier order, therefore, the said order would not operate as res judicata.

4. I find force in the reply argument given from the side of respondents. Any order whether interlocutory or not, if has not been passed on merit, it will definitely not operate as res judicata. The aforesaid case law of Division Bench of this court in the present facts and circumstances would not be applicable. The application was summarily rejected for want of supporting affidavit though, the affidavit in support of such application is not required under the procedure. So-far-as the availability of those documents with the respondents defendants is concerned, the mere observation in the earlier order is that the defendants had denied possession of the same. This point is also not discussed on merit. The second order passed by the court below is a full-fledged order passed after discussing the entire aspects of the matter and in the present context any bar of res judicata would not be applicable for the purposes to challenge this order.

5. As regards the second point of argument that such application should not

be allowed with a heading of Section 151 C.P.C., it also does not appear to be very sound. The mere mention of provision on the heading of the application will not render the application liable for rejection. On the contrary the prayer made in the application if found to be sound and covered under some other provision of the Code, it will not be treated as one made under Section 151 C.P.C. Such application should usually be considered in the light of its otherwise merits by the court. In the present case, the application with the prayer, appears to be pure and simple under the provision of Order XI, Rule 12 C.P.C. for discovery of document. It is definitely an order passed under that provision only and the application is not liable to be rejected summarily because it wrongly mentions Section 151 C.P.C. in its heading. The aforesaid case law of N.I.M.H. & Neuro Sciences (supra) is not applicable with the facts of this case. The trial court has given its serious thoughts to the prayer made in the application of the respondents plaintiffs and has found that the documents, which were sought to be discovered, would definitely be in possession of the petitioners, who are President and Secretary of the society and who alone represent the society. Therefore, if a direction has been given to them for presenting those documents, the said order cannot be said to be erroneous. The possession of the documents may be with the Treasurer but since the President and Secretary of the society represent the society itself, the direction of the court will be issued only to the President and Secretary and not to the Treasurer.

6. In the aforesaid view of the matter, I do not find any error whatsoever in the order of the court below and as such the petition having no force is hereby dismissed. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.7.2006

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.K. MISRA, J.

Habeas Corpus Writ Petition No.20098 of 2006

Saurabh @ Chhotoo ...Petitioner
Versus
District Magistrate, Jhansi and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Gupta

Counsel for the Respondents:
Sri Arvind Tripathi
A.G.A.

Constitution of India-Art-226-Habeas Corpus Petition-detention on the ground-named accused in FIR-offence under section 147/148, 149, 302, 504, 506 I.P.C.-role of petitioner-in darkness-knifing the victim-accused person loudly exhorting to do with breach of Public Order-detention Order Quashed.

Held: Para 4

It has come in the FIR that when the accused were loudly exhorting each other during the course of committing this crime, the inverter was on which goes to show that there was no light in the locality. The incident which took place in the cover of the darkness and in which the petitioner has been given the role of knifing the victim, had nothing to do with the breach of public order. While considering the question whether a particular incident gave rise to breach of public order or it was only breach of law

and order, it has to be seen as to what is the reach of the incident on the society. The present case at best can be said to be a murder committed in a dark night at about 8.30 P.M. when there was no light and the market was almost closed.

(Delivered by Hon'ble K.K. Misra, J.)

1. The petitioner has challenged the detention order dated 30.7.2005 passed against him by the District Magistrate, Jhansi- respondent no. 1 under Section 3 (2) of the National Security Act 1980 and his continued detention thereunder.

2. The grounds of detention are contained in Annexure-2 to the writ petition. The detention order was passed on the basis of an F.I.R. registered as case crime no. 1435 of 2005 under sections 147,148,149,302,504,506 IPC P.S. Kotwali, district Jhansi, relating to an incident which took place on 30.5.2005 at about 8-30 P.M. The FIR was lodged by one Brijesh Kumar Sharma against the present petitioner and six others, in which one Rajesh alias Ranu was alleged to have been stabbed by Kapil, Manish alias Patiey, Dilip Lahariya, Durgesh, Chintoo, Chhuttu Pandit alias Ankit and the present petitioner. The present petitioner was alleged to have stabbed the deceased with knife.

Counter and rejoinder affidavits have been exchanged.

3. We have heard Sri S.N. Gupta, counsel for the petitioner, Sri Arvind Tripathi A.G.A. for the state.

4. The sole point argued by the counsel for the petitioner is that the grounds relied upon by the detaining authority in passing the impugned order in question did not at all relate to public order. Instead, they could simply raise the question of law and order. It has been argued that the detention order has been passed by the authority concerned without application of mind. Indeed, the intensity of the complained act and its impact on the society has to be considered to ascertain as to whether it is a question of law and order or public order. In the present case, the incident is alleged to have taken place in the night. It has come in the FIR that when the accused were loudly exhorting each other during the course of committing this crime, the inverter was on which goes to show that there was no light in the locality. The incident which took place in the cover of the darkness and in which the petitioner has been given the role of knifing the victim, had nothing to do with the breach of public order. While considering the question whether a particular incident gave rise to breach of public order or it was only breach of law and order, it has to be seen as to what is the reach of the incident on the society. The present case at best can be said to be a murder committed in a dark night at about 8.30 P.M. when there was no light and the market was almost closed.

5. In similar writ petition of the co-accused in writ petition no. 71190 of 2005 this court has held that the incident whereupon the instant detention order is grounded is not relatable to disturbance of the public order.

6. In view of the above, we come to the conclusion that the incident whereupon the instant detention order is grounded is not relatable to disturbance of the public order.

7. In the result, we allow the writ petition and quash the impugned detention order dated 30.7.2005 passed against the petitioner by the respondent no. 1.

8. It is ordered that the detenu saurabh alias Chhotoo shall be released forthwith, if not wanted in any other connection. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 37440 of 2006

Babundar Singh Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Gyanendra Kumar Singh

Counsel for the Respondents:
Sri P.N. Rai
S.C.

State Election Commission Rules-Rule 115-Bye-Election-election of village Pradhan held on 17.8.05-elected village Pradhan died on 2.10.05-three members committee appointed to carryout the development work by order dated 23.2.06-held-D.M. is obliged to complete election process within 3 months-direction issued accordingly.

Held: Para 5 and 6

Under the Act as well as the Rules, the respondent no.3, District Magistrate, Ghazipur is obliged to take steps to fill up the post as soon as possible, after the vacancy on the post of Pradhan occurs. In the present case, nine months have passed but the post of Pradhan has not been filled up. Thus, it is a fit case for issuance of a writ of mandamus directing the respondents for filling up the post of Pradhan of the village in question.

Accordingly, it is directed that the District Magistrate, Ghazipur, respondent no.3 shall take immediate steps to fill up the post of Pradhan Gram Sabha Balua Tappa Kathaut (Hariharpur), Block Mohammadabad, District Ghazipur in accordance with the provisions of U.P. Panchayat Raj Act, 1947 as well as Rules 1994 and hold the election and complete the process as expeditiously as possible, preferably within a period of three months from today but not later than four months.

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

1. An election for the post of Gram Pradhan of the village in question was held on 17.8.2005 in which one Rajesh Rai was elected as Gram Pradhan. On 2.10.2005 said Rajesh Rai was murdered and thereby a vacancy occurred on account of the death of Gram Pradhan of the Gram Sabha Balua Tappa Kathaut (Hariharpur), Block Mohammadabad, District Ghazipur. Thereafter on 23.2.2006 the respondent no.5, District Panchayat Raj officer, Ghazipur has passed an order appointing a Committee to carry on the development work of the village as provided under the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans) Rules, 1994. This writ petition has, thus, been filed for quashing the order dated 23.2.2006 passed by respondent no.5 and also for a direction in the nature of mandamus directing the respondents to hold the election of the Gram Pradhan of the village in question, within a stipulated period as may be fixed by this Court.

2. I have heard Sri Gyanendra Kumar Singh, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the State-respondents. With consent of learned counsel for the parties, this writ petition is being disposed of without calling for a counter affidavit.

3. Rule 14 of the U.P. Panchayat Raj (Election of Members, Pradhans and Up-Pradhans), Rules, 1994 (in short Rules of 1994) provides that the general election of the Gram Pradhans ought to be held by the District Magistrate in accordance with the directions the State Election Commission. Rule 115 of the Rules, which relates to bye-elections, provides that in case of a casual vacancy in the office of Pradhan, the District Magistrate shall, as soon as may be, appoint the date, time and place for various stages of bye-election in accordance with Rule 14.

4. The submission of learned counsel for the petitioner is that although more than nine months have passed since the vacancy on the post of Pradhan had occurred but till date the respondents have not taken steps to fill up the post, as is required under the Rules and have merely appointed a committee to carry out the development work of the village. Learned counsel for the petitioner further contends that in the absence of an elected Pradhan of his village, besides the development, other works are also suffering because of which the petitioner as well as the other villagers are suffering.

5. Under the Act as well as the Rules, the respondent no.3, District Magistrate, Ghazipur is obliged to take steps to fill up the post as soon as possible, after the vacancy on the post of Pradhan occurs. In the present case, nine months have passed but the post of Pradhan has not been filled up. Thus, it is a fit case for issuance of a writ of mandamus directing the respondents for filling up the post of Pradhan of the village in question.

6. Accordingly, it is directed that the District Magistrate, Ghazipur, respondent no.3 shall take immediate steps to fill up the post of Pradhan Gram Sabha Balua Tappa Kathaut (Hariharpur), Block Mohammadabad, District Ghazipur in accordance with the provisions of U.P. Panchayat Raj Act, 1947 as well as Rules 1994 and hold the election and complete the process as expeditiously as possible, preferably within a period of three months from today but not later than four months.

7. This writ petition stands allowed to the extent indicated above. No order as to costs.

8. The office is directed to supply a certified copy of this order to the learned Standing Counsel within a week, free of charge, for necessary compliance.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2006

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

Civil Misc. Writ Petition No. 53010 of 2000

Roop Kishore Agarwal and others ...Petitioners

Versus

IV Additional District Judge, Bareilly and others ...Respondents

Counsel for the Petitioners:
Sri P.K. Jain
Sri K.M. Garg
Sri Lal Vijay Singh

Counsel for the Respondents:
Sri B.D. Mandhyan
Sri A.N. Sinha
Sri Satish Mandhyan
S.C.

U.P. Urban Building Regulation (Regulation of letting Rent and Eviction) Act 1972-S-16-Release application-On the ground of sub-let the shop in question-plea of joint Hindu Family taking-Act 1972 prohibit creation of partnership-lease deed registered in August 99-No document produced about registered partnership-finding recorded by the courts below-warrant, no interference-direction issued to vacate the property within six month-on payment of Rs.9000/- rent instead of Rs.1500/-.

Held: Para 8 & 9

Trial court has found that sub-letting stands proved even by the statement of DW3 Roop Kishore Agarwal. He admitted that he was looking after the Income Tax matters but he could not say that any partnership deed was registered with Income Tax Department. He also admitted that another firm in the name of M/s Cage and Cage was also working of which Aasha Agarwal defendant No.2 was the owner. He could not file any documentary evidence to show that there was any partnership firm in between him and his brothers. He also admitted that all the three brothers were residing separately and suit for partition in between defendants and their other family members had also been decreed in 1980-81. He also admitted that on the date when registered lease deed was executed his father was present at Bareilly. The trial court from the said fact rightly held that all the three brothers were carrying on separate business from the accommodation in dispute and were paying tax separately. Trial court further held that defendant failed to show that in the Income Tax Department they had shown in their income tax return that they were doing business in partnership with the name of Agarwal Brothers.

It has been held by the Supreme Court in *Harish Tandon Vs. A.D.M AIR 1995 SC 676* that if son-in-law is made partner of the firm it gives rise to vacancy and sub-letting under U.P Act No. 13 of 1972.

Case law discussed:
2000 (4) ALR 636 (SC)
2004 (4) SCC-794
AIR 1992 SC-66
AIR 1995 SC-676

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

1. This is tenants' writ petition arising out of suit for eviction filed by landlord respondent No.3 Ramesh Chand Agarwal in the form of SCC suit No. 32 of 1994. Landlord stated in the plaint of the suit that property in dispute which is in the form of two shops was let out through registered lease deed to Roop Kishore Agarwal petitioner No.1 however he had sublet the same to petitioner No 2 and 3 Smt Aasha Agarwal and Sri Ashok Kumar Agarwal. Smt Aasha Agarwal is wife of Sudhir Agarewal who is real brother of Roop Kishore Agarwal petitioner defendant No.3. Ashok Kumar is also real brother of Roop Kishore Agarwal. Property was let out through registered lease deed in August 1969.

2. Defendants took up the case that accommodation in dispute was taken on rent by Hindu Undivided Family (HUF) of which all the three brothers were members and their father Vishan Narain Agarwal was Karta hence there was no sub-letting. Trial court did not believe the

version of the tenants. Trial court held that brother and brother's wife are not members of family as defined under section 3(g) of the Act hence sub-letting was established. Additional JSCC, Bareilly decreed the suit for eviction through judgment and decree dated 7.8.99. It may be mentioned that the rent of the shop in dispute is Rs. 75/- per month. Against judgment and decree passed by the trial court, petitioners filed SCC Revision No. 25 of 99. IV A.D.J, Bareilly through judgment and order dated 24.10.2000, dismissed the revision hence this writ petition.

3. In my opinion, both the courts below have rightly held that building in dispute was not allotted to HUF. Courts below rightly held that in case building had been let out to HUF it should have been mentioned in the registered lease deed while the said deed was only in between landlord and Roop Kishore Agarwal petitioner defendant No.1. Courts below also rightly held that in case building in dispute had been let out to HUF then the lease should have been in favour of father of defendant No.1 and 3 as he was alive at the time of execution of lease deed and he was Karta of HUF.

4. It is true that creation of partnership by the tenant was not prohibited under old Rent control Act (U.P Act No. 3 of 1947). U.P Act No. 13 of 1972 for the first time prohibited creation of partnership by the tenants. However defendants petitioners did not take any such case that after lease of the shop in dispute and before July 1972 when U.P Act No. 13 of 1972 was enforced any formal partnership took place among them. In fact defendants did not plead that at any point of time any formal partnership was entered into in between them. The only defence was that building in dispute was let out to HUF hence they all were entitled to do business there from.

5. In respect of default, both the courts below have held that as tenant had deposited entire arrears of rent, interest and cost of the suit on the first date of hearing hence they were entitled to benefit of section 20(4) of the Act.

6. Learned counsel for the tenant has argued that landlord in his oral statement copy of which is annexure 5 to the writ petition admitted that the firm with the name of Agarwal Brothers having three partners who were doing business from the shop in dispute since long was the tenant. In the said statement there is no such admission.

7. Learned counsel for the tenant has cited several authorities in respect of sub-letting including the authority of Supreme Court reported in ***Resham Singh Vs. Raghubir Singh 2000(4) ALR 636 (SC)***. In the said authority, the tenant had gone underground due to pendency of criminal case against him and in his absence his brother was looking after the business from the tenanted shop. In such situation Supreme Court held that there was no sub-letting. The said authority is not at all applicable to the facts of the instant case. The authority reported in ***P. Singh Vs. R. Gautam 2004(4) SCC 794*** has also been cited. The said authority was from Himachal Pradesh. In the said authority it was held that if partnership was a device to cover the sub-letting then it amounted to sub-letting. In the instant case it has been found that all the three defendants were carrying on their independent

business from the shop in dispute hence the said authority is not applicable. Learned counsel for the tenant has also cited ***C.M. Shah Vs. CIT AIR 1992 SC 66*** dealing with the concept of HUF. In the instant case it has been held that building was not let out to HUF.

8. Trial court has found that sub-letting stands proved even by the statement of DW3 Roop Kishore Agarwal. He admitted that he was looking after the Income Tax matters but he could not say that any partnership deed was registered with Income Tax Department. He also admitted that another firm in the name of M/s Cage and Cage was also working of which Aasha Agarwal defendant No.2 was the owner. He could not file any documentary evidence to show that there was any partnership firm in between him and his brothers. He also admitted that all the three brothers were residing separately and suit for partition in between defendants and their other family members had also been decreed in 1980-81. He also admitted that on the date when registered lease deed was executed his father was present at Bareilly. The trial court from the said fact rightly held that all the three brothers were carrying on separate business from the accommodation in dispute and were paying tax separately. Trial court further held that defendant failed to show that in the Income Tax Department they had shown in their income tax return that they were doing business in partnership with the name of Agarwal Brothers.

9. It has been held by the Supreme Court in ***Harish Tandon Vs. A.D.M AIR 1995 SC 676*** that if son-in-law is made partner of the firm it gives rise to vacancy and sub-letting under U.P Act No. 13 of 1972.

I do not find any error in the findings of the courts below in respect of sub-letting.

Accordingly writ petition is dismissed.

Tenant petitioner No.1 is granted six months time to vacate provided that:

(1) Within one month from today he files an undertaking before the prescribed authority to the effect that on or before the expiry of period of six months he will willingly vacate and handover possession of the property in dispute to the landlord respondent.
(2) For this period of six months, which has been granted to the petitioner to vacate he is required to pay Rs.9000/- (at the rate of Rs.1500/- per month) as damages for use and occupation. This amount shall also be deposited within one month before the prescribed authority and shall immediately be paid to the landlord respondent.

10. It is further directed that in case undertaking is not filed or amount of Rs.9000/- is not deposited within one month then tenant petitioner No.1 shall be liable to pay damages at the rate of Rs.3000/- per month since after one month till the date of actual vacation.

11. Similarly if after filing the aforesaid undertaking and depositing Rs. 9000/-, the property in dispute is not vacated on the expiry of six months then damages for use and occupation shall be

payable at the rate of Rs.3000/- per month since after six months till actual vacation.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2006

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

Civil Misc. Writ Petition No. 69970 of 2005

Abhay Kumar Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Aditya Kumar Tripathi
S.C.

Counsel for the Respondents:
Sri Neeraj Tiwari
S.C.

Constitution of India Act 226,-Use of unfair means -by notice of 10.06.05 university charged the petitions for attempting the answer in paper III economics :- Petitioner send reply on 20.9.05- No specific finding about use of there chits in the answer book for arbitrary attitude of the anchorites loss of 2 year carriers of petitioner can not be over sighted general mandamus issued with certain necessary guide lines for university:

Held- Para 8

It must be borne in mind that where the career of a young man is at stake, every body concerned must be anxious that if the charge of malpractice is being pursued the enquiry should be brought to as speedy a conclusion as possible and should be conducted in such a manner as to give not the least room for complaint. In the instant case, the loss of two years is a big blow to the career of the petitioner and delay in the matter can safely be attributed to the indifference and arbitrary attitude of the authorities concerned. In the circumstances, it would be in the fitness of things that the Court should take proactive attitude to repair the loss and harassment suffered by the petitioner.

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

1. Impugned herein is the notice dated 10.6.2005 issued under the signatures of Asstt. Kul Sachiv (Confidential) Chhatrapati Sahuji Maharaj University, Kanpur Nagar (hereinafter referred to as the University) served to the petitioner listing therein the charge that the petitioner had used unfair means in the course of attempting the answers of question paper no. III (Economics) while appearing in B.A.III year examination and further that one printed piece of paper was seized from his possession.

2. It would transpire from the record that reply to the aforesaid notice was submitted on 20.9.2005 by the petitioner but result of the aforesaid examination was not declared and hence, the present petition came to be instituted seeking the relief that respondent no.2 be directed to declare result of the petitioner of B.A. 3rd year examination conducted in the year 2005.

3. This Court, by means of order dated 10.11.2005 granted one month's time to produce relevant record attended with the direction to also file counter affidavit. Sri Neeraj Tiwari, appearing for the University, filed counter affidavit today and also supplementary counter affidavit. Alongwith the supplementary counter affidavit, the learned counsel has also filed copy of order dated 25.7.2005

by which the Asstt. Registrar issued a letter informing that petitioner's result of B.A. Part III conducted in the year 2005 was cancelled further informing that he has been permitted to re-appear in examination to be held in the year 2006.

4. Learned counsel for the petitioner repudiated the contention that copy of order-dated 25.7.2005 was ever communicated or served to the petitioner by the Asstt. Registrar concerned at the same time stating that the said letter has, for the first time, seen the light of the day today through the supplementary counter affidavit filed today. The original record as demanded by the order aforestated, was produced by Sri Neeraj Tiwari, learned counsel for the University before this Court today. Learned counsel for the petitioner canvassed that as a matter of fact no charge sheet was served to the petitioner although it is claimed to have been issued by the office and further that subsequently, the petitioner obtained duplicate charge-sheet. It is further canvassed that the charges levelled against the petitioner as contained in the notice are scrappy, nebulous and vague inasmuch as it does not disclose in specific terms that the alleged offending printed material had any nexus to the alleged copying while attempting Economic paper no. III or that it was ever seized from the possession of the petitioner or from any place easily accessible to the petitioner. The learned counsel quipped that the petitioner never used any unfair means in the examination nor any offending material was found from his possession in the examination hall and lastly, it has been submitted that the charges levelled against the petitioner do not stand substantiated from any material on record. The learned counsel also canvassed that the entire procedure followed by the University in the matter of use of unfair means by the petitioner smacks of mechanical exercise of power without any application of mind. **Per contra**, Sri Neeraj Tiwari, learned counsel appearing for the University contended that although it has not been stated in so many words in the charge sheet whether mutilated printed paper had any - nexus to the same subject or that it was used for the said purpose but it is amply eloquent from the record that the petitioner made use of the offending paper for copying in the said examination. The learned counsel also drew attention to the fact that the unfair means Committee examined the materials and in the ultimate analysis found the petitioner guilty of using unfair means in the examination.

5. I have bestowed my anxious consideration upon the arguments advanced across the bar and have also scanned very closely the materials on record. I have also been taken through the finding of the Unfair Means Committee. As stated supra, the charge listed out against the petitioner was that he used unfair means or attempted to use the unfair means for copying. There is nothing clinching in the finding recorded by the Committee that the petitioner either used or attempted to use the unfair means in the examination while attempting Economic paper no. III. The committee has drawn a presumption without any valid justification that petitioner might have used materials which amounts to using the unfair means in the examination on the basis of alleged recovery of a torn half-page printed piece of paper which has not been proved to have been found from the possession of the petitioner. I have searched the entire record and there

is nothing on record that the offending material was found or recovered from the actual possession of the petitioner or it was found either from the desk or from a place easily accessible to him near the desk where the petitioner was sitting while writing the answers. It is also worthy of notice here that there is no shade of allegation either in the charge-sheet or anywhere else in the entire record that the petitioner had made use of torn printed paper or any other offending paper for copying or he attempted to make use of the offending piece of paper or that during the course of examination, he was caught inflagrante delicto by the invigilator or any member of the flying squad. Yet another circumstance worthy of notice in this case is that the torn piece of paper alleged to have been recovered from the possession of the petitioner did not bear signature of the petitioner. In the circumstances it makes sense that in case offending piece of paper had been recovered from the possession of the petitioner, the signature of the petitioner must have been obtained thereon. I have every reason to believe that the petitioner in attempting any of the questions did not appropriate for copying any offending piece of paper. There is nothing in the charge sheet that the petitioner could have used the material in examination found from his possession.

Another aspect worthy of notice here is that though charge-sheet is claimed to have been issued by the office but there is no evidence on record that it was ever served to the petitioner and subsequently, the petitioner obtained duplicate charge sheet from the office containing charges against him and submitted his explanation which it would further appear from the record was not taken into reckoning by unfair means committee and further that the reasons recorded are not persuasive that offending piece of paper had been used in attempting the questions. It is also not clear as to from what place, the offending piece of paper was found kept or was recovered. The Court in the above perspective is of the view that charges framed against the petitioner as contained in the notice are vague, nebulous and hazy and have not been framed with the required clarity to show that the petitioner used unfair means or attempted to use unfair means or that the offending piece of paper was recovered from his possession. To be precise, the inescapable conclusion is that the no charge-sheet was served to the petitioner and further that subsequently, duplicate charge-sheet was obtained by the petitioner from the office and submitted his reply which was not taken into reckoning. From a close scrutiny of the charge sheet it would also transpire that the charge sheet lacked requisite details in absence of which effective reply could not be submitted and any action on the basis of charge sheet would occasion gross injustice to the petitioner.

6. In the above conspectus, the irresistible conclusion is that the petitioner did not make use of any unfair means in attempting question of Economic paper no. III, while appearing in B.A. III year examination.

7. The Court feels constrained to observe that the belated disposal of such matter imperils the career of a student and in such matters it is expected that the authorities must act with alacrity and promptitude. In the matter at hand, the charge of copying is attributed to the petitioner while attempting answer to

Economic III paper on 22.3.2005 while charge sheet alleged to be issued to the petitioner is dated 10.6.2005 though it was never served to the petitioner as stated supra. In this connection, averments made in para 9 of the writ petition may be noticed in which it is clearly stated that charge-sheet alleged to have been issued was never received or served to the petitioner. In the counter affidavit in reply to the above averments, it has not been denied that the petitioner was previously served charge sheet and all that has been stated is that the charge sheet was issued to the petitioner. In this view of the matter, the averment that no charge sheet was served to the petitioner commends itself for acceptance. It would appear from the record that after obtaining duplicate copy of charge sheet, the petitioner submitted his reply on 20.9.2005. The impugned order conveying decision of cancellation of examination is dated 25.7.2005 though it also was not served to the petitioner and the learned counsel minced no words to say that this order annexed to the supplementary counter affidavit never saw the light of the day earlier nor it was served to the petitioner. Yet another circumstance worthy of notice is that the charge-sheet framed is on printed form and the charges embodied therein are vaguely spelt out and few choice-drawn charges made applicable to the petitioner have been merely right-clicked. By this reckoning, it is implicit that reply of the petitioner dated 20.9.2005 submitted after obtaining duplicate copy of charge sheet was not taken into reckoning as the impugned order annexed to the supplementary counter affidavit had already been passed on 25.7.2005. This shows that the petitioner was seriously prejudiced on account of his not being afforded opportunity of submitting reply to the charges. All this goes to show that the authorities acted indifferently and arbitrarily and in a manner, which was fraught with the consequence of dallying with the career of the students. It is indeed shocking that the charge sheet was never served to the petitioner and subsequently, reply submitted by the petitioner after obtaining duplicate charge-sheet was not taken into reckoning and as a result, it can well be said that the indifferent and arbitrary attitude of the authorities resulted in spoiling two precious year of the petitioner. In the circumstances, I feel compelled to lay down following guidelines for edification of all the university authorities in the State of U.P.

1. That the charge sheet so issued must contain definite charges expressed with clarity whether the student actually made use of unfair means or attempted to use the unfair means or may have used the same or the offending material from which copying is alleged was recovered from the possession of the student or it was recovered from a place accessible to the student or from any other place or that the offending material was smuggled into for copying by the student from other side or that the student cribbed from the student nearby or next to him and such charges must be propped up with relevant evidence on record.
2. That it must be mentioned with clarity in the charges as to which of the offending material was used by the student while attempting a particular question and from which place the material used for copying was recovered.

3. That the authority concerned must be held responsible for serving personally the charge-sheet. In case, charge sheet so issued is not received by the student concerned, it would be deemed that no charge sheet has been served to the student and in that event, benefit would accrue in favour of the student and the authority concerned would be held responsible for spoiling the career of a student.
4. That the authority concerned charged with the duty of conducting proceeding in the event of charge of copying being foisted upon the student, shall ensure that the proceedings are taken to some finality within a specified period i.e. within a period not exceeding three months from the of incidence of copying or from the last date on which the examinations come to a close.
5. That the order in this connection shall be informed with reasons and no printed form will be used by the authority as has happened in the case in hand.
6. That the offending material if found from the possession of the student or from a place accessible to the student, must bear signatures of the student concerned and if student refuses to sign the offending material/paper recovered from his possession, such refusal must find mention in the charge-sheet.
7. That the charge-sheet shall be framed separately informed with requisite details in each case and no printed form will be used by authority.

8. It must be borne in mind that where the career of a young man is at stake, every body concerned must be anxious that if the charge of malpractice is being pursued the enquiry should be brought to as speedy a conclusion as possible and should be conducted in such a manner as to give not the least room for complaint. In the instant case, the loss of two years is a big blow to the career of the petitioner and delay in the matter can safely be attributed to the indifference and arbitrary attitude of the authorities concerned. In the circumstances, it would be in the fitness of things that the Court should take proactive attitude to repair the loss and harassment suffered by the petitioner.

9. In the result, the writ petition is allowed with costs. The order dated 25.7.2005 (Annexure 1 to the supplementary counter affidavit) canceling the examination of the petitioner is quashed and in consequence it is directed that the University shall take all necessary steps for evaluation of the copy of Economic III paper of B.A. III year and declare the result within 15 days from the date of production of a certified copy of this order.

10. Before parting with the case, I would not refrain from observing that the petitioner was seriously prejudiced and damage done to the career of the petitioner cannot be repaired in terms of money. In the facts and circumstances of the case, the petitioner would be at liberty to claim damages from the authorities concerned for the loss of two precious year on account of lackadaisical, indifferent and arbitrary approach of the authorities concerned, by invoking appropriate remedy permissible to him in law. Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2006

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Second Appeal No. 626 of 2005

Abdul Sattar ...Defendant-Appellant
Versus
Ram Rakshpal ...Plaintiff-Respondent

Counsel for the Appellant:
Sri P.P. Srivastava
Sri Suneet Kumar

Counsel for the Respondent:
Sri K.M. Garg

Code of Civil Procedure Order 22 r 4 readwith High Court Rules-Chapter X rule-3-Appeal by dead person-affidavit sworn on 5.7.05-On 3.8.2005 reported by Stamp Reporter showing limitation upto 3.8.2005-appeal presented before court on 1.8.05 in the meantime on 17.7.05 sole appellant died-on 8.8.05 substitution application filed-cause shown sufficient-delay in filing application condoned-substitution application allowed.

Held: Para 7

In the instant case, two applications under Chapter X Rule 3 of the High Court Rules supported by an affidavit has been brought on record seeking permission to array the legal representatives of the deceased-appellant Abudl Sattar as the appellant nos. 1/1 to 1/7. The Judgment and decree passed in the first appeal is 19.4.2005. The certified copy of the decree appended with the appeal shows that it was prepared on 3.5.2005 and the appellant died subsequent to the passing of the judgment and preparation of the decree on 17.7.2005. In fact the appeal was also reported at the time when the appellant was alive and, therefore, I come to a conclusion that this is a fit case where the benefit of Chapter X Rule 3 of the High Court Rules is available to the present appellant.

Case law discussed:
AIR 1953 AHO 97
AIR 1976 Alld.-444
2005 (98) RD-636
AIR 1976 Goa-54
AIR 1964 Mysore-293
2(V.61 C-2) C.
AIR 1982 Bomb.
AIR 1934 Alld-25

(Delivered by Hon. Mrs. Poonam Srivastava. J.)

1. Heard Sri P.P. Srivastava, Senior Advocate assisted by Sri Suneet Kumar, learned counsel for the appellant and Sri K.M. Garg, Advocate for the plaintiff-respondent.

2. An objection has been raised at the very out set regarding maintainability of this second appeal by Sri K.M. Garg on the ground that the appeal was instituted by a dead person. Sri P.P. Srivastava appearing for the defendant-appellant has brought to my notice the relevant dates relating to the present second appeal. The plaintiff-respondent instituted a suit No. 134 of 1989 before the Civil Judge (Junior Division), Bijnor for recovery of possession, damages and mesne profit at the rate of Rs.500/- per month along with 180/0 interest. The trial court decreed the suit in part, for recovery of possession and mesne profit at the rate of Rs.20/- per month with 18% per annum. The' defendant-appellant preferred an appeal vide Civil Appeal No. 25 of 2003 which was dismissed vide judgment and decree dated 19.4.2005 by the Additional District Judge, Bijnor. The present second appeal was prepared and affidavit filed in support of the stay application was sworn on 5.7.2005. The appeal was reported on

6.7.2005. It was reported that the limitation of the appeal is up till 3.8.2005. The appeal was presented on 1.8.2005. In the intervening period, when the appeal was reported and it was presented before the Court, within limitation, the appellant died on 17.7.2005. The order sheet dated 4.8.2005 shows that the appeal came up before the Court for the first time on 4.8.2005 and thereafter it was adjourned on a number of dates. It transpires from the record that on 8.8.2005 a substitution application under Chapter X Rule 3 of the High Court Rules read with Order 22 Rule 4 C.P.C. was moved. On 22.8.2005, this application came up before the Court. Counsel for the plaintiff-respondent accepted the notice and prayed time to file a counter affidavit. Subsequently, another application under Section 151 C.P.C. was filed and the Court directed the application along with accompanying affidavit to be kept on record on 22.8.2005. Another application under Section 5 of the Indian Limitation Act was also filed for condonation of delay. Simultaneously on the same day another application under Chapter X Rule 3 of the High Court Rules read with Section 151 C.P.C. was filed, to which counter and rejoinder affidavits have been exchanged. Before the appeal was heard on merits, the respective counsel for the parties were heard at length on the question of maintainability of this appeal. In the circumstances, I proceed to decide the substitution application and also application under Chapter X Rule 3 of the High Court Rules read with Section 151 C.P.C. Order 22 C.P.C. deals with the substitution proceeding to be adopted on the death, marriage and insolvency of the parties.

3. Sri K.M. Garg appearing for the plaintiff-respondent has emphatically stated that at the time when the appeal was presented, admittedly, the sole defendant-appellant was dead and since the appeal was presented by a dead person, it is a nullity and IH 1 subsequent application for substitution can be entel1aincd The submission on behalf of the plaintiff-respondent is that the provisions or Order 22 C.P.C. is applicable in a pending proceeding and not III all appeal which was instituted by a person who was already dead, and, therefore, since the appeal is a nullity, the subsequent application also can not be entertained. A number of decisions has been relied upon by Sri K.M. Garg, **M/s Nevandram Javermal Vs. Devikabai Haridas Gandhi and others. AI.R. 1982 Bombay. 589. Bala Prasad Vs. Radhey Shyam and another, A.I.R. 1934 Allahabad, 25, Chitradhar Gogoi and others Vs. Lalit Chandra Gogoi and others, A.I.R 1974 Gauhati 2 (V 61 C 2). C. Muttu Vs. Bharath Match Works, Sivakasi, A.I.R. 1964 Mysore, 293 (V 51 C 73), The Temple of Shri Shantadurga Calangutcarina, Nanora and others Vs. Macario Francisco Jose Duarte and another, A.I.R. 1976 Goa, Daman and Diu, 54. Cuttack Municioality Vs. Shvamsundar Behera, A.I.R. 1977 Orissa, 137, Banarasi Vs. Smt. Savitri Unadhyay and others, 2005 (98) RD, 636 and Smt. Jagrani (Dead) throught Lrs. Vs. IInd Additional District Judge, Jhansi. 2005 (98) RD, 636**.

4. Sri P.P. Srivastava has placed reliance on a decision of this Court in the case of **Smt. Prempiari and others Vs. Dukhi and another, AI.R. 1976 Allahabad, 444**. It is argued on behalf of

the deceased appellant that no doubt when an appeal is filed against a dead person, it is a still-born appeal and the provisions of Order 22 C.P.C. would not apply, but in the event, an application is made for substituting the legal heirs of the deceased who died prior to the institution of the appeal, the appeal would be taken to have been filed on the date of the application and if the appeal is time barred and the provisions of Section 5 of the Indian Limitation Act is invoked for getting the delay condoned, it would be taken that the appeal is filed on the date, limitation is condoned.

5. After going through the aforesaid decisions cited by the respective counsels for the parties, so far the application under Order 22 C.P.C is concerned it is correct to say that no substitution can be permitted in a case where there was sole defendant or the appellant and he was dead on the date of institution of the appeal, but where there are more defendants then one, and one of them was dead when the suit was filed or the appeal was presented, the court have held that the legal representatives of the deceased-defendant can be brought on record subject to the question of limitation If there would have been a number of appellants then the suit was very much maintainable at the instance of the other appellants and application for substitution under Order 22 Rule 4 C.P.C, can very well be entertained. In the case of **Bala Prasad (Supra)** this High Court had clearly held that where a suit is filed against the several defendants, one of whom \\as dead at that time of institution, the suit can not be considered to have been instituted against a dead person and it can not be said that it is 110t a validly t instituted suit. In such an event, the court can exercise all the powers of Order 22 Rule 4 C.P.C. In the present case, however the situation is altogether different, the appeal was presented by a dead person., Admittedly the appellant Abdul Sattar was not alive on 1.8.2005. He was not alive at the relevant time, therefore, the appeal can very well be said to be a nullity and no aid can be taken under the provisions of Order 22 Rule 4 or Order 6 Rule 17 C.P.C. The decisions cited on behalf of the plaintiff-respondent so far the provisions of Civil Procedure Code is concerned, appears to be correct law and therefore L come to a conclusion that the application for substitution under Order 22 or Order 6 Rule 17 C pecan not he allowed. The application for substitution is accordingly dismissed.

6. However, Allahabad High Court Rules 1952 provides a remedy in such an extra ordinary circumstances, Chapter X of the High Court Rules deals with the appeal or application by or against the legal representatives, assignee etc. Chapter X Rule 3 of the High Court Rules is quoted below:

"3. Appointment of legal representative of deceased party after the filing of appeal- Where after a memorandum of appeal has been presented to the Court, any appellant or any party interested in the maintenance of an objection filed under Rule 21 of Order XLI of the Code is informed that any person who is arrayed as a party in such appeal or objection had died before the memorandum of appeal was presented but after the decree or order appealed from was passed, he may subject to the law of limitation, make an application for an order that the memorandum of appeal be amended by substituting for the person

who is dead, his legal representative. The application shall state such facts as may be necessary to support it and shall be accompanied by an affidavit."

7. A careful reading of this Rule make it evident that the High Court Rules have taken care of a contingency where the sole appellant or the respondent died before the memorandum of appeal was presented but was alive on the date when the decree or order appealed was passed. The memorandum of appeal can be permitted to be amended by substituting the person who is dead and his legal representatives can very well be brought on record. In the instant case, two applications under Chapter X Rule 3 of the High Court Rules supported by an affidavit has been brought on record seeking permission to array the legal representatives of the deceased-appellant Abudl Sattar as the appellant nos. 1/1 to 1/7. The Judgment and decree passed in the first appeal is 19.4.2005. The certified copy of the decree appended with the appeal shows that it was prepared on 3.5.2005 and the appellant died subsequent to the passing of the judgment and preparation of the decree on 17.7.2005. In fact the appeal was also reported at the time when the appellant was alive and, therefore, I come to a conclusion that this is a fit case where the benefit of Chapter X Rule 3 of the High Court Rules is available to the present appellant. The learned counsel for the appellant has cited a Division Bench decision of this Court, **Banke Bihari Lal and another Vs. Mahadeo Prasad. A.I.R. 1953 Allahabad 97**, on the question of condonation of delay and burden of proof for grant of relief of condonation of delay.

8. I have carefully examined the counter and rejoinder affidavits filed in support and against the delay condonation application. It is apparent that though the appeal was reported and it was lying with the counsel for the appellant but it was not within his knowledge that the sole appellant is dead. Subsequently an application for substitution as well as for bringing on record the legal representatives under the provisions of High Court Rules along with delav condonation application was filed. I find that the cause shown is sufficient and thus the delay in filing the application is fit to be condoned. The application under Chapter X Rule 3 of the High Court Rules is allowed. Counsel for the appellant is permitted to bring on record the heirs of the appellant within a period of three weeks from today. Office is directed to summon the trial court record at the cost of the appellant and list this appeal before the appropriate Court for admission after receipt of the record.

9. Till the next date of listing, the parties are directed to maintain status quo as on today. Delay condoned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2006

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.14044 of 2006

Aditya Shukla ...Petitioner
Versus
Smt. Shanti Devi Srivastava ...Respondent

Counsel for the Petitioner:
Sri R.S. Mishra

Counsel for the Respondent:

Constitution of India-Art. 226-Right of Third Party-Release application of land lord-rejected by Rent Control & Eviction officer-during pendancy of revision the petitioner got allotment order of the accommodation in question-subsequently the land lords revision stand allowed-which resulted the release of accommodation in Question in favour of land lord-held-in matter of release between land lord and tenant-No other person can be heard-once release application allowed-consequential order of allotment automatically goes.

Held: Para 5

Admittedly a revision lies against the order passed by the Rent Control & Eviction Officer rejecting release application and a revision, as already stated, has been filed by the landlord which has been allowed by the impugned order. In Full Bench decision of this Court in the case of *Talib Hasan and another vs. Ist Additional District Judge, Nainital and others, 1986 (1) ARC 1* this Court has held that the matter of release is between landlord and tenant and no other person has a right to be heard. This decision has been upheld by the Apex Court. In view of the ratio of Talib Hussain (supra) petitioner's contentions, that the order was exparte and that the petitioner was not a party to the revision and that he was not heard and ultimately since the petitioner is going to be affected by the order of release, cannot be accepted. The petitioner is in occupation by virtue of a consequential order of allotment which has been passed after the release application of the landlord was rejected. Thus in my opinion once the order rejecting the lease application is set aside the consequential order of allotment automatically goes and no further right flows in favour of the petitioner.

Case law discussed:

2002 ACJ 1043 distinguished

1996 (1) ARC 1 relied on

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

1. The petitioner, an allottee of the accommodation in dispute, aggrieved by the order passed by the revisional authority dated 22nd October 2005 whereby the revisional authority allowed the revision filed by the landlord against the order rejecting the release application filed by the landlord and directing release of the accommodation in favour of the landlord, approached this Court by means of this writ petition under Article 226 of the Constitution of India.

2. The brief facts are that the respondent-landlord filed an application for release of the accommodation in favour of the landlord consequent to vacancy declared in the accommodation in question. This release application has been rejected by the Rent Control & Eviction Officer by its order dated 18th August 2005 whereby direction was given to proceed with the allotment of the accommodation in accordance with law. The landlord-respondent aggrieved by this order dated 18th August 2005 filed a revision i.e. Rent Revision No.41 of 2005 before the revisional authority. During the pendency of revision it appears that the accommodation in question was allotted in favour of the petitioner and as per assertions made by the petitioner, the petitioner occupied the accommodation in question. The revision against the order dated 18th August 2005 was ultimately allowed by the revisional authority by its order dated 22nd October 2005 whereby the accommodation in question was directed to be released in favour of the landlord.

3. Learned counsel for the petitioner submitted that the petitioner was not a party to the revision, therefore, any order that has been passed by the revisional authority is not binding on him. It is further submitted that since the petitioner was not a party to the revision, the order allowing the revision and directing the release of the accommodation has been passed without hearing the petitioner is in contravention of the principles of natural justice.

4. Learned counsel for the petitioner has further relied upon a decision of this Court reported in ***2002 ACJ 1043, Smt. Satyawati and others vs. Prescribed Authority, Etawah and others***, wherein this Court has held that an order directing to proceed exparte is prejudicial to petitioner's interest, therefore, the order was set aside by this Court. In my opinion the aforesaid ratio laid down by this Court in the above decision do not apply in the present case. In the present case the allotment order was passed in favour of the petitioner which is a consequential order to the order passed by the Rent Control & Eviction Officer rejecting the release application filed by the landlord.

5. Admittedly a revision lies against the order passed by the Rent Control & Eviction Officer rejecting release application and a revision, as already stated, has been filed by the landlord which has been allowed by the impugned order. In Full Bench decision of this Court in the case of ***Talib Hasan and another vs. Ist Additional District Judge, Nainital and others, 1986 (1) ARC 1*** this Court has held that the matter of release is between landlord and tenant and no other person has a right to be heard. This decision has been upheld by the Apex Court. In view of the ratio of Talib Hussain (supra) petitioner's contentions, that the order was exparte and that the petitioner was not a party to the revision and that he was not heard and ultimately since the petitioner is going to be affected by the order of release, cannot be accepted. The petitioner is in occupation by virtue of a consequential order of allotment which has been passed after the release application of the landlord was rejected. Thus in my opinion once the order rejecting the lease application is set aside the consequential order of allotment automatically goes and no further right flows in favour of the petitioner.

6. In view of what has been stated above this writ petition has no force and is accordingly dismissed. Petition dismissed.
