ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2006

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

Civil Misc. Writ Petition No. 54067 of 2005

Shivendra Gupta ...Petitioner
Versus
The State of U.P. & others...Respondents

Counsel for the Petitioner:
Sri R.K. Sachan

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Re evaluation of answer script-after summoning the answer script of Sanskrit Question No.18 found unmarked-Conduct of examiner with playing with the carrier of gullible student-direction issued to the board for appropriate action against such examiner- by debarring him from being enlisted in penal of examiner in future.

Held: Para 5

Regard being had to the omission in leaving answer to question no. 18 unmarked, I am of the view that conduct of the examiner, which is fraught with the consequence of playing with the future, and career of a gullible student must be censured. In my considered opinion, the Board will institute appropriate enquiry into the matter and in case the first examiner is found at fault, it may take appropriate action against him including action of debarring him from being enlisted in the panel of examiners in the next sessions and even thereafter. It is indeed a serious matter and it is expected that the Board will not show any unmerited leniency in such matters when the future and career of a student is at stake.

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

1. This writ petition is directed to issue a writ of mandamus commanding the respondents to produce the answer book pertaining to High School Examination **2005** Roll No. **1150817** relating to subject Sanskrit and Social Science Paper II.

2. Heard learned counsel for the petitioner and also learned Standing counsel. Learned Standing counsel has produced scripts of the Social Science II and Sanskrit papers written the petitioner and other relevant documents in compliance of the earlier of the Court dated 8.8.2005.

3. From a close scrutiny of Answer script of Sanskrit paper, it would appear that answer written to question no.18 of Sanskrit paper was left without marking by the Examiner. Accordingly, on re-checking of question no.18, petitioner was awarded four more marks. In this view of the matter, the total mark in Sanskrit paper would now add up to 73.

4. In so far as answer-script of Social Science II paper is concerned, there appears to be no error in marking and therefore, there would no change in the ultimate marks awarded to the petitioner in the said paper.

5. Regard being had to the omission in leaving answer to question no. 18 unmarked, I am of the view that conduct of the examiner, which is fraught with the consequence of playing with the future, and career of a gullible student must be censured. In my considered opinion, the Board will institute appropriate enquiry into the matter and in case the first

examiner is found at fault, it may take appropriate action against him including action of debarring him from being enlisted in the panel of examiners in the next sessions and even thereafter. It is indeed a serious matter and it is expected that the Board will not show any unmerited leniency in such matters when the future and career of a student is at stake.

6. Since the Court is concerned with what is happening involving future and career of a student, it cannot remain a passive pronouncer of judgment unconcerned with the end result. In this view of the matter, it is directed that enquiry report as may be ordered be taken to some completion within a specified period and this Court be apprised to the result of enquiry. The case be listed for the limited purpose after three months.

7. In the meantime, ad interim mandamus is issued commanding Opposite Parties to issue corrected mark-sheet to the petitioner within two weeks from the date of presentation of a certified copy of this order.

8. List the case on **13.11.2006**

Certified copy of this order be issued to learned counsel for the parties within 5 days on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.09.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 38515 Of 2002

Shri Nirbhay Mehrotra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.N. Dhavalikar
Sri Shyam Narain
Sri Sudhanshu Narain

Counsel for the Respondents:
Sri S.M.A. Kazmi
Sri V.R. Agrawal
Sri Piyush Bhargava
S.C.

U.P. Industrial dispute 1947-Section 2(z)-workman-working on the post of Deputy Director(finance)-entrusted with the duty of administration supervising and Controlling all employees of Accounts Department-being member of Hospital coordination Committee-cannot be treated a workman.

Held-Para 8

In his evidence, the petitioner failed to discharge the burden cast upon him to prove that he comes under the definition of the workman given under Section 2(z) of the Act, as no evidence was led by, the petitioner regarding the nature of duties performed by him. He has not stated anywhere as to what manual, supervisory, technical or clerical work was being performed by him so as to bring him within the ambit of the definition of workman. In his evidence, he has throughout stated in the negative that he did not perform administrative,

managerial or supervisory duties. No positive evidence of the duties performed by, him has been given by the petitioner. On the contrary, since the respondent-Hospital had proved before the Tribunal that the duties performed by the petitioner were of allocation of jobs, assignment of work, recommendation leave, carrying out confidential appraisal etc., it is not understood as to how the petitioner would thus be covered under the definition of the workman given under the Act.

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

1. The petitioner, who was working as Deputy Director (Finance) in the establishment of the respondent no. 2, Kamla Nehru Memorial Hospital, was dismissed from service vide order dated 9.12.1994. Challenging the said order of dismissal, the petitioner filed a Civil Suit no. 7 of 1995 before the Civil Judge, Allahabad, which was subsequently dismissed as withdrawn. Thereafter the petitioner raised an industrial dispute. Since the matter could not be reconciled, a reference was made by the State Government under Section 4 of the U.P. Industrial Disputes Act, 1947 (for short "the Act") to the Tribunal, which was registered as Adjudication Case No. 3 of 1999. The reference was as to whether the dismissal of the Workman Sri Nirbhay Mehrotra was proper and legal and, if not, what relief would he be entitled to? The Tribunal, thereafter, vide award dated 18.7.2000, held that since Si Mehrotra could not be termed as a workman under the definition provided in the Act, hence there was no valid industrial dispute and the order of reference made by the State Government under the Act was without jurisdiction, and thus not maintainable. Aggrieved by the said award, the petitioner has filed this writ petition.

2. I have heard Sri Shyam Narain, learned counsel appearing for the petitioner as well as Sri V.R. Agrawal, learned Senior Counsel, assisted by Sri Piyush Bhargava, learned counsel on behalf of the respondents no. 2 and 3 hospital. Pleadings have been exchanged and with the consent of the learned counsel for the parties, this writ is being disposed of at this stage.

3. Brief facts are that the petitioner was appointed on 11.3.1985 as Officer on Special Duty. Thereafter he was promoted as Accounts Officer and confirmed on such post. His designation was then changed to Finance Officer. He was later promoted as Deputy Director (Finance) in the Delhi office of the respondent-Hospital.

4. While the petitioner was working a Deputy Director (Finance), he was served with a charge sheet on 22.1.1994. An enquiry was conducted by, the enquiry officer, who submitted his report on 29.9.1994. Then, after issuing show cause notice to the petitioner and considering his reply, the dismissal order dated 9.12.1994 was passed by the respondent-Hospital authorities.

For the purpose of deciding the reference made to it, the Tribunal framed four issues, namely,

(i) Whether the workman claiming to be the workman is workman as defined in the U.P. Industrial Disputes Act? If so, its effect;

(ii) Whether, kamla Nehru Memorial Hospital, Allahabad is an industry as

defined in the U.P. Industrial Disputes Act? If so, its effect;

(iii) Whether the domestic enquiry conducted by the employers was in accordance with law and fair complying the rules of natural justice? Its effect; and

(iv) Whether the jurisdiction of the Industrial Tribunal is barred in view of the fact that the workman had taken recourse and had filed civil suit which was latter withdrawn with permission from the Civil Court itself.

5. While the Tribunal answered the second issue in favour of the petitioner and held that the respondent-Hospital was an industry as defined under the Act, but the issue no. 1 and 4, which relate to whether the petitioner was a workman as defined under the Act or not, and as to whether the jurisdiction of the Tribunal would be barred in view of the earlier civil suit filed by the petitioner or not, were both decided against the petitioner. Since it was held that the petitioner was not a workman and the Tribunal did not have jurisdiction, the Tribunal did not decide the third issue relating to fairness of the enquiry.

6. Having heard the learned counsel for the parties and considering the facts and circumstances of this case, I do not find any good ground for interference with the impugned award.

7. The finding on the Issue no. 1 is justified as it is fully supported by the evidence on record. From the record, it is clear that the petitioner was entrusted with the administrative managerial duties, which included the submission of annual confidential reports of employees working under him for the purposes of confirmation, promotion and crossing of efficiency bar etc. and extract of some confidential reports have also been quoted in the award of the Tribunal. Besides this, all the employees of the Accounts Department of the Hospital were under the petitioner and reporting to him. It has further been found that the petitioner was a member of the Hospital coordination committee, which was the highest body of the Hospital for managing its affairs. Such position has, not been denied by the petitioner also. The Tribunal also held that Service Rules of the Hospital show that the Accounts Officer/finance Officer was to be entrusted with administrative duties. The petitioner was admittedly drawing the salary of Rs.6800/- per month and was even empowered to sanction purchases up to certain limit.

8. In his evidence, the petitioner failed to discharge the burden cast upon him to prove that he comes under the definition of the workman given under Section 2(z) of the Act, as no evidence was led by, the petitioner regarding the nature of duties performed by him. He has not stated anywhere as to what manual, supervisory, technical or clerical work was being performed by him so as to bring him within the ambit of the definition of workman. In his evidence, he has throughout stated in the negative that he did not perform administrative, managerial or supervisory duties. No positive evidence of the duties performed by, him has been given by the petitioner. On the contrary, since the respondent-Hospital had proved before the Tribunal that the duties performed by the petitioner were of allocation of jobs, assignment of work, recommendation leave, carrying out confidential appraisal etc., it is not understood as to how the petitioner would

thus be covered under the definition of the workman given under the Act.

9. Even otherwise, in the plaint filed by the petitioner in Suit No. 7 of 1995, which was subsequently withdrawn by him, it had been admitted by the petitioner that he was working in the management cadre. Sri Shyam narain has, however, submitted that such assertion in the plaint would not amount to admission on the part of the petitioner as the suit filed by him had been withdrawn. Since on the basis of evidence adduced by the parties, it has already been proved beyond doubt that the petitioner was not a workman, I am thus not inclined to go into the said question as to whether an admission in the suit (which was subsequently withdrawn) would be binding on the petitioner in proceedings under the Industrial disputes Act. From the findings recorded by the Tribunal, it is clear that the petitioner was performing managerial duties and could not be treated as a workman for the purposes of the Act and as such, there was no valid industrial dispute and the order of reference made by the State Government under the Act was without jurisdiction.

10. Accordingly, the award passed by the Tribunal is confirmed and this writ petition is dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2006.

BEFORE
THE HON'BLE R.K. AGARWAL, J
THE HON'BLE BHARATI SAPRU, J

Criminal Misc. Writ Petition no. 15109 of 2002

Chaudhary Shankar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri O.P. Khare

Counsel for the Respondents:
Sri Saitsh Chaturvedi
Sri A.K. Singh
Sri R.A. Yadav
S.C.

Constitution of India-226-Fixation of Pension- Petitioner retired as Additional District Magistrate (J)-on 13.10.63-G.O. dated 13.04.2000-providing 50% Basic Pay of revise Pay scale of Rs.10,000-15,200-held-entitled Rs.5000/- per month toward pension-fixation of Rs.4167/- wholly illegal-contrary to the provision of G.O.-direction issued to pay interest at the rate of 12% per annum from September 2000 to till the date of actual payment-difference of amount so calculated w.e.f. 01.01.1996 be paid with 10% interest per annum.

Held: Para 7 and 8

Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that the Government Order dated 13th April, 2000 specifically provides for payment of at least 50% of the minimum of the revised pay scale as on 1st January, 1996 to the pensioners. There is no dispute regarding revised pay scale of Rs.10000-

15200 in respect of the post from which the petitioner had retired. Thus, he was entitled for Rs.5000/- as pension payable from 1st January, 1996. The fixation of pension at Rs.4167/- is, therefore, wholly illegal and contrary to the provisions of Government Order dated 13th April, 2000.

So far as the claim of interest is concerned, we find that the Apex Court in the cases of Dr. Uma Agrawal vs. State of U.P. and others, 1999 SCC (L&S) 742 and Vijay L. Mehrotra vs. State of U.P. and others, (2000) 2 UPLBEC 1599 has held that the State is liable to pay simple interest on the delayed payment of retiral benefits. As admittedly the arrears of revised pension were paid in September, 2000, and the pension in the revised pay scale, pursuant to the Government Order dated 13th April, 2000, has wrongly been fixed, the petitioner is entitled for interest also. We, therefore, direct the respondent nos. 1 and 4 to pay interest at the rate 12% per annum on the amount of arrears paid in September, 2000 from the date when it became due till the date of actual payment and further to fix the petitioner's pension at Rs.5000/- plus allowances from 1.1.1996 onwards. The petitioner shall also be paid interest on the arrears of the difference amount so calculated at the rate of 10% per annum from the date it became due till the date of its actual payment. The difference amount along with interest shall be paid to the petitioner within one month from the date a certified copy of this order is filed before the respondent nos. 1 and 4.

Case law discussed:

2000 (1593) U.P.& BR
1999 SCC(L&S)-742
2000 (2) UPLBEC-1599

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

1. By means of the present writ petition filed under Article 226 of the Constitution of India, petitioner Chaudhary Shankar Singh, seeks the following reliefs:

"(a) Writ order or direction to the respondent No.1 to allow the benefit of the provisions of Civil Service Regulation Article 474A(b), which provides the benefit of 30 years as qualifying service for full pension notionally for 27 ½ years of service to claim full pension at 55 years retirement age besides the petitioner may be allowed the consequential benefits as well which is based on law. (Annexure-No. 12 to the writ petition).

(b) Writ order or direction in the nature of mandamus to pay 50% of minimum of the revised pay scale for the post of A.D.M(J) last held by the petitioner, which is Rs. 10000 x 30/60 = Rs. 5000/- per month from 01-01-1996, as per G.O. Dated 13-4-2000 based on recommendation of 5th Central Pay Commission, as adopted by the U.P. State Government.

(c) Writ order or direction in the nature of mandamus to respondents No. 1 and 3 to pay to the petitioner an interest @ 18% per annum amounting to Rs. 64,000/- approximately, as per law laid down by the Apex Court in V.L. Mehrotra Vs. State of Uttar Pradesh and other reported in U.P. & B.R. 2000(1593) on delayed payment of Benefits under Rule 11 on the following amounts detailed in para-10 of the writ petition.

(d) Writ order or direction to respondent No.3 to refix the pension of the petitioner keeping in view the principles laid down in the case of D.S. Nakara Vs. Union of India referred to in para 7 (ii) of the writ petition.

(e) Order to grant any other and further relief on the facts and circumstances of the case including the cost of filing this writ petition."

Briefly stated the facts giving rise to the present writ petition are as follows:-

2. The petitioner was superannuated on attaining the age of 55 years on 31st October, 1963, while working on the post of Additional District Magistrate (Judicial). He had put in a qualifying service of 27 ½ years. Even though he opted for the retirement benefits under U.P. Retirement Benefit Rules, 1961, yet he was wrongly classified under the U.P. Liberalised Pension Rules, 1961 and was paid pension accordingly under the Liberalised Pension Rules, 1961. On a representation being made, the pension of the petitioner was re-fixed on 30th June, 1987. The petitioner was not satisfied with the fixation of his pension and made several representations. When the authorities did not care to decide the representation of the petitioner, he was left with no other option but to approach this Court by filing Civil Misc. Writ Petition No. 7373 of 2000 in which this Court, vide judgment and order dated 11th February, 2000 directed the authorities concerned to decide the representations made by the petitioner by a speaking order. Representation has since been decided. The pension has been revised and the revised pension along with the arrears has been paid to the petitioner. The petitioner still not being satisfied with the revision of his pension in view of the provisions of the Government Order dated 13th April, 2000, a copy of which is Annexure No.1 to the writ petition, according to which he is entitled for being paid at least 50% of the minimum of the revised pay scale of the post he was holding at the time of retirement, as on 1st January, 1996 as pension, for which he made another representation and the authorities have re-fixed the pension at Rs.4167/-. The submission is that he is entitled to be paid a sum of Rs.5000/- as pension in terms of the Government Order dated 13th April, 2000.

3. We have heard Sri O.P. Khare, learned counsel for the petitioner, learned Standing Counsel, who represents respondent nos. 1, 2 and 4 and Sri Satish Chaturvedi, who represents respondent no. 3.

4. Learned counsel for the petitioner submitted that fixation of pension at Rs.4167/- is not in accordance with the Government Order dated 13th April, 2000 inasmuch as under the said Government Order the petitioner is entitled for pension of Rs.5000/- being 50% of minimum of the pay scale of Rs.10000-15200, which is the revised pay scale of the post from which the petitioner had retired. He further submitted that he is entitled for interest at the prevailing market rate on the amount of arrears which was paid to him in the month of September, 2000 and also on the amount of difference payable pursuant to the Government Order dated 13.4.2000.

5. Sri Satish Chaturvedi, learned counsel appearing for the respondent no. 3, however, submitted that the respondent no. 3, vide order dated 28th November, 2001, had decided the representation of the petitioner in compliance of the order dated 11th February, 2000 passed by this Court and the amount of pension as determined is being paid to the petitioner.

6. Learned Standing Counsel, who represents respondent nos. 1,2, and 4, however, submitted that the pension has been rightly calculated and re-fixed at Rs.4167/- vide order dated 22nd June, 2001 and it needs no revision.

7. Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that the Government Order dated 13th April, 2000 specifically provides for payment of at least 50% of the minimum of the revised pay scale as on 1st January, 1996 to the pensioners. There is no dispute regarding revised pay scale of Rs.10000-15200 in respect of the post from which the petitioner had retired. Thus, he was entitled for Rs.5000/- as pension payable from 1st January, 1996. The fixation of pension at Rs.4167/- is, therefore, wholly illegal and contrary to the provisions of Government Order dated 13th April, 2000.

8. So far as the claim of interest is concerned, we find that the Apex Court in the cases of **Dr. Uma Agrawal vs. State of U.P. and others**, 1999 SCC (L&S) 742 and **Vijay L. Mehrotra vs. State of U.P. and others,** (2000) 2 UPLBEC 1599 has held that the State is liable to pay simple interest on the delayed payment of retiral benefits. As admittedly the arrears of revised pension were paid in September, 2000, and the pension in the revised pay scale, pursuant to the Government Order dated 13th April, 2000, has wrongly been fixed, the petitioner is entitled for interest also. We, therefore, direct the respondent nos. 1 and 4 to pay interest at the rate 12% per annum on the amount of arrears paid in September, 2000 from the date when it became due till the date of actual payment and further to fix the petitioner's pension at Rs.5000/- plus allowances from 1.1.1996 onwards. The petitioner shall also be paid interest on the arrears of the difference amount so calculated at the rate of 10% per annum from the date it became due till the date of its actual payment. The difference amount along with interest shall be paid to the petitioner within one month from the date a certified copy of this order is filed before the respondent nos. 1 and 4.

9. As the petitioner is 99 years old, it goes without saying that respondent nos. 1 and 4 shall accord top priority to this matter and work out the amount and pay the same to the petitioner within the stipulated period so that the petitioner may feel satisfied by enjoying the fruits of his career during his life time. The writ petition succeeds and is allowed.

However, there shall be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2006.

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J
THE HON'BLE AMAR SARAN, J

Criminal Misc. Writ Petition no. 5585 of 2006

Smt. Neelanjana Gupta and others ...Petitioners
Versus
State of U.P. and others...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Singh

Counsel for the Respondents:
Sri C.K. Parekh

<u>Constitution of India, Art.-226-Quashing of FIR</u>-offence under section 498-A-/323/504/506 I.P.C.-The main purpose to encourage the settlement of marital disputes between the spouses- to avoid the interminable litigation- so that they do not lose their youthful years- accordingly the husband deposited Rs.600000/- and the wife informant admitted the receiving and filed application for with drawl of criminal case and the other proceeding u/s 125 Cr.P.C.-held- FIR liable to quashed – necessary directions issued to the family court also – relating to divorce proceeding.

Held: Para 11

As we feel that the parties have amicably parted on the intervention of this Court and the petitioner Prashant Gupta has paid a substantial amount Rs. 6 lakhs to arrive at a permanent settlement with Anjali Gupta, the parties may now be interested in getting on with their lives, marrying someone else of their choices, we therefore think that considering the apparent irretrievable break down of their marriage, and for putting a 'quietus to the litigations' the Principal Judge Family Court may also consider passing appropriate orders in the petition for divorce filed by Smt. Anjali Gupta most expeditiously. It is directed that when petitioner Prashant Gupta who works out of station and who needs to travel abroad appears before the Court concerned for the purpose of filling his absence of objections to the prayer for divorce the concerned Court should not grant any unnecessary adjournment.

<u>Case law discussed:</u>
1977(2) SCC-699
AIR 2004 SCC-261

(Delivered by Hon'ble Imtiyaz Murtaza, J.)

1. This writ petition has been filed by the petitioners for quashing the first information report lodged at case crime No. 395 of 2005, under Sections 498-A/323/504/506 IPC read with Section ¾ of Dowry Prohibition Act, police station Colonelganj, district Allahabad.

2. We have heard learned counsel for the parties, and have perused the affidavits and counter-affidavits filed by the parties.

3. The F.I.R contained the usual allegations of cruelty and dowry demand. As the parties appeared to be of respectable status and petitioner No. 3 is said to be working in Infosys company it was apparent to this Court that the FIR has been lodged under the aforesaid sections in view of the marital incompatibility between the petitioner No. 3 Smt. Anjali Gupta. It may be mentioned that a divorce suit had even been filed by respondent No. 3 against petitioner No. 3 under Section 13 of the Hindu Marriage Act.

4. Keeping in mind the sage advice of the apex Court in *B.S. Joshi v. State of Haryana*, AIR 2003 SC 1386 to Courts to encourage settlement of marital disputes between contesting spouses so that they do not lose their youthful years in chasing interminable litigations, we encouraged the parties to arrive at an amicable settlement with the aid of their counsel. Accordingly during the course of the hearing of this petition on 9.5.2006, we postponed the case to 17.5.2006 so that the parties could thrash out the terms of a settlement. Fortunately the parties and counsel have heeded our advice, and have reached a fair settlement to the satisfaction of both parties.

5. In pursuance of the compromise, the petitioner no. 3 has paid Rs. 600,000/-

(Rupees six lakhs only) by two bank drafts and a counter affidavit dated 9.5.2006 has even been by respondent No. 3 in which she has admitted receiving the amount. She has further mentioned that she is no more interested in prosecuting the petitioner s on the basis of the FIR. She is also willing to file an application for withdrawal of criminal case No. 541 of 2005 (Smt. Anjali Gupta s. Prashant Gupta) under Section 125 of Code of Criminal Procedure pending before the Principal Judge, family court, Allahabad. She further states that she will not claim any kind of maintenance form petitioner No. 3 in future also.

6. The petitioners are also agreeable to the aforesaid terms of the compromise. Learned counsel for the petitioners however urges that petitioner No. 3 has no objection to the divorce decree being granted, but as petitioner No. 3 is not in Allahabad as he has to remain out of station and sometimes out of the country in connection with his employment in Infosys Ltd., when he appears before the Principal Judge, Family Court, Allahabad to file his consent and absence of objection to the prayer for divorce being sought by respondent No. 3, the concerned court may be directed to dispose of the petition for divorce speedily and not grant any unnecessary adjournment.

7. Reiterating the following lines from paragraph 10 of *B.S. Joshi v. State of Haryana*, I think the interests of justice would be met if we the prayer of parties is acceded to and the criminal proceedings and other litigation between the parties is brought to an end. The lines read:

"In State of Karnataka v. L. Muniswamy and others ((1977) 2 SCC 699), considering the scope of inherent power of quashing under Section 482, this Court held that in the exercise of this wholesome power, the High Court is entitled to quash proceedings if it comes to the conclusion that ends of justice so require. It was observed that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. This Court said that the compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. On facts, it was also noticed that there was no reasonable likelihood of the accused being convicted of the offence. What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family members and as a result there of she has again started living with her husband with whom she earlier had differences or she has willingly parted

company and is living happily on her own or has married someone else on earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise of power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences. Answer clearly has to be in 'negative'. It would, however, be a different matter if the High Court on facts declines the prayer for quashing for any valid reasons including lack of bonafides."

8. In *B.S. Joshi's case* it has further been observed in paragraph 8, that in an appropriate case for securing the ends of justice, the proceedings can be quashed by the High Court in exercise of powers under section 482 Cr.P.C. or even in exercise of its extraordinary powers under Article 226 of the Constitution of India.

9. In another decision of the apex Court, *Smt. Swati Verma v. Rajan Verma and Ors*, AIR 2004 SC 261, where similar to the present case the disputes including the criminal and divorce litigation between the sparring spouses had been decided on the basis of compromise and where again the husband had paid Rs. 6 lakhs to his wife for the settlement, the apex Court had quashed the criminal proceedings under section 498-A, and 406 IPC before the Allahabad High Court infructuous. In that case in paragraph 7 the Hon'ble Supreme Court had observed:

"7. Having perused the records placed before us we are satisfied that the marriage between the parties has broken down irretrievably and with a view to restore good relationship and to put a quietus to all litigations between the parties and not to leave any room for future litigation, so that they may live peacefully hereafter, and on the request of the parties, in exercise of the power vested in this Court under Art. 142 of the Constitution of India, we allow the application for divorce by mutual consent filed before us under S. 13(B) of Hindu Marriage Act and declare that the marriage solemnized between the consenting. parties on 13th June, 2001 at Delhi is hereby dissolved, and they are granted a decree of divorce by mutual consent."

10. Taking a cue from the aforesaid decisions we think that the interest of justice would be met if the FIR at Case Crime No. 395 of 2005 and the 125 Cr.P.C. proceedings between the parties are quashed by this Court.

11. As we feel that the parties have amicably parted on the intervention of this Court and the petitioner Prashant Gupta has paid a substantial amount Rs. 6 lakhs to arrive at a permanent settlement with Anjali Gupta, the parties may now be interested in getting on with their lives, marrying someone else of their choices, we therefore think that considering the apparent irretrievable break down of their marriage, and for putting a 'quietus to the litigations' the Principal Judge Family Court may also consider passing appropriate orders in the petition for divorce filed by Smt. Anjali Gupta most expeditiously. It is directed that when petitioner Prashant Gupta who works out of station and who needs to travel abroad appears before the Court concerned for the purpose of filling his absence of

objections to the prayer for divorce the concerned Court should not grant any unnecessary adjournment.

12. In this view of the matter, we quash the criminal proceedings against the petitioners in case crime No. 395 of 2005, under Sections 498-A/323/504/506 IPC read with Section ¾ of Dowry Prohibition Act, police station Colonelganj, district Allahabad. We further quash the proceedings under section 125 Cr.P.C. in case No. 451 of 2005, pending before the Principal Judge, Family court, Allahabad. We also direct the Principal Judge, Family Court, Allahabad not to grant any adjournment on the date when petitioner No. 3 appears before the Court for filing his consent and no objection to the grant of a decree of divorce to respondent No. 3 in her petition under Section 13 of the Hindu Marriage Act against petitioner No.3, and to pass appropriate orders very expeditiously, The concerned Court is also directed to pass appropriate orders in the proceedings under section 125 Cr.P.C. in the light of the orders passed in this writ petition. In future also it is expected that the parties shall not raise any claim or counter claim against each other.
With these observations, this writ petition is allowed.

Copy of the order may be given to the parties by 27th May 2006 on payment of usual costs. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2006

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

Civil Misc. Writ Petition No.266 of 2006

Smt. Kamlesh ...Petitioner
Versus
Mukya Nirwachan Ayuct, Rajya Nirwachan Ayog, U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vivek Prakash Mishra

Counsel for the Respondents:
Sri P.N. Rai
Sri Rajendra Singh Parihar
S.C.

<u>Constitution of India-Art. 226-Power of re counting of Votes</u>-election for the post of member of Block Development Committee-petitioner secured 378 Votes- respondent no. 3 got 337-by order dated 26.10.05 petitioner declared successful and certificate issued-subsequent declaration in favour of respondent no. 3-on the basis of re-counting on the ground-the votes of polling booth No. 132 was not counted-held-once result declared-certificate issued-the election process come to an end-subsequent order based on re counting without jurisdiction.

Held: Para 8 & 11

The law on the issue involved in this petition is well settled. The election law is too technical; equity, justice etc. have no role in such matters. The result had been declared by the Returning Officer. The petitioner had been declared successful and the certificate to that effect was also issued in her favour. In such circumstances the Returning Officer had become functus officio and the

mistake, if any, in declaring the result without counting some of the votes, could be rectified only at the intervention of the Election Tribunal/Court but it was not legally permissible for the Returning Officer on any ground, whatsoever, to review his earlier order. The order passed by him is therefore without jurisdiction and the certificate declaring respondent no.3 as a successful candidate cannot be given effect to.

From the above, it is evident that election comes to an end on declaration of the result of the election, i.e. when the certificate is issued to a particular candidate declaring him successful. Thus, in the instant case, the election had come to an end the moment the certificate was issued in favour of the petitioner and all subsequent proceedings taken by the Returning Officer are without any authority/competence.

Case law discussed:
AIR 2002 SC-2112
AIR 1978 SC-851
1995 AWC-1465
AIR 1952 SC-64
2000 (91) R.D.-619
AIR 1954 SC-520
1995 AWC-1465
AIR 1965-1892
2005 (8) SC-383
AIR 1985 SC-1746
AIR 2004 SC-3600
AIR 1988 SC-61
AIR 1999 P & H. 1 (F.B.)

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

1. This petition involves a substantial question of law as to whether after declaration of the result by the Returning Officer and issuance of the certificate of declaration in favour of a successful candidate, the Returning Officer has the competence to order for recount of the votes or issue a certificate in favour of any other candidate on the ground that certain votes had not been counted before the declaration of the result.

2. The facts and circumstances giving rise to this case are that the petitioner was a candidate for the post of member of Block Development Committee (hereinafter called the "B.D.C.') for Kshetra Panchayat Swar, District Rampur. The election was held on 23.10.2005 and after the counting of votes, it was found that the petitioner secured 378 votes while the respondent no.3 Smt. Surja secured only 337 votes and another candidate Geeta could secure only 24 votes. On the basis of this counting, the Returning Officer, respondent no.2 declared the petitioner successful, and the certificate to that effect dated 26.10.2005 (Annex.1) as required under the Rules was also issued to her. The Returning officer, subsequent thereto, declared the respondent no.3 as a successful candidate and also issued the certificate to that effect on the same date on the ground that the votes relating to polling booth no.132 had not been counted and could not be taken into consideration while making the declaration in favour of the petitioner. As after counting all the votes, respondent no.3 secured 463 votes and petitioner could secure only 414 votes, respondent no.3 was declared successful. Petitioner filed Writ Petition No. 74495 of 2005 to challenge the certificate issued in favour of respondent no.3. This Court, vide order dated 08.12.2005 dismissed the writ petition as withdrawn but granted permission to file a fresh petition. Hence this petition.

3. Heard Shri Vivek Prakash Mishra, learned counsel for the petitioner, Shri

P.N. Rai, learned counsel appearing for respondent nos. 1 and 2 and Shri Rajendra Singh Parihar for respondent no.3.

4. It has been submitted by learned counsel for the petitioner that once the result had been declared, the Returning Officer had become functus officio. He, therefore, had no authority under law to count other votes for any reason whatsoever and declare respondent no.3 as a successful candidate.

5. Shri P.N. Rai and Shri Rajendra Singh Parihar, learned counsel appearing for the respondents have submitted that in order to rectify a factual error, the Returning Officer found it necessary to do so in the interest of justice for holding a fair election, and as the result declaring the petitioner successful had been made inadvertently, the same was rectified by the Returning Officer and hence the petition is liable to be dismissed.

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

7. The learned counsel for the respondents have admitted in their counter affidavit that the result was declared by the Returning Officer on 26/10/2005 and petitioner was declared a successful candidate and the certificate to that effect (Annex.1) was also issued to her. While entertaining the writ petition, this Court passed an interim order in favour of the petitioner and she is still holding the post under the interim order of this Court.

8. The law on the issue involved in this petition is well settled. The election law is too technical; equity, justice etc. have no role in such matters. The result had been declared by the Returning Officer. The petitioner had been declared successful and the certificate to that effect was also issued in her favour. In such circumstances the Returning Officer had become functus officio and the mistake, if any, in declaring the result without counting some of the votes, could be rectified only at the intervention of the Election Tribunal/Court but it was not legally permissible for the Returning Officer on any ground, whatsoever, to review his earlier order. The order passed by him is therefore without jurisdiction and the certificate declaring respondent no.3 as a successful candidate cannot be given effect to.

9. Shri P.N. Rai, learned counsel for the respondent Commission has submitted that the Election Commission has plenary and all necessary powers for smooth, free and fair conduct of the election subject only to a valid law and in exercise of its residual power, such a course is permissible. To fortify his submission, reliance has been placed by Shri Rai on the judgments of the Hon'ble Apex Court in Union of India Vs. Association for Democratic Reforms & Anr., AIR 2002 SC 2112; & Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851, wherein it has been held that the Commission is competent, in an appropriate case, to pass an appropriate order to meet a particular fact situation in exercise of its powers under the Statute though the order is to be passed on receiving the reports from the Returning Officer with regard to any situation arising **in the course of an election** and the powers has to be exercised with promptitude. The aforesaid contention has

to be rejected for the reason that in Mohinder Singh Gill (supra), the Hon'ble Apex Court has held that the power of the Commission and its officers can be exercised to hold free and fair election till its culmination in the formal declaration of the result. The Court held as under:-

"Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and **culmination in the final declaration of the returned candidate."** (Emphasis added).

10. Similar view had earlier been taken by the Apex Court in N.P. Ponnuswami Vs. The Returning Officer, Namakkal Constituency, Namakkal Salem Dist. & Ors., AIR 1952 SC 64.

11. From the above, it is evident that election comes to an end on declaration of the result of the election, i.e. when the certificate is issued to a particular candidate declaring him successful. Thus, in the instant case, the election had come to an end the moment the certificate was issued in favour of the petitioner and all subsequent proceedings taken by the Returning Officer are without any authority/competence.

12. More so, recounting of votes is permissible on limited grounds, by the Returning Officer only prior to the declaration of the result. He has no competence to order for recount the votes after declaration of the result of the election. If the respondent no.3 was so aggrieved she could have filed an election petition seeking direction for recounting of votes from the Election Tribunal but it was not permissible for the Returning Officer to provide the remedy to the respondent no.3 as he was not the appropriate forum to adjudicate upon the controversy, at all.

13. It is settled legal position that once result of the election is declared, it can be challenged only before the election Tribunal. (Vide N.P. Ponnuswami (supra); Durga Shankar Mehta Vs. Raghuraj Singh, AIR 1954 SC 520; Brundaban Nayak Vs. Election Commission of India & Anr., AIR 1965 SC 1892; Mohinder Singh Gill (supra); Krishna Ballabh Prasad Singh Vs. Sub Divisional Officer, Hilsa-cum-Returning Officer & Ors., AIR 1985 SC 1746; and The Election Commission of India Vs. Shivaji & Ors., AIR 1988 SC 61).

14. In exceptional circumstances, where the facts are not in dispute, the controversy regarding disqualification etc. can also be agitated in writ jurisdiction. (Vide K. Venkatachalam Vs. A. Swamickan & Anr., AIR 1999 SC 1723; and Lal Chand Vs. State of Haryana & Ors., AIR 1999 P&H 1 (FB); Manda Jaganath Vs. K.S. Rathnam & Ors., AIR 2004 SC 3600; Harnek Singh Vs. Charanjit Singh, (2005) 8 SCC 383).

15. Thus, in view of the above, the Returning Officer had lost the competence to deal with the issue further once the result had been declared.

16. We also find no force in the submissions made by Sri Rai that in such a fact-situation, Election Commission and its officers had a legal obligation/implied powers to rectify the mistake made inadvertently. Legal maxim "Quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest' means when the law gives some one anything, it

gives him also that without which the thing cannot exist, does not apply in the facts of the instant case for the reason that immediately after declaration of the result and issuance of the certificate, the election came to an end, and the Returning Officer became functus officio, i.e. after discharging the duties of the Returning Officer, his authority stood terminated automatically. Thus, the Returning Officer had lost the competence to deal further even if some votes were left to be counted inadvertently. Thus, the order passed by the Returning Officer cannot be sustained in the eyes of law.

17. The issue involved herein has been examined by various Division Bench of this Court in Smt. Ram Kanti Vs. District Magistrate & Ors., (1995) AWC 1465; and Shambhu Singh Vs. State Election Commissioner & Ors., 2000 (91) RD 619, wherein it has been held that declaration of the result once made cannot subsequently be cancelled. Once the election process comes to an end, the Authority becomes defunct.

18. In view of the above, petition succeeds and is allowed. The certificate issued in favour of respondent no.3 declaring her as a successful candidate (Annex CA-2) is hereby quashed and consequently the earlier certificate declaring the petitioner successful stands revived. It will, however, be open to the respondent no.3 to approach the appropriate forum, i.e. the Election Tribunal for seeking appropriate remedy, if she is so advised.

19. A copy of this order may be issued to the learned counsel for the parties by 01.04.2006 on payment of usual charges. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2006

BEFORE
THE HON'BLE V.C. MISRA, J.

Civil Misc. Writ Petition No. 45006 of 2001

Smt. Anju Jain ...Petitioner
Versus
The General Manager (Personnel & HRD), State Bank of India & others ...Respondents

Counsel for the Petitioner:
Sri R.M. Shukla
Sri M.C. Tewari
Sri O.P. Sharma

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

<u>Constitution of India, Art. 226</u>- Compassionate Appointment-claim rejected-taking into account the past conduct of the employee-died in harness-held-it is not a benefit provided to the deceased employee-but for providing immediate relief to the dependents to survive-view takes by the Bank authority-held-impermissible in the eye of law being in violation of principle of natural justice.

Held: Para 7

No past acts of misconduct of the employee who dies in harness can be taken into account while considering the case of a family member for employment on compassionate ground, as it is not a benefit provided to the deceased employee but for providing immediate succor to its dependants to survive. The decision of the respondents is impermissible in the eye of law being in

violation of the principles of natural justice.

Case law discussed:
2005 (Supp.) 2 SCC-689
2005 (1) UPLBEC—978
2004 (2) UPLBEC-1503
2004 (3) UPLBEC-2244

(Delivered by Hon'ble V.C.Misra, J.)

1. Sri O.P. Sharma, learned counsel for the petitioner and Sri Vipin Sinha, learned counsel for the respondents-Bank are present. Counter and rejoinder affidavits have been exchanged in this case. On the joint request of learned counsel for the parties, this writ petition is being decided finally at the admission stage itself in terms of the Rules of Court.

2. This writ petition has been filed by the petitioner for quashing the impugned order dated 16.7.2001 (Annexure No. 4 to the writ petition) declining the appointment of the petitioner on compassionate ground by the Assistant General Manager, State Bank of India and for a direction commanding the respondents-Bank to give appointment to the petitioner in the Bank on compassionate ground on account of death of her husband who died on 25.1.2000 while working as Assistant in the Karhall Branch of State Bank of India, Agra.

3. The facts of the case in brief are that the husband of the petitioner Deepak Kumar Jain who was working as Assistant in the Karhall Branch, State Bank of India, Agra expired on 25.1.2000 leaving behind him the petitioner and three daughters aged about 8 years, 6 years and 3 years respectively and his old parents. Neither any moveable or immoveable property nor cash balance or jewellery was left behind by him and there was no other source of income except of family pension which was insufficient to maintain his family. His widow-the petitioner submitted an application for appointment on compassionate ground in the Bank on account of death of her husband, which was rejected by respondent no. 3- Chief General Manager (Personnel and HRD) vide letter dated 21st May, 2001 without providing any opportunity of hearing to her. The petitioner thereafter filed an appeal before the Chairman, State Bank of India, Central Office, Mumbai on 7th March, 2001 averring therein all the facts and also that the petitioner and her family should not be penalized on account of earlier acts of her late husband, whatsoever. The petitioner's appeal was also dismissed by the Chairman, State Bank of India and dismissal order was communicated to her vide its letter dated 16.7.2001. The petitioner, being aggrieved, filed this writ petition.

4. In the counter affidavit filed by the respondents Bank it has been stated that Sri D.K. Jain- husband of the petitioner was placed under suspension by the competent authority w.e.f. 30.5.1995 and was served with a charge sheet dated 6.9.1995 for having committed gross misconduct, inter alia that on 23.1.1995 he accepted a deposit of Rs.200/- each from two customers and issued counter foils but the amount was credited to their respective accounts on the next date i.e. 24.1.1995; that on 2.2.1995 he submitted a false T.A. Bill for Rs.109/- in connection with his visit to Tundla Branch on 27.1.1995 to attend an inquiry which he did not attend; that on 20.3.1995 he purchased a Cheque for Rs. 300/- from Seo Ka Bazar (Agra) Branch without

keeping sufficient balance in his Account. All the said charges levelled against him were found to be proved and thus the disciplinary authority imposed a penalty of reducing his basic pay by two stages and stopping of five annual future increments with cumulative effect of postponing his further increments. In the counter affidavit it has been further stated that the Bank had introduced the scheme of compassionate appointments in the year 1979, which was amended from time to time. The applicable scheme at relevant time for compassionate appointment updated up to 1.1.1998, inter alia, provides that the object of granting compassionate appointment is to enable the bereaved family on sudden crisis due to death of the bread earner but to offer compassionate appointment was subject to the satisfaction of the competent authority of the respondents- Bank. It has also been stated in the counter affidavit that in the present case the compassionate appointment of the petitioner-a dependant of the deceased employee was not covered under the terms and conditions of the Scheme provided for the said purpose and that there did not exist any vested right in the petitioner and, therefore, she was not entitled to any benefit.

5. Learned counsel for the petitioner has relied upon the decisions of Hon'ble the apex Court as well as of this Court rendered in the case of Smt. Phoolwati Vs. Union of India & others (2005)Supp (2) S.C.C. 689); Mritunjay Mishra Vs. Chief General Manager, State Bank of India & others ((2005) 1 UPLBEC 978); Ajay Kumar Shevdy Vs. The Chief Security Commissioner & others (2004) 2 UPLBEC 1503) ; and in Chief General Manager, State Bank of India & others Vs. Durgesh Kumar Tiwari (2004) 3 UPLBEC 2244. Learned counsel for the petitioner has submitted that when the petitioner applied for compassionate appointment on the death of her deceased husband, who was an employee of the respondents- Bank the earlier Scheme was fully applicable to the petitioner's case, copy of which is annexed as Annexure No. 4 to the Supplementary Affidavit.

6. Learned counsel for the respondents-Bank has submitted that the earlier scheme for compassionate appointment was withdrawn and was substituted by another scheme from the date of its enforcement which is not applicable in the present case. However he has admitted that the earlier scheme was applicable in the present case. A copy of the said scheme for appointment on compassionate grounds for dependants of deceased employees/ employees retired on medical grounds has been filed by the respondents- Bank as Annexure No. 2 to the counter affidavit. Learned counsel for the respondents- Bank has submitted that clause 6 (d) of the Scheme as updated up to 1.1.1998 provided that prior Government concurrence was mandatory for considering the cases where disciplinary action had been taken against the employee or disciplinary proceedings were pending or contemplated against him but later on the matter was reconsidered by the government and it was decided that such proposal may be considered by the Boards of the Bank in terms of the Government guide lines and the matter should not be referred to the Government in future. Learned counsel for the respondents-Bank submitted that accordingly in pursuance to the Government decision the Executive of the Central Board of the Bank approved the revised authority structure to deal with the

cases provided for in the amended scheme of May, 2002 in which as per clause 11 (A) (a) thereafter the Managing Director & Group Executive (National Bank Group) shall be competent authority for approving such proposal for compassionate appointment in cases where a penalty for minor misconduct was inflicted on the deceased employee. It has been further submitted that as per clause 11 (D) of the scheme, the Executive of the Central Board would be competent authority to give prior sanction for appointment under the Scheme if penalty for gross misconduct was inflicted.

7. I have heard learned counsel for the parties at length and looked in to the record of the case as well as the authorities cited by the learned counsel for the petitioner and I find that at the time when the petitioner applied for compassionate appointment on the death of her deceased husband, the earlier Scheme was applicable to the petitioner's case and the amended Scheme came into force from May, 2002. I am of the view that the inapplicable provisions of the clauses of the amended Scheme could not be taken resort to by the respondents as a ground to deprive/scuttle the rightful benefits that accrue to the petitioner only due to some charges of misconduct of the deceased husband of the petitioner for which he had already been penalized. No past acts of misconduct of the employee who dies in harness can be taken into account while considering the case of a family member for employment on compassionate ground, as it is not a benefit provided to the deceased employee but for providing immediate succor to its dependants to survive. The decision of the respondents is impermissible in the eye of law being in violation of the principles of natural justice.

8. In the result the petition succeeds and is allowed and the impugned orders dated 21.5.2001 and 16.7.2001 (Annexures No. 2 and 4 to the writ petition) are hereby quashed. Accordingly the respondents-Bank is directed to provide an appointment to the petitioner on compassionate ground on account of the death of her husband, in accordance with law and in terms of the earlier Scheme, which was inforce at that time within one month from the date a certified copy of this order is placed before the concerned authority-respondent Bank. There will be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 27402 of 2006

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

Counsel for the Petitioner:
Dr. Daya Shankar

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

Intermediate Education Act, 1921, Section 16-G.(7)-approval of suspension order-Principal of college-suspended by the management-papers sent for approval-No order passed within 60 days

whether the D.I.O.S. empowered to approve or disapprove even after expiry of sixty days? Held-'yes'.

Held: Para 5

In view of the aforesaid, it is clear, that the District Inspector of Schools was competent to approve or disapprove the suspension order even after the expiry of 60 days. Consequently, the submission of the learned counsel for the petitioner is bereft of merit. No other point was raised by the learned counsel for the petitioner.

Case law discussed:

1995 (1) UPLBEC 460 (FB) relied on.

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

1. The petitioner is the Principal of the College and was suspended on certain charges by an order dated 27.3.2005. The petitioner filed a Writ Petition No.37014 of 2005 praying for the payment of the salary, on the ground, that the suspension order had not been approved within the stipulated period of 60 days, as contemplated under Section 16-G (7) of the U.P. Intermediate Education Act. The Court by an order dated 5.5.2005 passed an interim order which is quoted herein under:-

"In the meantime, in case suspension order dated 28.2.2005 has not been approved, then respondents are directed to ensure payment of salary to the petitioner month by month along with teaching and non-teaching staff of the institution."

2. The petitioner has filed the present writ petition for the quashing of the orders dated 9.3.2006 and 11.3.2006 passed by the District Inspector of Schools, whereby he has approved the suspension order dated 27.2.2005.

3. Dr. Daya Shanker, the learned counsel for the petitioner submitted, that the suspension order, having not being approved within the stipulated period of 60 days, became inoperative and the suspension order came to an automatic end, in view of Section 16-G(7) of the U.P. Intermediate Education Act and, therefore the District Inspector of Schools had no authority to approve the suspension order after the expiry of 60 days.

4. Sri V.K. Singh, the learned counsel for the Committee of Management submited that even after the expiry of 60 days, the District Inspector of Schools was empowered and competent to approve or disapprove the order of suspension. In support of his submission, the learned counsel for the respondent has relied upon a decision of a Full Bench of this Court in **Chandra Bhushan Misra vs. District Inspector of Schools, Deoria and others**, (1995) 1 UPLBEC 460, in which the Full Bench answered the reference as under:-

"An order of suspension of the Head or a teacher of an Institution does not lapse even if not approved by the Inspector within sixty days from the date of such order and it merely ceases to operate and becomes effective again after it is approved by the Inspector."

The Full Bench further held-

"In view of the provisions of sub-section (7), an order of suspension of Head or a teacher of an Institution shall remain in force for a period of sixty days from the date of such order even if it is not approved in writing by the Inspector;

but in the absence of the approval by the Inspector such an order will cease to operate on expiry of sixty days from the date of the order, although it will continue to exist though inoperative. But if the order of suspension is approved even after the expiry of sixty days, it will come into force again and will become effective immediately on such approval. Any other interpretation will lead to serious consequences. Inaction on the part of the Inspector either deliberate or otherwise may frustrate the object of the provision itself."

5. In view of the aforesaid, it is clear, that the District Inspector of Schools was competent to approve or disapprove the suspension order even after the expiry of 60 days. Consequently, the submission of the learned counsel for the petitioner is bereft of merit. No other point was raised by the learned counsel for the petitioner.

6. It has come on record that there is a lot of acrimony between the petitioner and the Manager of the Committee of Management of the Institution concerned. From the record, it transpires, that the petitioner was suspended on a variety of charges on three occasions and on each occasion the petitioner obtained an interim order from the Court. Upon a query being raised by the Court, Sri V.K.Singh, the learned counsel for the Manager and the Committee of Management submitted, that no charge sheet was issued on the suspension order issued earlier and, that the charge-sheet, pursuant to the suspension order dated 27.2.2005 had been issued on 10.4.2006 which the petitioner refused to accept. Dr. Daya Shanker, on the other hand, submitted that till date, no charge-sheet has been served upon the petitioner and, therefore, the question of refusal to accept the charge sheet does not arise.

7. Be that as it may. In view of the fact, that the suspension order has been approved and a charge-sheet has been issued, I direct the learned counsel for the Committee of Management and the Manager to serve a copy of the charge-sheet upon the learned counsel for the petitioner today, who in turn, will handover or forward the copy to the petitioner. The petitioner may file a reply to the said charge-sheet within a reasonable period. Upon the receipt of the reply, the Committee of Management may proceed accordingly and complete the inquiry and pass a final order within four months from the date of the submission of the reply to the charge-sheet.

8. The writ petition dismissed with the aforesaid observation.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2006

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

Civil Misc. Writ Petition No.19260 of 2005

Shrawan Kumar ...Petitioner
Versus
U.P. Institutional Service Board and others ...Respondents

Connected with:
Civil Misc. Writ Petition No.53585 of 2004

Counsel for the Petitioner:
Sri M.P. Gupta

Counsel for the Respondents:
Sri O.P. Singh

Sri R.S. Singh

U.P. Cooperative Societies Employees Services Regulation, 1975-Regulation 12-cut of dated-for purpose of age-vacancy advertised on 23.6.04-fixation of cut of date as 1.7.04-held-illegal-petitioner was 18 years 5 month on 1st July, 04-hence on 1.1.04 being under age can not be appointed-disapproval by Board held proper.

Held: Para 7

Let us apply the said principles in the present case. A copy of the select list together with the details is annexed with the petition. It shows that on 1st. of July, 2004, the petitioner was 18 years five months. Had the cut off date been fixed correctly in accordance to regulation 12, the petitioner would have been under age on 1st. of January, 2004. Similarly, there may be large number of candidates who may have become over age on 1st of July, 2004 and may not have applied in pursuance of the advertisement. As already stated hereinabove, the Board being custodian of the rights of equal opportunity to the teeming millions of unemployed youth, it was justified in refusing the approval.

Case law discussed:

2006 (4) SCC-1
1998 (2) ESC-1331

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

1. Heard Sri M.P. Gupta for the petitioner, Sri O.P. Singh for respondent No.1 and Sri R.S. Singh, learned counsel for the respondents no. 2, 3 and 4.

2. This petition is directed against an order dated 27.12.2004 passed by the respondent no.1 by which the approval of the appointment of the petitioner has been refused.

3. Pivotal facts relevant for the decision of this petition are that eleven posts of class IV employees in District Cooperative Bank Ltd., Mirzapur were advertised on 23.6.2004. Petitioner and others applied and the petitioner was duly selected as shown in the select list published on 5th. July, 2004. However, the respondent Service Board refused to grant the approval on the ground that the cut off date with respect to the age of candidates was fixed against the provisions of law.

4. Learned counsel for the petitioner has urged that the objection raised on behalf of the Board was highly technical and since the petitioner was otherwise qualified, the approval ought to have been granted and the appointment letter issued.

5. The U.P. Cooperative Institutional Service Board was constituted in exercise of powers under Section 122 of the U.P. Cooperative Societies Act, 1965 for the purposes of recruitment, training and disciplinary control of employees of Cooperative Societies. The U.P. Cooperative Societies Employees Services Regulation, 1975, governs the service conditions of such employees. Regulation 5 provides for recruitment and appointments in the Cooperative Societies through the Board whether it is by direct recruitment or by promotion. Sub-clause (v) mandates that every selection shall be subject to the approval of the Board and the appointment can only be made with the prior approval of the Board. Regulation 12 provides that if the posts are advertised in the first half of the year, i.e. ending on June 30, the cut off date for the purpose of age shall be first of January of that year and in case of advertisement subsequent to 30th June, the cut off date

would be first of July of the year of recruitment. It further provides that the candidates should not be less than 18 years or more than 35 years of age on the aforesaid cut off date. Regulation 15 provides that no appointment can be made except in the manner provided in the regulations without the prior approval of the Board and in the order as mentioned in the list communicated by the Board.

6. A copy of the advertisement is annexed with the petition and admittedly it was published on 23rd. June, 2004 but the cut off date has been fixed as 1st. July, 2004. In the impugned order the Board found that the fixation of the cut off date was against the provisions of regulation 12 and this violation deprived large number of candidates from applying for the post. It is also apparent that though the advertisement was made on 23rd. June, 2004 but only eight days were given for submission of the forms i.e. uptil 30th. June, 2004, while the interview was fixed for 4th. July, 2004. The nature of the powers conferred on the Board is one of trust of vast number of eligible unemployed citizens. The Board is the repository of the interest of all those eligible persons who may apply for recruitment. The petitioner though contends that it is a mere technicality, but the Board has to examine the matter from a larger and broader perspective and has to act as a guardian for equal right protection of such unemployed people. The Apex Court through a Constitutional Bench pronouncement in the case of **Secretary State of Karnataka and others v. Uma Devi (3) others** [2006 (4) S.C.C. 1] has cautioned the courts against individualization of justice. It held that high prerogative writs should not normally be issued except after balancing rights of the numerous persons who are not before the Court as against the few who approach it. Considering large number of decisions where directions were issued presumably on the basis of equitable considerations, it posed a question and then answered it to the following effect:

"The question arises, equity to whom ? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements."

7. Let us apply the said principles in the present case. A copy of the select list together with the details is annexed with the petition. It shows that on 1st. of July, 2004, the petitioner was 18 years five months. Had the cut off date been fixed correctly in accordance to regulation 12, the petitioner would have been under age on 1st. of January, 2004. Similarly, there may be large number of candidates who may have become over age on 1st of July, 2004 and may not have applied in pursuance of the advertisement. As already stated hereinabove, the Board being custodian of the rights of equal opportunity to the teeming millions of unemployed youth, it was justified in refusing the approval.

8. Further, though, no time limit has been fixed under the regulations for accepting application from the candidates, eight days provided by the Bank cannot be said to be reasonable. Thus, on this score also the Board cannot be faulted. The Board has already directed the Bank to re-advertise the vacancy.

9. Lastly it is urged that in view of rule 4 read with Rule 6 of U.P. Recruitment in services (Age limit) Rules 1972, the cut-off date provided in the advertisement was in order due to the overriding effect of the Rules. In support he has relied upon a Single Judge decision of this court in the case of **Raj Vikram Khare V. Ist J, Banda [1998 (2) ESC 1331]**

10. The U.P. Recruitment in Services (Age limit) Rules, 1972 (hereinafter referred to as 1972 Rules) were framed under the proviso to Article 309 of the Constitution. It would be useful to note Article 309 of the Constitution:

"Recruitment and conditions of service of persons serving the Union or a State*.- Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:*

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

11. It is apparent that the power to frame Rules under it is qua recruitment "to public services and posts in connection with the affairs of the Union or of any State". The question is whether recruitment by a Cooperative Society is recruitment to any public service in connection with the affairs of the State.

12. Cooperation is a movement. People with similar interests and goal get together to form a Society. A Cooperative Society by its very nature is an organization where people voluntarily associate together on the basis of equality for the promotion of their common economic interest which they cannot achieve by individual isolated action because of the weakness of the economic position of a large majority of them. it is purely a private organization having no nexus with the affairs of the State. No doubt, it is controlled and regulated by the U.P. Cooperative Society Act, 1965, but its character remains private and individual. Rules have been framed for maximizing economic outcome and to regulate the recruitment and conditions of service of its employees. The employees are paid from the coffers of the society and are its employees for all purposes and do not hold any civil post under the State. As noticed in the opening part of this judgment, Rules have been framed under the 1965 Act. Rules of 1972 only apply to government Servants and not to employees of Cooperative Societies,

therefore neither ratio in Raj Vikram Khare (Supra) nor the rules apply in the present case.

13. Apart from the aforesaid, no pleadings have been raised in the writ petition to show how the 1972 Rules apply to employees of the Cooperative Society.

14. For the reasons above, this is not a fit case for interference under Article 226 of the Constitution of India. However, in case, any fresh recruitment is made, as directed by the Bank, the petitioner of either the present petition or the connected petitions can apply, but their claim may not be dislodged only on the ground of age. With the aforesaid observation, the petition is rejected. No order as to costs. Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.10.2006

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

Criminal Misc. Application No. 11893 of 2004

Shiv Narain Jaiswal and others ...Applicants
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Applicants:
Sri R.S. Gupta

Counsel for the Opposite Parties:
Sri Brijesh Sahai
A.G.A.

Code of Criminal Procedure-Section 156 (3)-power of the Magistrate to register and investigate the case-treating the application under Section 156 (3)-as a complaint.

Held: Para 24

The position that emerges out of the discussion attempted above is that, taking into consideration the above rulings of Hon'ble Apex Court and Full Bench of this Court, the Single Judge ruling in Shyam Lal Jaiswal's case laying down a contrary view can not be followed and in view of the above ruling of Hon'ble Supreme Court and the Full Bench of this Court, the order passed by the learned Magistrate is completely valid . He had jurisdiction to pass an order for registration of the case as a complaint on an application under section 156(3) Cr. P. C. as laid down by the above Full Bench on the point no. 2 in its judgement.

Case law discussed:
1997 (35) ACC-371 (SC), 2004 (1) ACC-831, 2001 (Suppl.) ACC-277, J.T. 2001 (2) SC-81, AIR 1961 SC-986, AIR 1977 SC-240. 2001 (43) ACC-50, 1997 (35) ACC-371 (SC), 2000 (41) ACC-831, 2001 (Suppl.) ACC-277

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

1. This is an application under section 482 Cr.P.C. for quashing the proceedings of criminal case no. 3025 of 2002, Abhay Pratap Singh Vs. Shiv Narain Jaiswal and others, pending before the the Chief Judicial Magistrate, Azamgarh and the orders dated 23.9.2002 and 2.1.2003 passed by the Chief Judicial Magistrate, Azamgarh.

I have heard learned counsel for the applicants and learned A.G.A. for the State.

2. The facts relevant for disposal of this application are that Abhay Pratap Singh, (O.P.no. 2 in this case) moved an

application under section 156 (3) Cr.P.C. against the accused applicants with these allegations that he is an Advocate practising in civil court, Azamgarh. He had purchased a piece of land bearing plot no. 485 in Mauza Kolwaz Bahadur for construction of his house and after getting his name mutated he started construction of the house in accordance with sanctioned map. Prem Narain and Shiv Narain etc. (applicants in the present case) had their land adjacent to the aforesaid land and they objected to these constructions hence, the plots of both the parties were surveyed and a report was submitted to higher authorities which made it clear that Shiv Narain etc. have no concern with the land of Abhay Pratap Singh. The authorities were also satisfied on seeing the documents of Abhay Pratap Singh and Abhay Pratap Singh after completing the construction of walls on 10.9.2002 put roof on the walls, and on that date at about 11 P.M. accused Prem Narain, Shiv Narain and two sons of Prem Narain along with their 3-4 companions came to the newly constructed house of Abhay Pratap Singh. They were having lathis, Dandas, Ballam, Gandasa, and country made pistol in their hands. Abhay Pratap Singh was present at his newly constructed house along with Avnind Singh and Mundesh Singh. Prem Narain and his companions started abusing them and challenged Abhay Pratap Singh, Avnind Singh and Mundesh Singh, and fired at them with an intent to kill them. The assailants were identified in the light of torches. They demolished the roof of the house and caused loss to the complainant to the tune of Rs.30,000/-. They also took five bags of cement, four Phawaras, two Belchas and three Balties with them. Fires were done by the accused persons from their fire arms but the complainant and his companions some how escaped injuries. The complainant went to the police station to lodge a report but his report was not written. When the local police did not take any action, Abhay Pratap approached the higher Police authorities vide his application dated 11.9.2002 which was sent by Registered Post. Even then no action was taken. Then he moved this application under Section 156(3) Cr,P.C. for taking action against the accused persons who had committed offences under sections 504, 506, 147, 148, 149, 440, 307 and 379 I.P.C.

3. On the above application moved on 17.9.2002, the Magistrate passed an order on 23.9.2002 for its registration as complaint and fixed a date for recording statement of the complainant under section 200 Cr.P.C. After recording statement of the complainant he also recorded the statements of witnesses Awanind Singh and Mukesh Singh under section 202 Cr.P.C. Then he passed an order on 2.1.2003 summoning the accused applicants under sections 147, 148, 149, 379, 354, 440, 504 and 506 I.P.C. Aggrieved with the orders dated 23.9.2002 and 2.1.2003 the accused filed this application under section 482 Cr.P.C. for quashing these orders.

4. It has been alleged in this application that a civil suit was already pending between the parties in respect of the disputed land and a copy of the plaint of O.S. no. 679 of 2001 filed in the court of Civil Judge (Junior Division), Azamgarh was produced as Annexure no.1 to the affidavit and a copy of injunction order issued by the Civil Judge (Junior Division) in that suit directing both the parties to maintain status-quo

was filed as Annexure no.2. A copy of the written statement of the defendants in that suit was also filed as annexure no.3.It was alleged that since the application was filed under section 156(3) Cr.P.C., the Magistrate could not pass an order for registering it as a complaint case and in support of this contention the learned counsel for the applicant has cited before me a ruling of Hon'ble K.N. Sinha, J. of this Court in 'Shyam Lal Jaiswal Vs. State of U.P' 2003 (46) ACC 1164 in which it has been held that in an application moved under section 153(3) Cr.P.C. Magistrate cannot pass an order for registering it as complaint and such an order is illegal. In reply to this contention, the learned counsel for O.P. no.2 cited before me a Full Bench ruling of this Court in 'Ram Babu Gupta Vs. State of U.P.and others ' 2001 (43) ACC 50. In this case it has been held that Magistrate has got jurisdiction to treat the application moved under section 156(3) Cr.P.C. as complaint and the different view taken by the Division bench of this Court in the case of 'Suraj Mal Vs. State' 1993(30) ACC 81 does not lay down correct law.

5. I have carefully gone through both these rulings. The Full Bench decision in the case of Ram Babu Gupta is based upon the decision of Hon'ble Supreme Court in the case of Suresh Chand Jain Vs. State of Madhya Pradesh and another' J.T. 2001 (2) SC 81. Their Lordships of Full Bench have referred to various rulings on the above point in para 15 of the judgment. It may be mentioned that the decision in Suresh Chand Jain's case was pronounced by Hon'ble Supreme Court when the judgment in Ram Babu Gupta's case had been reserved. After delivery of the judgment of Hon'ble Apex Court in the aforesaid case the Full bench fixed a date for re-hearing of the matter in the light of the above judgment and thereafter it decided this case on the basis of the above judgment in Suresh Chand Jain's case holding that in view of this pronouncement of the Hon'ble Supreme Court there was no necessity to deal with the rulings referred to in para 15 of the judgment.

6. The view taken by Hon'ble Single Judge in Shyam Lal Jaiswal's case is just opposite to the view taken by the Full bench in the case of Ram Babu Gupta and it appears that this Full Bench ruling was not cited before his Lordship while deciding the above case. His Lordship has, however, relied upon the following three rulings in his judgment in the case of Shyam Lal Jaiswal:

1. Madhu Bala Vs.Suresh Kumar and others 1997 (35) ACC 371 (S.C.);
2. Dinesh Chandra and others Vs. State of U.P. 2000(41) ACC 831 (Allahabad);
3. Mahboob Ali Vs. State of U.P. and others 2001 (Suppl) ACC 277 (Allahabad).

7. I have gone through all the aforesaid three rulings as well as the ruling of Hon'ble Apex Court in Suresh Chandra Jain's case referred to in the Full Bench ruling of this Court in Ram Babu Gupta's case with a view to ascertain as to what is correct legal position, I now proceed to discuss all these rulings:

8. First of all I take up the judgement of Hon'ble Apex Court in the case of Suresh Chand Jain Vs. State of Madhya Pradesh & another: JT 2001 (2) SC 81. In this case facts were that a complaint was made before the Chief Judicial Magistrate, Neemuch (M.P.) with

the allegation that the accused had committed offence punishable under section 420 I.P.C. and under section 3 of the Prizes, Chits and Money Circulation Scheme (Prohibition) Act. After perusal of the complaint the Magistrate was of the view that the offence was of serious nature and so it required to be investigated by the police. He, therefore, instead of proceeding with the matter as a complaint case, passed an order directing the police under section 156(3) Cr. P. C. to investigate the case. This order was challenged by the accused before the learned Sessions Judge by filing a revision contending that the Magistrate had no jurisdiction to pass such an order on a complaint filed before him. This plea was rejected by the Sessions Judge. Then he moved an application before High Court under section 482 Cr.P.C. That application was also dismissed. Then he filed a criminal appeal before the Hon'ble Apex Court challenging the above order. The Hon'ble Supreme Court holding that the order passed by the Magistrate was absolutely right made following observations in para 10 of the judgement:

"The position is thus clear. Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156 (3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an F.I.R. There is nothing illegal in doing so. After all registration of an F.I.R. involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156 (3) of the Code that an F.I.R. Should be registered, it is the duty of the officer-in- charge of the police station to register the F.I.R. regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

9. The Hon'ble Apex Court in the said judgement relied upon its earlier decision of three Judges Bench in Gopal Das Sindhi and others Vs. State of Assam and another (AIR 1961 SC 986) and two Judges Bench in Tula Ram and others Vs. Kishore Singh (AIR 1977 SC 240). In Gopal Das Sindhi (supra) the Hon'ble Apex Court had made the following observations:

"If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We can not read the provision for section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate the cases involving cognizable offences is

with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizable of a cognizance offence."

10. The same position was reiterated by Hon'ble Apex Court in Tula Ram (supra).

11. A decision of Punjab & Haryana High Court in Suresh Kumar Vs. State of Haryana [1996 (3) Recent Criminal Reports 137] was also cited before the Hon'ble Apex Court in which a contrary view was taken by that Court. In regard to that ruling the Hon'ble Apex Court made the following observation in para 12 of its judgement:

"......... It is unfortunate that when this Court laid down the legal position so explicitly in the above two decisions which reached the notice of the learned Judge of the Punjab and Haryana High Court, he had formulated a position contrary to it by stating that "the Magistrate has no power within the contemplation of section 156(3) of the Code, to ask for registration of the case." It appears that the judicial officers under Punjab and Haryana High Court who were, till then, following the correct position, were asked by the learned Judge to follow the erroneous position formulated by him in the aforesaid judgement."

12. Now I take up the Full Bench judgement of this Court in Ram Babu Gupta and another Vs. State of U.P. and others [2001 (43) ACC 50]. In this Full Bench case the following two points were framed for consideration:

"1. Should the Magistrate while exercising powers under Section 156(3) Cr.P.C. be left to write cryptic orders " register and investigate." or " register and do the needful" or " he has to investigate", or the like? Or the Magistrate's order should prima facie indicate application of mind;

2. Is the observation of the Division Bench in Suraj Mal (supra) correct when it says that when an applicant before a Magistrate prays only for registration and investigation of a case, such an application will not become "complaint" as defined in Section 2 of the Cr.P.C.?"

13. This Hon'ble Full Bench after referring to the case law on the point and then relying upon the aforesaid ruling of Hon'ble Apex Court in Suresh Chand Jain (supra), replied point no.1 as under:

"16. Having thus noticed the observations aforesaid in Suresh Chand Jain, it may be desirable to revert to the facts in Suresh Chand Jain. The Magistrate in that case received a complaint submitted by the complainant and expressed his opinion that from the allegations therein, serious offences were disclosed and the complaint was required to be investigated by the police and thus forwarded it to the police station with the direction to register the First Information Report and initiate investigation and called a copy of the FIR immediately on registration of the case.

17. In view of the aforesaid discussion on the legal provisions and decisions of the Supreme Court as on date, it is hereby held that on receiving a complaint, the Magistrate has to apply his mind to the allegations in the complaint upon which he may not at once proceed to take cognizance and may order it to go to

the police station for being registered and investigated. The Magistrate's order must indicate application of mind. If the Magistrate takes cognizance, he proceeds to follow the procedure provided in Chapter XV of Cr.P.C. The first question stands answered thus."

Regarding point no.2 the Full /Bench made the following observations in para 18 and 19 of the judgement:

"18. Coming to the second question noted above it is to be at once stated that a provision empowering a court to act in a particular manner and a provision creating a right for an aggrieved person to approach a Court or authority, must be understood distinctively and should not be mixed up. While Sections 154,155 sub-section (1) and (2) of 156, Cr.P.C. confer right on an aggrieved person to reach the police, 156(3) empowers a Magistrate to act in a particular manner in a given situation. Therefore, it is not possible to hold that where a bare application is moved before Court only praying for exercise of powers under Section 156 (3) Cr.P.C., it will remain an application only and would not be in the nature of a complaint. It has been noted above that the Magistrate has to always apply his mind on the allegations in the complaint where he may use his powers under Section 156 (3) Cr.P.C. In this connection it may be immediately added that where in an application, a complainant states facts which constitute cognizable offence but makes a defective prayer, such an application will not cease to be a complaint nor can the Magistrate refuse to treat it as complaint even though there be no prayer seeking trial of the known or unknown accused. The Magistrate has to deal with such facts as constitute cognizable offence and for all practical purposes even such an application would be a complaint. This Court can do no better than refer to the following observations in Suresh Chand Jain (supra):-

"The position is thus clear. Any judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code.... could take further steps contemplated in Chapter XII of the Code only thereafter."

19. In view of the aforesaid discussion, the observations in the two paragraphs noted above in Suraj Mal (supra), cannot be said to be laying down correct law, therefore, those observations shall remain confined to the decision in Suraj Mal. The second point formulated above stands also answered thus."

14. It was thus also held in the above para 19 of the Full Bench Judgement that the Division Bench of this Court in Suraj Mal 1993 (30) ACC 81 taking a contrary view did not lay down the correct law.

15. In view of the decision of Hon'ble Supreme Court in Sumer Chand Jain (supra) and the Full Bench decision of this Court in Ram Babu Gupta (supra), the correct legal position is that even in a complaint, the Magistrate before taking the cognizance under Chapter XV of Cr.P.C. can pass an order for investigation by police under section 156(3) Cr.P.C. if the allegations made in the complaint disclose a cognizable offence. Similarly on an application under section 156(3) Cr.P.C. the Magistrate has got a right to treat it as a complaint and to proceed with it under Chapter XV of the Cr.P.C.

16. The aforesaid ruling of Hon'ble Supreme Court and the above Full Bench ruling of this Court do not appear to have been cited before Hon'ble K.N. Sinha, J. when his Lordship was deciding the case of Shyam Lal Jaiswal Vs. State of U.P. [2003 (46) ACC 1164] in which he has taken a view contrary to the law laid down by Hon'ble Apex Court and by the Full Bench of this Court.

17. Hon'ble K.N. Sinha, J. has, however, referred to following three decisions in support of his view that on an application moved under section 156(3) Cr.P.C. the Magistrate has got no jurisdiction to pass an order to treat it as a complaint.

1. Madhu Bala Vs. Suresh Kumar 1997(35) ACC 371 (SC)
2. Dinesh Chandra Vs.State of U.P. 2000 (41) ACC831
3. Mahboob Ali Vs. State of U.P 2001 (Suppl.) ACC 277.

I have gone through all these rulings also and now I proceed to discuss them one by one.

18. First of all I take up the ruling in the case of Madhu Bala (supra). In this case facts were that a complaint was lodged before the C.J.M. Kurukshetra under section 498A and 406 I.P.C. and on that complaint the Magistrate instead of taking cognizance under section 190 Cr.P.C. passed order for investigation by the police under section 156(3) Cr.P.C. directing the police to register the case and to investigate the same. Thereafter the police investigated the matter and submitted charge sheet against the accused persons under section 498A and 406 I.P.C. The Magistrate took cognizance against the accused persons under section 406 I.P.C. only . He did not take cognizance under section 498A I.P.C. holding that the offence under section 498A I.P.C. was allegedly committed outside his territorial jurisdiction within the district of Karnal. Thereafter another complaint was filed against the accused persons in the court of C.J.M. Karnal under Section 498A I.P.C. and on this complaint also the Magistrate passed order for investigation by the police under section 156(3) Cr.P.C. The police accordingly registered the case and after investigation submitted charge sheet. Then cognizance was taken by the Magistrate. Charges were also framed against the accused persons. Thereafter accused persons filed application under section 482 Cr.P.C. before Punjab and Haryana High Court challenging the orders of both the Chief Judicial Magistrate of Karnal and Kurukshetra. The High Court allowed the application under section 482 Cr. P. C. holding that the Magistrate had no power to direct the police to register the case. The order of the High Court was challenged before the Hon'ble Apex Court. The Hon'ble Apex Court allowed the appeal holding that the order passed by the Magistrates were completely legal and justified. It made the following observations in this judgement:

"From a combined reading of the above provisions, it is abundantly clear that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1)(a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate is such a case is to send the complaint to the appropriate Police Station under Section 156(3) for

investigation. Once such a direction is given under sub-section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a 'police report' in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1)(b)- but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be a 'police report' in view of the definition of 'complaint' referred to earlier and since the investigation of a 'cognizable case' by the police under Section 156 (1) has to culminate in a 'police report' the 'complaint'-as soon as an order under Section 156 (3) is passed thereon-transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (F.I.R.) As under Section 156(1), the police can only investigate a cognizable 'case', it has to formally register a case on that report"

19. Thereafter referring to certain provisions of the Police Act and Rules it further observed as under:

"From the foregoing discussion it is evident that whenever a Magistrate directs an investigation on a 'complaint' the police has to register a cognizable case on that complaint treating the same as the F.I.R. and comply with the requirements of the above Rules. It, therefore, passes our comprehension as to how the direction of a Magistrate asking the police to 'register a case' makes an order of investigation under Section 156 (3) legally unsustainable. Indeed, even if a Magistrate does not pass a direction to register a case, still in view of the provisions of Section 156(3) of the Code which empowers the Police to investigate into a cognizable 'case' and the Rules framed under the Indian Police Act, 1861 it (the police) is duty bound to formally register a case and then investigate into the same. The provisions of the Code, therefore, does not in any way stand in the way of a Magistrate to direct the police to register a case at the police station and then investigate into the same. In our opinion when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the Police would be 'to register a case at the police station treating the complaint as the First Information Report and investigate into the same."

20. With due deference to his Lordship deciding Shyam Lal Jaiswal's case (supra), it is pointed out that the above observations of the Hon'ble Apex Court do not support the conclusion drawn by his Lordship in the above ruling.

21. The second ruling referred in the case of Shyam Lal is of this Court in the case Dinesh Chandra (supra). I have very carefully gone through this ruling also. In this judgement no specific finding has been recorded on the issue and actually his Lordship (Hon'ble S.K.Agarwal, J.) has made a reference to the Full Bench which was constituted in the case of Ram Babu (supra). This reference has also been considered in the Ram Babu's case. In this case also, the Magistrate on a complaint before him passed an order directing registration of the case by the police and this order was challenged before this Court and the matter was referred to the above Full Bench.

While making the reference the following observations were made by Hon'ble S.K. Agarwal, J. in para 20 and 21 of its judgement:

"20. In view of the foregoing discussions what is essential for the exercise of the power under Section 156(3) is that the application must disclose the commission of a cognizable case and the facts given therein relate to commission of a cognizable offence. If that is there the Magistrate has to order investigation.

21.The Magistrate even in the case of a complaint, requesting him to take action against the offender, may also exercise this option. There is no bar to his doing this but it can be done at a pre-cognizance stage and not after cognizance is taken by him."

22. With due deference to his Lordship deciding Shyam Lal Jaiswal's case (supra), it is pointed out that the above observations of Hon'ble S. K. Agarwal, J do not support the conclusion drawn by his Lordship in the above ruling. It may also be added that the Full Bench of this Court in Ram Babu (supra) in para 37 of its judgment upheld the order passed by the Magistrate observing that the order dated 2.7.1997 passed by the Magistrate was reasoned one and there were no error in the order. It dismissed Crl. Revision No. 1466/2000 filed before this Court.

23. The last ruling cited by his Lordship in the case of Shyam Lal Jaiswal is the ruling in the case of Mahboob Ali (supra) delivered by Hon'ble U.S. Tripathi, J. In this case his Lordship had observed that Magistrate has got no jurisdiction to treat an application under section 156(3) Cr.P.C. as complaint and such an order passed by the Magistrate is without jurisdiction. It is, however, to be seen that this ruling was delivered by his Lordship on 21.12.2000 when the aforesaid judgemnt of Hon'ble Apex Court in Suresh Chand Jain (supra) and of Full Bench in the case of Ram Babu Gupta (supra) had not been delivered. So this ruling of Hon'ble Single Judge now can not be treated to be laying down the correct law in view of aforesaid rulings of Hon'ble Apex Court and Full Bench of this Court.

24. The position that emerges out of the discussion attempted above is that, taking into consideration the above rulings of Hon'ble Apex Court and Full Bench of this Court, the Single Judge ruling in Shyam Lal Jaiswal's case laying down a contrary view can not be followed and in view of the above ruling of Hon'ble Supreme Court and the Full Bench of this Court, the order passed by the learned Magistrate is completely valid. He had jurisdiction to pass an order for registration of the case as a complaint on an application under section 156(3) Cr. P. C. as laid down by the above Full Bench on the point no. 2 in its judgement.

25. Learned counsel for the applicant has also pointed out that there is no allegation of the offence under section 354 I.P.C. in the application of the complainant and the Learned Magistrate had erroneously passed an order summoning the accused for this offence. It was conceded by the Learned counsel for the complainant also that there is no allegation under section 354 I.P.C. against the accused persons and it appears that the order summoning the accused persons under section 354 I.P.C. has been passed

under some misapprehension. Hence the order passed by the Magistrate summoning the accused under section 354 I.P.C. is liable to be set aside.

26. The position in this way is that the application under section 482 Cr.P.C. deserves to be partly allowed to the extent of quashing of the summoning order under section 354 I.P.C. only. The rest of the summoning order passed by the Magistrate in respect of the remaining offences is valid.

27. Accordingly, the application under section 482 Cr. P. C. is partly allowed only to the extent it relates to quashing of the summoning order under section 354 I.P.C. and the summoning order to that extent is quashed. The remaining portion of the summoning order passed by the Magistrate is valid and is maintained. The accused are, however, allowed one month's time to appear before the Magistrate and during this period the execution of non bailable warrant against the accused applicant shall remain stayed so as to enable him to appear before the court concerned. The accused applicant, after putting in appearance before the court, may apply for bail and their bail application shall be decided by the Courts expeditiously, if possible on the same day, taking into consideration the directions of this Court in the case of Amrawati Devi Vs. State of U. P. [2004(ACJ) 1846].

With the above observations the application under section 482 Cr.P.C. stands disposed of. Petition Disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2006

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 3104 of 2004

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

Counsel for the Petitioner:
Sri Sant Sharan Upadhyaya
Mrs. Sadhna Upadhyaya january

Counsel for the Respondents:
Sri M.R. Jaiswal
Sri J.S. Tomar
S.C.

Constitution of India Art. 226-Compulsory retirement-committee found not properly constituted-No sufficient material before the screening committee to form an objective opinion-justifying the stand of compulsory retirement-order quashed.

Held: Para 11 & 12

The facts on record also do support the case on the petitioner that the censure entry dated 25.7.2002 was not communicated to the petitioner but even if it is accepted for argument shake that the said censure entry was communicated to the petitioner compulsory retirement on so censure entry is not justified. Thus it is held that there was no sufficient material before the Screening Committee to form an objective opinion that the petitioner was fit to be compulsorily retired.

In the aforesaid judgment this Court has held that the report of the Screening Committee was vitiated since the District Magistrate who was the appointing authority has not participated in the

proceedings rather has only written on the report as "approved". In the present case the District Magistrate himself was chairman of the Screening Committee and had signed the report and had passed the order for compulsory retiring the petitioner.

Case law discussed:

W.P. No. 7789/04 decided on 18.11.05
1998 (7) SCC-748
AIR 1995 SC-III
AIR 1992 SC-1020

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

1. Heard counsel for the petitioner, Sri S.S. Upadhyay and Sri M. R. Jaiswal standing counsel appearing for the respondents. Counter and rejoinder affidavits have been exchanged. With the consent of counsel for the parties the writ petition is being finally decided.

2. By this writ petition the petitioner has prayed for quashing the order dated 31.12.2003 compulsory retiring the petitioner. By an earlier order passed on 28.8.2006 learned standing counsel was directed to produce the original service record of the writ petitioner for perusal of the Court which has been produced and looked into.

3. Brief facts necessary for deciding the writ petition are:

The petitioner Hakim Singh was appointed on 22.4.1969 as Lekhpal and was subsequently promoted as Revenue Inspector on 24.2.1999. By an order dated 31.12.2003 passed by the District Magistrate the petitioner was compulsory retired.

4. Learned counsel for the petitioner challenging the order of compulsory retirement raised following submissions:-

1. The compulsory retirement of the petitioner was discriminatory in view of the fact that along with the petitioner fifteen other employees were compulsorily retired on the same date i.e. 31.12.2003 and with regard to thirteen employees the State Government itself has passed an order re-instating them in service by order dated 27.12.2004 on the basis of the report of the Commissioner dated 3.3.2004, he submits that there was no distinguishing feature in the petitioner's case with those thirteen employees who are re-instated hence the action with regard to the petitioner is discriminatory and arbitrary.

2. Learned counsel for the petitioner next submitted that there was no material with the respondents to take a decision for compulsory retirement; referring to the supplementary counter affidavit of the respondents where the materials have been mentioned against the petitioner. he submits that there are only two entries with regard to years 2000-2001 and 2001-2002 which have been made as "santoshjanak" with the remark that improvement is required. With regard to censure entry for the year 2002-2003 dated 25.7.2002 he submit that whereas the entry of 2002-2003 is mentioned as "Aprapt". The censure entry dated 25.7.2002 had never been communicated and the petitioner first time came to know about the censure entry from the counter affidavit filed in the writ petition.

3. Learned counsel for the petitioner further submitted that the Screening Committee was not properly constituted. He has placed reliance on the judgment of this Court passed in writ petition No. 7789 of 2004 decided on 18.11.2005 **Naresh Chandra Sharma Versus State of U.P. & others**. Learned counsel for the petitioner further placed reliance on the judgment of the apex Court reported in 1998 (7) S.C.C. 310 **M.S. Bindra Versus Union of India and others**; 2005 (9) S.C.C. 748 **Pritam Singh Versus Union of India and other** and A.I.R. 1995 S.C. 111 **Ram Chandra Raju Versus State of Orissa**.

5. The learned counsel for the respondents refuting contentions of the counsel for the petitioner contended that there was no discrimination qua the petitioner. Learned standing counsel referring to the Screening Committee report, letter dated 3.3.2004 submitted that thirteen persons were reinstated on valid reasons which are apparent from the report of the Commissioner dated 3.3.2004 and there was no discrimination in not reinstating the petitioner. He further submits that censure entry dated 25.7.2002 was duly served on the petitioner. He has so stated in the supplementary counter affidavit and has submitted that the said entry was received by the petitioner and there is endorsement of the receipt also. Learned counsel for the respondents further submits that there was sufficient materials with the respondents for compulsory retiring the petitioner.

6. I have considered the submissions of counsel for the parties and perused the record.

7. The first submission of counsel for the petitioner is discrimination violating the rights under Articles 14 and 16 of the Constitution. Learned standing counsel has placed the report of the Screening Committee and the letter of the Commissioner dated 3.3.2004 by which the report was sent to the State Government referring retirement of sixteen persons on 31.3.2003. From the report of the Commissioner it is clear that two persons with whom the recommendation for retiring the twenty persons was sent from regular establishment, they were less than fifty years of age and their compulsory retirement was illegal. The retirement with regard to Kailash Behari (peon), Jahani Ram (peon), Randhir Singh (driver) details were given with regard to them and it has been further observed that with regard to those persons there was no adverse entry in the last ten years. Learned standing counsel stated that their case were different from the petitioner. With regard to the Collection establishment, it has been mentioned by the Commissioner that the reports were mentioned with regard to nine employees by the Screening Committee and in the said report they have been recommended to retire on the basis of poor recovery but neither the details of the demand and the recovery nor any annual chart was placed on record. With regard to Ram Narain Dube an adverse entry was mentioned. Learned Standing counsel stated that said Ram Narain Dube was not reinstated. He has further stated that Ram Narain Dube has not challenged the order. The counsel for the petitioner submitted that Ram

Narain Dube was ill and he has left the service. From perusal of the Screening Committee report and the letter of the Commissioner dated 3.3.2004 I am satisfied that there is no discrimination for not reinstating the petitioner by the State Government and the submission of discrimination cannot be accepted.

8. The second submission of counsel for the petitioner is that the compulsory retirement can only be ordered when there are sufficient material to form an opinion to compulsory retire an employee. The judgment in the case of **M. S. Bindra Versus Union of India and others** (supra) has been relied. The apex Court laid down the principle after reiterating the earlier judgment in the case reported in A.I.R. 1992 S. C. 1020 **Baikuntha Nath Das and another Versus Chief District Medical Officer and another** and observed that the High Court can only interfere with the compulsory retirement order when either it was mala fide or based on no evidence or it is arbitrary in the sense that no reasonable person would form the requisite opinion on the given material. Paragraph 7 of the judgment is extracted below:-

"7. Approving the above principle, a three Judge Bench of this Court has laid down in Baikuntha Nath Das; and another v. Chief District Medical Officer and another, MANU/SC/0193/1992, AIR 1992 Screening Committee 1020, JTI 1992 (2) Screening Committee 1, (1992) ILLJ 784 Screening Committee, 1992 (1) SCALE 428, (1992) 2 SCC 299, (1992) 1 SCR 436, 1992 (1) SLJ177 (Screening Committee), (1992) 2 UPLBEC816 that five principles should be borne in mind while considering a case of compulsory premature retirement. It is not necessary to extract all the five principles here except No. (iii) which reads thus:

"Principles of natural justice have no place in the context of an order of compulsory retirement . This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary- in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order".

9. With regard to Hakim Singh the Screening Committee relied on three materials, namely, that he was asked to improve his work in the year 2000-2001 and 2001-2002 and further there was a censure entry made on 25.7.2002. I have perused the entries of the year 2000-2001 and 2001-2002. From the perusal of said entries it is clear that general grading which has been given by the reporting Officer as "Good" the accepting officer has graded him as "satisfactory" with the remark that the work needs to be improved. The entries of 2000-2001 and 2001-2002, they cannot be treated to be adverse when the accepting officer himself graded him as "satisfactory". after observing that work needed improvement. With regard to censure entry dated 25.7.2002 the petitioner's specific case in the writ petition is that the said entry was never served to the petitioner. Learned standing counsel has submitted that the entry was duly served. He has filed a copy of the censure order dated 25.7.2002 issued to the petitioner on which there are claimed to be short initials of the

petitioner dated 30.7.2002 but it does not appeal to reason as to if the petitioner had received the censure entry dated 25.7.2002 why he kept mum and did not even submit any representation or filed any objection. The petitioner's case is that he has not been served with the censure entry, he could not even give his explanation on the allegations against him in censure entry. The Commissioner in his letter dated 3.3.2004 as well as the State Government in its order has mentioned that the entire service record of an employee was required to be seen. From perusal of service record of petitioner it is clear that there are no entries after 1995-1996 till 2000-2001. According to the supplementary counter affidavit the entries for the years 1997-98, 1998-99, 1999-2000 and the last year 2002.2003 were not received.

10. As noted above after observing in annual remarks of 2000-2001 and 2001-2002 that the work needs improvement, the next crucial entry for the year 2002-2003 was not available. The annual remark of the year 2002-2003 could have disclosed as to whether there was over all improvement in the working of the petitioner but the said entry was not available as per chart annexed with the supplementary counter affidavit. In the last ten years entries looked into by the Screening Committee there were at least four entries which were not available as per chart filed along with the supplementary counter affidavit. In the facts of the present case where four entries out of ten entries which were being looked into by the Screening Committee being not available the Screening Committee ought to have looked into the entire service record of the petitioner. The apex Court in **Baikuntha Nath Das and another Versus Chief District Medical Officer and another** (supra) has laid down in paragraph 34 that the Screening Committee ought to have considered the entire service record before taking a decision in the matter, - of course attaching more importance to record of and performance during the later years. Paragraph 34 is extracted below:-

*"**34.** The following principles emerge from the above discussion:-*

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary___ in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter__ of course attaching more importance to

record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/Character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it un-communicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned in (iii) above. This aspect has been discussed in paras 30 to 32 above."

11. The facts on record also do support the case on the petitioner that the censure entry dated 25.7.2002 was not communicated to the petitioner but even if it is accepted for argument shake that the said censure entry was communicated to the petitioner compulsory retirement on so censure entry is not justified. Thus it is held that there was no sufficient material before the Screening Committee to form an objective opinion that the petitioner was fit to be compulsorily retired.

12. The next submission of the petitioner's counsel is that the Screening Committee was also not properly constituted. Reliance has been placed on the judgment of the learned Single Judge passed in writ petition No. 7789 of 2004 **Naresh Chandra Sharma Versus State of U.P. & others** (supra). In the aforesaid judgment this Court has held that the report of the Screening Committee was vitiated since the District Magistrate who was the appointing authority has not participated in the proceedings rather has only written on the report as "approved". In the present case the District Magistrate himself was chairman of the Screening Committee and had signed the report and had passed the order for compulsory retiring the petitioner.

In view of foregoing discussions the writ petition is allowed. The order dated 31.12.2003 is quashed. The petitioner is entitled to all consequential benefits.
Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2006

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHIV SHANKER, J.

Criminal Misc. Writ Petition No. 10413 of 2005

Gaurav Dewan and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Vivek Chaudhary

Counsel for the Respondents:
Sri U.N. Shukla
A.G.A.

Constitution of India, Art. 226-Qashing of F.I.R.-offence under section 420/468/471 I.P.C.-from bare perusal of allegation-prima-facie case made out-it is erroneous to assess the material before conclusion-of investigation-even under Art. 226 or 482 Cr.P.C. the power

should be exercised sparingly and in the rarest of rare case-direction issued to conclude the investigation within 3 months-till the submission of charge-sheet/final report arrest staged.

Held: Para 7, 8 & 9

It is erroneous to assess the material before it and conclude that the complaint can not be proceeded with. Although such order was passed in connection with an application under Section 482 of the Code of Criminal Procedure, but in the cases of quashing of the first information report much weightage can be given towards the proceedings of Section 482 Cr.P.C. than the Article 226 of the Constitution of India.

Therefore, having cumulative effect of both the judgements first information report can not be said to be quashed at this stage. However, in the interest of justice petitioners can be protected in the following manner.

The Investigating Officer of Case Crime No. 853 of 2005, under Sections 420, 467, 468 and 471 I.P.C., Police Station Kanth, District Moradabad will conclude the investigation within a period of three months from the date, on which a certified copy of this order is presented before him.

Case law discussed:
2004 SCC (Crl.) 3537
AIR 1992 SC-604

(Delivered by Hon'ble Amitava Lala, J.)

1. In the present case, the petitioners wanted to get an order of quashing the F.I.R. dated 29th September, 2005 lodged as Case Crime No. 853 of 2005, under Sections 420, 467, 468 & 471 I.P.C., Police Station Kanth, District Moradabad and further incidental prayers as well as interim order not to arrest the petitioners during pendency of the writ petition. It is well known that Section 420 I.P.C. is made for cheating and dishonestly inducing delivery of property. Such offence is cognizable, non-bailable, compoundable with permission of the Court before which any prosecution of such offence is pending, and triable by Magistrate of First Class. Sections 467, 468 and 471 I.P.C. are really applicable in the case of forgery.

2. The case of the complainant being respondent no. 4, the Secretary of Ganna Samiti Ltd., Kanth, in the first information report is that upon purchasing sugarcane through samiti by the petitioner company, the petitioners, being Managing Director and Occupier of the Company, handed over a cheque amounting to Rs. 3,19,14,000/- for the respective payments. On presentation to the bank, it was returned due to insufficient fund. According to the complainant, the petitioner no. 1, being Managing Director, knowing fully well that there is insufficient amount in the bank handed over the cheque. Therefore, such action is violative of the aforesaid sections.

3. According to us, Section 138 of the Negotiable Instruments Act, 1881 is squarely applicable in such a situation. Section 138 speaks for dishonour of cheque for insufficiency, etc., of funds in the account. Such section is as follows:-

"Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient

to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless—

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

Explanation.--For the purpose of this section, "debt or other liability" means a legally enforceable debt or other liability."

4. Therefore, the aforesaid section under the Negotiable Instruments Act, 1881 is a special Act when Section 420 of the Indian Penal Code is a general Act. It is well known that special prevails over the general. Therefore, in such situation, like the above, Section 138 of the Negotiable Instruments Act is desirably applicable. In any event, presently situation is different. The petitioners admittedly paid the amount of Rs.3,19,14,000/-, which has been recorded under an order of the Division Bench dated 18th October, 2005.

5. Petitioners contended that they have not violated the order of the Court and the cheque was given as a security in connection with the money to be paid pursuant to an order of the Court. The petitioners further contended that the first information report was made with a malafide intention. Submitting of a cheque in the bank in such situation is nothing but a pressure tactics upon the petitioners. No case has been formed under Sections 467, 468 and 479 I.P.C.

6. Two judgements were cited by the respective parties in respect of quashing of the first information report. The petitioners have cited a decision in connection with **AIR 1992 SC 604 (State of Haryana and others Vs. Ch. Bhajan Lal and others)** to establish that in view of the aforesaid circumstances the first information report should be quashed.

7. According to us, the Supreme Court in such judgement specifically held that power of the High Court either under Article 226 of the Constitution of India or under Section 482 of the Code of Criminal Procedure should be exercised sparingly and that too in the rarest of rare cases. According to us, a first information report has been lodged and the proceeding was initiated. Whether the proceeding is

rightly initiated or not, can not be germane in a situation where payment has already been made. Therefore, the petitioners have acted upon on the basis of the first information report, which is not only related to Section 420 I.P.C. alone but also under Sections 467, 468 and 479 I.P.C. It is to be remembered that in a judgement reported in **2004 SCC (Cri) 353 (State of M.P. Vs. Awadh Kishore Gupta and others)** again the Supreme Court held that it is not proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It is erroneous to assess the material before it and conclude that the complaint can not be proceeded with. Although such order was passed in connection with an application under Section 482 of the Code of Criminal Procedure, but in the cases of quashing of the first information report much weightage can be given towards the proceedings of Section 482 Cr.P.C. than the Article 226 of the Constitution of India.

8. Therefore, having cumulative effect of both the judgements first information report can not be said to be quashed at this stage. However, in the interest of justice petitioners can be protected in the following manner.

9. The Investigating Officer of Case Crime No. 853 of 2005, under Sections 420, 467, 468 and 471 I.P.C., Police Station Kanth, District Moradabad will conclude the investigation within a period of three months from the date, on which a certified copy of this order is presented before him. The petitioners are directed to co-operate with the Investigating Officer in all possible manner. If the Investigating Officer or informant found himself aggrieved due to falsification, misstatement, fraud, non-cooperation with the Investigating Officer or any other reasons whatsoever relevant for the purpose, he is at liberty to apply for recalling/variation/ vacating/ modification of the order. However, the petitioners will not be arrested in the above mentioned case crime number till the submission of the charge-sheet/final report, if any.

10. Accordingly, the writ petition stands disposed of.

However, no order is passed as to cost. Petition Disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2006

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Second Appeal No. 3330 of 1982

Noor Ahmad and another ...Defendant-Appellants
Versus
Iftikhar Uddin ...Plaintiff-Respondent

Counsel for the Appellants:
Sri Neeraj Agarwal
Sri J.N. Singh
Sri Anil Shukla
Sri N.K. Srivastava

Counsel for the Respondent:
Sri M.A. Zaidi

Code of Civil Procedure Order XXIII-rule-3-Compromise-in pending Second Appeal-both parties jointly moved

application-duly supported with affidavit-praying the appeal to be decided in terms of compromise-Trial Court verified in presence of parties-held-Appeal be decided in terms of Compromise-the compromise application accompanying affidavit will be part of Decree.

Held: Para 10

In view of the aforesaid, I am of the opinion that it is in the interest of justice that the Second Appeal be decided in terms of the compromise, copy whereof has been filed as Annexure 1 to the said affidavit accompanying the aforementioned application.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. Case called out in the revised list.

Sri Neeraj Agarwal, learned counsel for the defendants-appellants is present. However, Sri M.A. Zaidi, learned counsel for the plaintiff-respondent is not present.

2. It appears that Civil Misc. Application No. 1575 of 1990 (dated 21.3.1990) was filed under Order XXIII, Rule 3 of the Code of Civil Procedure, jointly on behalf of the defendants-appellants and the plaintiff-respondent.

3. The said application was signed by the then learned counsel for the defendants-appellants as well as the then learned counsel for the plaintiff-respondent. It was, inter-alia, prayed in the said application that the Second Appeal be decided in terms of compromise and the parties be directed to bear their own costs.

4. The said application was accompanied by an affidavit, sworn jointly by Noor Ahmad (defendant-appellant no.1) and Iftikhar Uddin (plaintiff-respondent) on 19th March 1990. Photostat copy of the compromise was filed as Annexure 1 to the said affidavit.

5. By the order dated 14.12.1999, this Court directed that the compromise be sent to the Court below for its verification.

The said order dated 14.12.1999 is reproduced below:

"The compromise has been filed by the parties and the same requires verification. Send it for its verification to the Court below.
List after three months."

6. Pursuant to the said order 14.12.1999, the aforesaid application and its accompanying affidavit, including annexure thereto, in original, were sent to the Court below for verification.

7. In compliance with the directions given in the said order dated 14.12.1999, the learned Civil Judge (Junior Division), Kasganj, District Etah sent a communication dated 10th March 2000 to the Registry of this Court. It was, inter-alia, stated in the said communication dated 10th March 2000 that the said compromise had been verified in presence of the parties by the learned Civil Judge (Junior Division), Kasganj, District Etah.

8. Alongwith the said communication, the aforementioned papers sent from this Court, including copy of the compromise, were also returned to the Registry of this Court.

9. A perusal of the notings on the back-side of Page 2 of the copy of the compromise, filed as annexure 1 to the said affidavit accompanying the aforementioned application, shows that the parties have acknowledged having entered into the said compromise, and the same has been duly verified by the learned Civil Judge (Junior Division), Kasganj, District Etah.

10. In view of the aforesaid, I am of the opinion that it is in the interest of justice that the Second Appeal be decided in terms of the compromise, copy whereof has been filed as Annexure 1 to the said affidavit accompanying the aforementioned application.

11. The Second Appeal is, accordingly, decided in terms of the compromise, copy whereof has been filed as Annexure 1 to the said affidavit accompanying the aforementioned application. The said compromise will form part of the decree.

12. The parties will bear their own costs. Decided in terms of compromise.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2006

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No.42245 of 2003

Harish Chandra ...Petitioner
Versus
Commissioner Moradabad Region Moradabad and others ...Respondents

Counsel for the Petitioner:
P.N. Tripathi
Sri P.S. Baghel

Counsel for the Respondents:
Sri Vijendra Singh
S.C.

U.P. Govt. Servants (Discipline and Appeal Rules, 1999, Rule-7-Constitution of India Art. 311 (2)-Dismissal-petitioner a lekhpal recommend 36 persons-for allotment of land during consolidation period-recommendation made on the basis of Govt. order-out of 36 only 22 persons allotment approved by S.D.O.-even the dispossession of these alloties stayed by High Court the authorities who had inquired and approved-not subjected to submit their explanation even-order of major punishment passed without giving the copy of inquiry report, the list of witness-without show cause notice-without oral evidence-held-order wholly perverse punishment order quashed-without back wages-conclude the enquiry after giving full opportunity till the conclusion of disciplinary proceeding shall be treated under suspension.

Held: Para 21

There is also substance in the argument of the petitioner that under the U.P. Government Servants Discipline and Appeal Rules, 1999, it was mandatory that the provisions of Rule 7 should have been complied with while imposing a major punishment on the petitioner. Had it been a case of imposition of minor punishment, the position would have been different. But here, in this case, when the petitioner was visited with the evil consequences of termination, the minimum to be observed in the enquiry was that the petitioner should have been given the documentary evidence, which was against him, and also the names of witnesses should have been revealed in the charge sheet itself. This was not done.

2003 (8) SCC-9
2001 (2) UPLBEC-1475

AIR 1979 SC-1022

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

1. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. This petition has been filed against orders passed by the respondents No.1, 2 & 3 dated 6.9.03, 15.4.02 and 30.10.01 which have culminated into termination of the petitioner who was working as a Lekhpal with the respondent State.

3. The petitioner was appointed as Lekhpal in the year 1987 and was continued to work in the department concerned. The petitioner received a show cause notice on 3.4.2000 stating therein that on account of certain charges against him, a disciplinary proceeding was contemplated. The petitioner submitted his reply on 5.4.2000. The petitioner was charge sheeted on 5.5.2000 and, thereafter, a supplementary charge sheet was also issued against him on 25.5.2000. The petitioner submitted his reply to the Enquiry Officer on 14.6.2000 and an order was passed on 1.7.2000 terminating the services of the petitioner.

4. The petitioner preferred an appeal before the District Magistrate, Bijnore on 14.7.2000. The District Magistrate allowed the appeal of the petitioner by setting aside the order-dated 1.7.2000 and made observation that the respondent No.3 Up Ziladhikari, Nazimabad, District Bijnore may pass a fresh order by giving a fresh show cause notice and also may pass an order that the petitioner would be treated to be on suspension during that period.

5. The petitioner, thereafter, received a fresh show cause notice on 10.1.2001 to which the petitioner gave a reply on 19.1.2001. The respondents, thereafter, passed an order on 30.10.2001 again terminating the services of the petitioner. This is the first order, which is impugned in the present writ petition. The petitioner, thereafter, filed an appeal against this order on 12.11.01. The appeal was dismissed by the order-dated 15.4.2002, which is also impugned in the present writ petition.

6. The petitioner, thereafter, filed a revision against the impugned order dated 15.4.2002 and the respondent No.1-Commissioner rejected the revision of the petitioner on 15.1.03. The ultimate order is the order-dated 15.1.03. Learned counsel for the petitioner has argued that all the impugned orders are fully perverse and arbitrary and violative of Article 21 of the Constitution of India as his right to livelihood is affected by terminating his services without giving him a proper enquiry.

7. The petitioner has drawn the attention of this Court to the revisional order dated 15.1.03 where the respondent No.1-the Commissioner recorded that out of 11 charges leveled against the petitioner, seven charges have been found to be proved but four charges are not proved. Learned Commissioner in the revisional order has stated that one of the most serious charges leveled against the petitioner was that even though chakbandi was going on in a village, the petitioner who was a Lekhpal in that village recommended the allotment of the land to 35 allottees, out of which, 22 allottees were subsequently found not to be genuine persons worthy of allotment.

Learned counsel for the petitioner Shri P.S. Baghel has argued that these findings have been reached by the Commissioner ignoring the material documentary evidence filed by the petitioner in its reply itself, wherein he had clearly disclosed before the Commissioner that the Government had issued a Government Order on 31.12.2000 by which it had permitted the allotments to be made even in villages where chakbandi was going on.

8. Learned counsel for the petitioner has argued that this material piece of evidence was ignored. It was not a case as if the petitioner had made allotments against the prevalent rules and orders and, therefore, the findings reached ignoring these vital piece of evidence, renders the findings perverse and, therefore, also the punishment imposed on the basis of these findings is also disproportionate.

9. The next argument of learned counsel for the petitioner is that in such a case, the Court, while exercising its power of judicial review, can interfere with the quantum of punishment.

10. The next argument of the learned counsel for the petitioner is that in the present case, the entire chargesheet does not disclose or attribute any motive of personal gain against the petitioner. At the most, the charge can be a charge of negligence and, therefore, he argues that such a charge of negligence could not have lead to the imposition of a major punishment such as termination of service, which deprives him of his very livelihood. Learned counsel for the petitioner in support of this argument has relied in the decision of **Dev Singh Vs. Punjab Tourisam Development Corporation Ltd. and another reported in (2003) 8 S.C.C.9**.

11. The next argument of the learned counsel for the petitioner was that the entire enquiry held against the petitioner was vitiated on account of the fact that the charge sheet did not either disclose the documentary evidence which was proposed to be used against the petitioner and also did not disclose names of any witnesses who shall stand testimony against the petitioner. This, learned counsel for the petitioner has argued, is in violation of the rules, which have been made in the State of U.P. namely, the U.P. Government Servants Discipline and Appeal Rules, 1999. He refers in particular Rule 7 of the Rules, where there is a mandatory requirement that the charge sheet must disclose firstly, the documentary evidence which is to be used against the delinquent and secondly, it must disclose the name of witnesses who are to appear testimony against the delinquent. Learned counsel for the petitioner has argued that in this case the decision has been taken in violation of Rule 7 of the Rules of 1999. In support of his decision, learned counsel for the petitioner has relied on a Division Bench decision of this Court report in (2001) 2 UPLBEC 1475 in the case Subhash Chandra Sharma Vs. U.P. Co-operative Spinning Mills and others wherein this Court held that in cases where a major punishment proposed to be imposed, an oral enquiry is a must, whether the delinquent makes a request for it or not. Admittedly, he says, in this case, there was no oral enquiry.

12. Learned counsel for the petitioner has also argued that at the most, the petitioner's case could be considered

to be a case of negligence. He has cited the case of **Union of India and others Vs. J. Ahmed reported in AIR 1979 S.C. 1022**. He has in particular, referred to paragraph-9 of the said judgment wherein the Supreme Court has explained that negligence in some cases would not constitute misconduct because the levels of administrative ability can not be measured into strict terms and both lack of efficiency and lack of foresight would amount to a serious lapse, but in the absence of charges of doubtful integrity, would not constitute misconduct.

13. Learned Standing Counsel has argued in reply that firstly, the petitioner has a clearly efficacious alternative remedy of filing a petition before the State Administrative Tribunal.

14. Secondly, learned Standing Counsel has argued that from a bare perusal of the impugned orders, it is clearly borne-out that the petitioner was not only guilty of negligence but the charges were fully proved against him. He has argued that not one but many charges were proved against him.

15. Learned Standing Counsel has argued that it is the Lekhpal, who is the key person in the village, who maintains the records of the village and, therefore, being the in-charge of the village record, he knows clearly as to whom land is to be allotted. In this particular case, 22 persons were wrongly allotted the land. Apart from this charge, there were other charges also against the petitioner such as unauthorized occupation of quarters and unauthorized absence.

16. Learned counsel for the petitioner has argued in rejoinder affidavit that out of the 22 persons who were disclosed to be wrongfully allotted the land, approached the Revenue Court and obtained stay order and, therefore, it can not be said that the allotment of land was completely wrongful.

17. I have heard learned counsel for the petitioner as well as learned Standing Counsel at length and I have given anxious and thoughtful consideration to the facts and circumstances of the case and perused the pleadings on record. Upon perusing the material on record, it is clear that the order of termination has been passed against the petitioner on account of the fact that he made wrongful allotment in village even though chakbandi was going on. The process of making allotment of land in the village is not an act, which is singly performed by the Lekhpal. The Lekhpal only recommends the names of the persons who can be made allottees. In this case too, the petitioner had made a recommendation of 35 persons and ultimately, the allotment was allowed under the signatures of the Tahasildar and the S.D.M.

18. In the enquiry that was conducted against the petitioner and upon perusal of the report which is on record of the case, it is apparent that the S.D.M. and the Tahasildar who endorsed and allowed the allotments recommended by the petitioner, was neither asked for an explanation in writing nor did they appear in the enquiry to show the circumstances in which they had put seal of approval on the allotments recommended by the petitioner. The act of allotment was indeed not finally done by the Lekhpal. His role perhaps was confined to making a wrongful recommendation but the seal of approval was put on it by the Tahsildar

and the S.D.M. upon making an enquiry from the learned Standing Counsel. He has been unable to inform the Court as to what action has been taken against these two persons who are also responsible for making all these allotments. There is not even a whisper in the record about what happened to those two other persons who participated in the alleged wrongful act of allotments made to 22 persons.

19. There is also substance in the argument made by the learned counsel for the petitioner that while replying to the charge that wrongful allotments has been made, despite the process of chakbandi going on in the village, the petitioner had included in his reply from subsequent pleadings that a Government Order had been issued by which it had been permitted that allotment could be made even despite the fact that chakbandi was going on in the village. The revisional order has not dealt with this matter at all.

20. Therefore, the consequential finding that it was done during the course of chakbandi is perverse.

21. There is also substance in the argument of the petitioner that under the U.P. Government Servants Discipline and Appeal Rules, 1999, it was mandatory that the provisions of Rule 7 should have been complied with while imposing a major punishment on the petitioner. Had it been a case of imposition of minor punishment, the position would have been different. But here, in this case, when the petitioner was visited with the evil consequences of termination, the minimum to be observed in the enquiry was that the petitioner should have been given the documentary evidence, which was against him, and also the names of witnesses should have been revealed in the charge sheet itself. This was not done.

22. Moreover, this Court has held in the case of **Subash Chandra Sharma** that oral testimony is a must in the case for imposition of major punishment. This too was not done in the present case.

23. Such being the facts and circumstances of the case, the conclusion reached is that the enquiry conducted against the petitioner was not fair and was vitiated for all the above reasons. Secondly, the resultant punishment of dismissal was also not fair.

24. I deem it appropriate that the petitioner be given a fair chance of enquiry. The respondents must also initiate action against the Tahsildar and against the S.D.M. if they had not already done so, who put seal of approval on the alleged wrongful action. As such, a fresh enquiry be conducted for the petitioner which may be completed within a period of three months. The petitioner will be allowed to participate freely in the enquiry. For a period of three months, the petitioner will be deemed to be on suspension and will be paid normal subsistence allowance. The orders of dismissal and consequential order passed in appeal and revision are set aside. The subsistence allowance will be paid to the petitioner as from today. The petitioner will not be entitled to any arrears or back wages until conclusion of the enquiry and/or until fresh order is passed in his favour.

25. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.9.206

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 31065 of 2004

Ali Hussain ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Daya Shanker Mishra
Sri Chandra Kesh Mishra
Sri Bipin Bihari

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226-claim for back wager-where the termination order quashed by court-No specific direction for back wages-it can not be claimed as a matter of right-unless specifically pleaded-material produced to substantiate his pleading-not entitled for back wages.

Held: Para 18

In view of the above discussions and the facts that the petitioner has failed to plead and prove that he was not gainfully employed from 14.11.73 to 7.10.98, the petitioner is not entitle for payment of back wages as of right particularly when the Court in its wisdom had not exercised the discretion in his favour at the time when his writ petition against the order of termination was allowed in part. As there was no direction for payment of back wages therein on reinstatement and the claim for back wages has been rejected by the authorities on a uniform and a rational policy decision, it would not be proper to interfere in exercise of writ jurisdiction.

Case law discussed:
AIR 2006 SC-586
J.T. 2005 (6) SC-461
(1979) 1 SCR 563
2002 (6) SCC-41
J.T. 2002 (5) SC-143
AIR 2002 SC-2676
2005 (6) SCC-36
2005 (5) SCC-124
2006 (2) SCC-711
2005 (2) SCC-373
AIR 1988 SC-2181
AIR 2001 SC-1684
1996 SCSR (15)-726
AIR 1991 SC (2)-2010

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The one and the only question which arises and has been raised in this petition under Article 226 of the Constitution of India is whether the petitioner whose termination was set aside is entitled to back wages for the period from the date of his termination till his reinstatement even though he had not worked during this period.

2. The petitioner-Ali Hussain has joined PAC on 27.10.1966. On 22.5.1973 a case crime no.506/73 was registered against him on account of his participation in the PAC revolt of 1973. In the Sessions Trial No.556/74 State Vs. Ram Awadh and others, the petitioner was acquitted on 23.12.1981 of the criminal charges. The State Government filed an appeal No.2262/82 against his acquittal. The appeal was dismissed by the High Court vide judgment and order dated 21.12.1992. Further, the S.L.P. of the State Government in the Hon'ble Supreme Court was also dismissed on 4.8.1994. In the meantime due to his involvement in revolt, the Inspector General of PAC, Bareilly dismissed him from service on 14.11.1973. The termination order was challenged by the petitioner before U. P. State Public

Services Tribunal. The claim of the petitioner was dismissed on 20.1.1981. Against the order of the Tribunal, the petitioner filed a writ petition no.8063/81. The said writ petition was partly allowed by the High Court vide judgment and order dated 18.3.1998. The High Court set aside the order of the Tribunal dismissing the claim of the petitioner and quashed the order of dismissal of the petitioner dated 14.11.1973 with the direction to reinstate the petitioner in service within two months but no direction was given for payment of back wages rather the matter of payment of back wages was relegated for decision to the State Government i.e. Dy. Director General of PAC, Lucknow. In pursuance of the order of High Court, the petitioner was reinstated on 7.10.1998 and his representation for back wages from 14.11.1973 up to 7.10.1998 was rejected vide order dated 20.2.2003 on the ground that since the petitioner had not worked during the aforesaid period he is not entitle for any back wages.

3. The petitioner has, therefore, challenged the order dated 20.2.2003 rejecting his representation for back wages and has prayed for payment of back wages for the period 14.11.73 to 7.10.98. The petitioner by an amendment which was allowed on 3.7.2006 has also challenged the Government Order dated 15.4.2004 which provides for non payment of back wages to all PAC personal whose services were terminated on account of their participation in the PAC revolt of 1973 but were subsequently reinstated on the principle of 'No work No pay'.

4. I have heard Sri Bipin Bihari, learned counsel appearing for the petitioner and learned Standing Counsel.

5. Learned counsel for the petitioner has argued that once the termination order of the petitioner has been set aside on merit, the petitioner is entitled to be reinstated in service with full back wages and there is no justification for denying the payment of back wages as there was no fault on the part of the petitioner. Learned counsel for the petitioner further contended that in similar circumstances in a very large number of cases relating to PAC revolt of 1973 itself many of the employees have been reinstated with full benefits of service and back wages. Therefore, the action of the respondents in not awarding back wages to the petitioner is arbitrary and discriminatory in nature. On the other hand, learned Standing Counsel has submitted that the petitioner has not worked for the period from 14.11.1973 to 7.10.1998 and therefore he cannot be paid back wages for the said period. Moreover, the petitioner has no where pleaded in the writ petition that he was not gainfully employed elsewhere during that period and as such he is not entitle to any relief with regard to back wages. Learned Standing counsel has placed reliance upon two decisions of this Court wherein in respect of PAC revolt of 1973 similarly situate employees were refused relief with regard to payment of back wages.

6. The law with regard to the payment of back wages on reinstatement has under gone a sea change. Previously, direction to pay full back wages on reinstatement use to be a regular feature. However, lately a pragmatic approach had been adopted and it has been laid down that the payment of full back wages is not mechanical and automatic and no precise formula can be laid down for awarding back wages and it would depend upon the

facts and circumstances of each case. Hon'ble Supreme Court in one of the latest decision **State Brassware Corporation. Ltd. & Anr. Vs. Udai Narain Pandey, AIR 2006 SC 586**, after considering all previous decisions in this regard observed that the payment of full back wages which used to be normal result of reinstatement is not automatic nor it should be granted mechanically only for the reasons that the termination was held to be invalid. A similar view was expressed by Hon'ble Supreme Court in **M.L. Binjolkar Vs. State of Madhya Pradesh JT 2005 (6) SC 461** wherein it was observed as follows:-

"The earlier view was that whenever there is interference with the order of termination or retirement, full back-wages were the natural corollary. It has been laid down in the cases noted above that it would depend upon several factors and the Court has to weigh the pros and cons of each case and to take a pragmatic view....."

In Hindustan Tin Works (P) Ltd. Vs. Employees of Hindustan Tin Works (P) Ltd. (1979) 1 SCR 563, it has been held that though the relief of reinstatement with continuity in service can be granted when termination is found to be invalid, it does not lay down in absolute terms that the right to claim back wages must necessarily follow reinstatement in service.

7. Hon'ble Supreme Court followed the above decision in **Hindustan Motors Ltd. Vs. Tapan Kumar Bhatacharya (2002) 6 SCC 41: JT 2002 (5) SC 143: AIR 2002 SC 2676** and emphasized that in granting the relief of back wages application of mind is imperative. In other words, the payment of full back wages cannot be a natural consequence of reinstatement.

8. In the case of **Andhra Pradesh State Road Transport Corporation & Ors Vs. Abdul Kareem (2005) 6 SCC 36**, Hon'ble Supreme Court even denied continuity of service to the employee who was directed to be reinstated with continuity in service but without back wages.

9. It has further been laid down in **Allahabad Jal Sansthan Vs. Daya Shanker Rai and others (2005) 5 SCC 124** as under:-

"A law in absolute terms cannot be laid down as to in which cases, and under what circumstances, full back wages can be granted or denied. The Labour Court and/ or Industrial Tribunal before which industrial dispute has been raised, would be entitled to grant the relief having regard to the facts and circumstances of each case. For the said purpose, several factors are required to be taken into consideration. It is not in dispute that Respondent 1 herein was appointed on an ad hoc basis; his services were terminated on the ground of a policy decision, as far back as on 24.1.1987. Respondent 1 had filed a written statement wherein he had not raised any plea that he had been sitting idle or had not obtained any other employment in the interregnum. The learned counsel for the appellant, in our opinion, is correct in submitting that a pleading to that effect in the written statement by the work-man was necessary. Not only no such pleading was raised, even in his evidence, the workman did not say that he continued to remain unemployed. In the instant case, the

respondent herein had been reinstated from 27.2.2001."

10. In the present case, the petitioner has nowhere pleaded in the writ petition that he was sitting idle and was not gainfully employed during that period for which he is claiming back wages. The petitioner has not even disclosed any where as to how he spent the said period and as to how he was able to manage his affairs for all these years without being employed elsewhere or doing any business etc.. A faint and a vague attempt has been made by filing a supplementary affidavit stating in one sentence that after termination of service, the petitioner was nowhere gainfully employed. However, the said averment in the supplementary affidavit is not enough and sufficient pleading to establish beyond doubt that the petitioner had remained unemployed or without work or was not having any income during the period 14.11.73 to 7.10.98. It is absolutely beyond imagination to believe that the petitioner had not been gainfully employed elsewhere for about 25 years continuously.

11. It was the cardinal duty of the petitioner to have established beyond doubt that he was not gainfully employed during the period in dispute and the burden to prove the same was upon him only as it has been held by Hon'ble Supreme Court in **State of M.P. & Ors. Vs. Arjunlal Rajak (2006) 2 SCC 711** as follows:-

"The onus to prove that he had completed 240 days of work or he had not been gainfully employed within the said period was on the workman."

12. A similar view was also expressed in **Kendriya Vidyalaya Sangathan & Ars. Vs. S.C.Sharma (2005) 2 SCC 373** and it was laid down that initial burden lies upon the employee to prove that he was not gainfully employed and since the employee had neither pleaded nor placed any material to establish that he was not gainfully employed. It was not proper to grant back wages.

13. It is settled principle of law that the party has to plead his case and produce material to substantiate his pleadings and in the absence of the pleadings or incomplete pleadings, the Court is under no obligation to consider the point which has not been taken and substantiated. In **Bharat Singh and Ors. Vs. State of Haryana and Ors, AIR 1988 SC 2181**, Hon'ble Supreme Court observed that in a writ petition, the petitioner must plead and prove relevant facts by evidence. If the facts are not pleaded and the evidence in support of such facts is not brought on record, the Court is not bound to entertain the point so raised in as much as in a writ petition not only the facts are required to be stated but the evidence in support thereof is also required to be pleaded and brought on record.

In **M/s Atul Castings Ltd. Vs. Bawa Gurvachan Singh, AIR 2001 SC 1684**, the Hon'ble Apex Court observed as under:-

"The findings in the absence of necessary pleadings and supporting evidence cannot be sustained in law."

14. In view of the above facts and dictum of law, in the absence of proper

pleadings and material in support, it cannot be accepted that the petitioner had remained unemployed and without any work for about 20 years so as to entitle him back wages for the period in dispute.

15. In support of his averments, learned counsel for the petitioner has placed reliance upon the decision of Hon'ble Supreme Court in the case of **Ramesh Chander & Ors. Vs. Delhi Administration & Ors., 1996 SCSR (15) 726**. The said judgment and order of Hon'ble Supreme Court is distinguishable and has no application in the facts and circumstances of the present case as in that case reinstatement was ordered with back wages and all other consequential benefits on the ground of discrimination as some other similarly situate employees were given the benefit of back wages. However, in the present case, the High Court while setting aside the order of termination has only directed for reinstatement without any order of payment of back wages. The point of discrimination, if at all was available to the petitioner at that time, but it was not raised or if raised was not considered and decided in his favour. Therefore, the point of discrimination is not available to the petitioner in this writ petition being barred by principles of constructive res judicata as enshrined by Section 11 Order II Rule 3, C.P.C. The learned counsel for the petitioner has also placed reliance upon few decisions of the High Court wherein directions were issued for payment of back wages to the similarly situate PAC personnel who have participated in the PAC revolt of 1973. However, the said judgments and orders of the High Court are of no help to the petitioner as in all of them directions were issued while setting aside the termination order for not only of reinstatement but for payment of back wages. In some cases, back wages were given under the threat of contempt of Court. Therefore, there is no discrimination.

16. Learned counsel for the petitioner has also relied upon another case of Hon'ble Supreme Court in **Union of India etc. Vs. K.V. Jankiraman etc. reported in 1991 (5) Service Law Reporter 602: AIR 1991 SC (2) 2010** wherein it has been observed that the normal rule of " no work no pay" is not applicable where the employee was willing to work but was kept away from the work by the authorities and there was no fault on the part of the employee. The said case law is of no help to the petitioner as it does not provide that in every case of reinstatement where there is no fault of the employee, the payment of back wages should be made. The High Court in its wisdom has not directed for payment of back wages and has left the matter at the discretion of the authority and the authority on due consideration on the principle of "no work no pay" and the policy decision had refused to award back wages. Therefore, the decision can not be faulted with unless it is established to arbitrary and unreasonable.

17. On the other hand, learned Standing Counsel has placed reliance upon the decision of this Court in Writ Petition No.3676 of 2003 Ram Briksha Singh and Ors Vs. State of U.P. and Ors. dated 24.10.03 This matter also related to the similarly situate PAC personnel wherein their claims for back wages were rejected even by the High Court as they had not pleaded that they were not gainfully employed for the period of which they were claiming the back wages,

particularly, when there was no direction by the Court earlier for their reinstatement with full back wages.

18. In view of the above discussions and the facts that the petitioner has failed to plead and prove that he was not gainfully employed from 14.11.73 to 7.10.98, the petitioner is not entitle for payment of back wages as of right particularly when the Court in its wisdom had not exercised the discretion in his favour at the time when his writ petition against the order of termination was allowed in part. As there was no direction for payment of back wages therein on reinstatement and the claim for back wages has been rejected by the authorities on a uniform and a rational policy decision, it would not be proper to interfere in exercise of writ jurisdiction. Moreover, even in equity it would not be proper after 33 years to award back wages to the petitioner for the period of 25 years i.e. Between 14..11.73 to 7.10.98 specifically when it is admitted that the petitioner has not worked during the above period.

19. The writ petition, therefore, lacks merit and is, hereby, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2006

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.17386 of 2006
Connected with
Civil Misc. Writ Petition No.17412 of 2006
Civil Misc. Writ Petition No.17765 of 2006
Civil Misc. Writ Petition No.17160 of 2006
Civil Misc. Writ Petition No.17455 of 2006

Krishna College of Law, Bijnor ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anurag Khanna

Counsel for the Respondents:
Sri Govind Saran
S.C.

Constitution of India Art. 226-Admission in Management Quota- Admission in LLB three years and five years course-all the candidates from merit list got admitted-management admitted some student. Under management Quota as the numbers of seats was lying vacant-after accepting the examination fee-university can not refused such students-even if the university unable to recommend the deserving students or merit-directions issued accordingly.

Held: Para 13

The Government or the Universities can have only regulatory approach but certainly not the approach that would destroy the educational atmosphere which is being created in the country by participation/ establishment of these colleges in the field of education, hence every seat filled up by the institution is precious and cannot be permitted to

remain vacant or go waste in any session. The institutions, in this regard, cannot be given free hand and Government, Universities and the institutions should supplement each other to raise the standard of education day to day.

Case law discussed:

Spl. Appeal No. 47 of 2006 decided on 18.10.06.

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

1. These writ petitions raise common questions of law and facts, as such, they are being decided by this common judgment. Civil Misc. writ No. 17386 of 2006 is being treated as main petition.

2. Petitioner's institution- Krishna College of Law is self financed; does not receive any aid from the State Government and is running a law college of three and five years duration. State Government vide orders dated 19.6.2002 and 3.4.2003 respectively granted "No Objection Certificate' to the petitioner's institution (for shorr "institution'). The institution was grated temporary affiliation to run three years' law course provided the institution obtains permission from the Bar Council of India vide order dated 13.8.2002 passed by the Chancellor. Bar Council of India granted permission to the institution to run three years' law course with four Sections and intake of 80 students in each Section for the academic session 2002-2003 vide order dated 1.10.2002 in pursuance whereof the University permitted the institution vide letter dated 10.10.2002 to admit 320 students. Thus, three years' law course continued in the institution for the academic sessions 2003-04 and 2004-05; examination of the students were held and results were declared.

3. The institution was thereafter granted permission by the State Government vide order dated 3.4.2003 to run five years' law course. The institution was then permitted to run three years' law course with intake of 4 Sections of 80 students and five years' law course with intake of two Sections of 80 students for academic years 2003-04 and 2005-06 by the Bar Council of India. Vide orders dated 13.8.2003 and 11.9.2003, the Chancellor extended the affiliation to the three years' course from 1.7.2003 and five years' course from 1.7.2003 for five years respectively.

4. The University vide letter dated 23.10.2003 also permitted the institution to admit students in the five years' law course. For the academic session 2005-06, the University issued letters to the students who had qualified in the entrance examination to approach the colleges of their choice for admission in three years' law course and in pursuance thereof 11 students approached the institution, who were admitted. Vide letter dated 20.11.2005 issued by the University, the institution was informed that it can further admit 30 students from the list sent by the University in five years' law course. However, only six students came forward thereafter to take admission in the institution which fact was informed to the University vide letter dated 22.12.2005.

5. The institution again vide letter dated 5.1.2006, the institution informed the University that only 11 students had approached for admission against the University quota and 36 students had been admitted in the management quota and

that a large number of seats were lying vacant.

6. When the institution received no response it filled up the vacant seats from management quota in accordance with Government order dated 14.12.1999.

7. Examination forms together with examination fee of 480 students for examinations for session 2005-06,which were to commence in March 2006 was submitted by the institution were accepted by the University and roll numbers were also issued to the students but the institution was informed vide impugned letter dated 18.3.2006 that it has admitted students in excess of the sanctioned strength as such, the students would not be permitted to appear in the examination.

8. Counsel for the petitioner contended that the respondent-University is estopped from refusing permission to the students admitted against management quota after having accepted their examination forms and fee. It is urged that the petitioner has admitted the students strictly in accordance with the norms fixed by the Bar Council of India and the Government order dated 14.12.1999 in which it is clarified that in case the students are not recommended by the Government or the University, the Management shall be entitled to fill up the vacant seats. It is also urged that the institution has not admitted any student in excess in the Ist year Law courses rather the respondents are confusing the matter as the institution has taken direct admission of some students in IInd year law courses which is strictly within the four-corners of the permission granted by the Bar Council of India and as such it cannot be said that the institution has admitted students more than the sanctioned strength.

9. Counsel for the respondent-University rebutted the arguments advanced by counsel for the petitioner and contended that in its meeting held on 23.3.2006, the Admission Committee of the University resolved that the admit card be issued to the students who have been admitted on the basis of the list supplied by the University and against 15% management quota. The institution, in question, had sanctioned strength of 160 seats in 5-years' law course. However, the institution has admitted 6 students from University quota and 114 directly. In the 5-years' course of law, the University provided a list of 30 students for admission.

10. He further submits that the Co-ordinator, Law entrance Examination issued a selection letter with rank number and option of the students for the College. This letter was issued for taking admission by 827 students of General category,498 against other Backward Class and 385 against Scheduled Caste upto 10.12.2005. The Admission Committee resolved in its meeting held on 18.11.2005 that the last date for admission was 10.12.2005 and thus, there was no justification for making admission after the cut off date. He urged that the Government Order dated 14.12.1999 was superceded by Government order dated 16.3.2005 and, therefore, the institution, in question could not fill up the vacancies in terms of Government order dated 14.12.1999.

11. Heard counsel for the parties and perused the record. With explosion of population, India now today is

represented by 70% youth. The young generation coming up requires vast infrastructure in education system to make them literate and complete with the work in any field of education. The future of the country rests on the young ones today. The Government is unable to cope up with the problem of providing good infrastructure in the education system and quality schools in adequate number to meet this problem. It is rather helpless and has to rely upon on private self-financed institutions. The students cannot be deprived of the education as the eradication of illiteracy is one of the basic goals of our Constitution which helps in eradication of poverty and other miseries.

12. After perusal of record, there is no iota of doubt in my mind that no excess student was admitted in the Ist year law course by the institution. The students, whose names were included in the list circulated by the University had choice to take admission in any of the Colleges which were affiliated with the University. Admittedly, less number of students approached the institution for admission but all those students who approached the Colleges, in pursuance of the examination conducted by the University and list circulated by it were give admission by the institution. No one of them was denied admission nor there was any grievance by any student that he/she has not been admitted. It is apparent that the University confused the issue as the institution, in question, admitted some direct students according to circular issued by the Bar Council of India. In similar circumstance, a Division Bench of this Court in Special Appeal No. 46 of 2005- ***Rajiv Academy of Technology and Management Mathura and others Vs. State of others*** passed the following orders:-

"Thus accordingly it is directed that pending disposal of this appeal or further orders of this Court, whichever is earlier, the Universities will not disaffiliate any college or take any other steps adverse to them or their admitted students because and only because the impugned Government Order regarding seat allotment and reservation has not been allowed or is not being followed by the college, in question. In other words no adverse steps will be taken if the College, in question, admits a lesser percentage of the Universities forwarded students than 85% or admits a large number of privately admitted students than 15%. This will also cover the Colleges which have admitted already more than the 15% on the management quota. We make it clear that the admissions granted by the Colleges on the management quota and which are to be granted hereafter will be so done at the sole risk and responsibility of the Colleges and the students themselves who are being thus admitted; it should be understood that no equities are finally being created in favour of the students only by reason of their admission on the management quota if those are in excess of 15%.

We also direct each and every college hereafter in regard to management quota admission above 15% to bring it to the notice of each such students admitted that the admission is subject to the results in these appeals and is being permitted on the basis of the interim order we pass hereinbelow: a copy of this interim order has to be served to each such freshly admitted students. It shall be ensured by each college and they will keep record signed documents in their possession for

showing to this Court as and when necessary that each such admitted student was given a copy of our interim order before money was taken from such student for admission and admission granted to him.

The order and observations herein, however, worded, are without prejudice to the final rights and contentions of the parties in these appeals or the future proceedings. We take note that in spite of the time honoured fifty-fifty formula honoured and accepted by the Supreme Court so far, the Government Order impugned before us, covers not merely the 2004-05 academic session but future sessions as well. Whatever might be the fate of the students, or Universities or the Colleges affiliated to them for the session 2004-05, if final pronouncement in regard to appropriateness or the otherwise of the Government Order in the final pronouncement of these appeals is likely to benefit all concerned in the future years to come. As such the appeals will be heard out fully and decided and it should be borne in mind that the results for the current academic session and the mode of admission therein might be quite different from the mode of admission which might be decided as correct and just according to the Constitution and other laws of the country for the future academic session. We make it clear that we are not directing any admission to be made by the order nor finally permitting any such admission. All admission, as we have said earlier, will ultimately abide by the results of the appeals and the admissions given or admission taken on the part of the colleges and students respectively will be with their eyes fully open that even during the academic session such admissions might be nullified and result in a loss of several months of studies to the students apart from the monetary loss which might also be a consequences of the final order in appeals.

Put up on 31st March, 2005 for further hearing, marked "After recess'"

13. It is the colleges established in the private sector which have came forward to give respite to the students and professional fields by imparting education. They invest huge amount of money and provide best infra-structure available. Though they may not be allowed to indulge in profiteering but are certainly entitled to cover the expenses and to gain some profit so that advancement in teaching skills and infra-structure can be made by future investment. If such colleges do not provide quality teaching or indulge in unfair practice, certainly the students will not prefer such colleges. The Government or the Universities can have only regulatory approach but certainly not the approach that would destroy the educational atmosphere which is being created in the country by participation/ establishment of these colleges in the field of education, hence every seat filled up by the institution is precious and cannot be permitted to remain vacant or go waste in any session. The institutions, in this regard, cannot be given free hand and Government, Universities and the institutions should supplement each other to raise the standard of education day to day.

14. The controversy raised in these petitions are covered by the decision dated 12.12.2005 rendered by this Court in ***Anurag Kumar Tiwari and others vs. state of U.P and others*** wherein it has been held as under:-

"The basic idea for passing of the said order is that in self financing institution seats shall not go waste and arrangement shall be made for filling up the said seats. Consequently, in the present case also, as seats have been filled up on the same principle that the seats shall not go waste and as no complaint has been made by any candidate recommended by the University that they were denied admission and further no one has come forward complaining that his merit has been ignored, in these circumstances and in this background as on the strength of interim order petitioners have already undertaken the examination, as such consequently it is hereby directed that the result of the petitioners be also declared forthwith."

15. The aforesaid decision was challenged in Special Appeal Nos. 47 of 2006 ***Chattrapati Sahu ji Maharaj University, Kanpur Vs Rao Gajendra singh Yadava and others*** and Special Appeal no. 48 of 2006- ***Chattrapati Sahu ji Maharaj University, Kanpur Vs Anurag Kumar Tiwari and others***. Dismissing the Special Appeals vide judgment and order dated 18.1.2006, the Court held as under:-

"We are in respectful agreement with the reasoning given and the order passed by Hon'ble Mr. Justice V.K. Shukla on the 12th of December, 2005. The following passage from his Lordship's judgment is extracted below:-

"This fact is also undisputed that each and every student who had been recommended by the University had been accorded admission by the institution, in question and no candidate come forward to complain that in spite of their name being recommended by the University they were not admitted by the institution, in question and directives were disregarded on account of extraneous considerations. Here institution has accorded admission to each and every candidate recommended by the University to the institution, in question. This fact is also undisputed that there are 100 seats sanctioned and as far as petitioners are concerned their admission has been made well within the sanctioned strength and at no point of time any dispute has been raised that there is any ineligibility or disqualification attached to them and no candidate has come forward complaining that on account of extraneous consideration there candidature has been ignored and deprived."

Acceptance of the appellant's case would mean that at the instance of the University, the Court would have to direct the withholding of result of students who have already been admitted, completed the course and taken their examinations.

The reading of the Government orders involved do not at all show that it was intended that self-financing institutions would allow their seats to go vacant even if the University was unable to recommend sufficient number of qualifying and deserving students.

The appeals are, therefore, dismissed."

16. This position is more or less same in all these connected writ petitions. That being so, they deserve to be allowed.

17. In the result, the writ petitions are allowed. The respondent-University is directed to declare the results of the students, within 15 days from the date of

production of a certified copy of this judgment and order, who had been allowed to appear in the examination in terms of interim orders passed by this Court. No order as to costs.
Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.03.2006

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Appeal No. 4563 of 2005

Prabhu Dayal ...Claimant/Appellant
Versus
State of U.P. & others ...Opposite Parties/ Respondents

Counsel for the Appellant:
Sri Hardev Singh

Counsel for the Respondents:
Sri Ravi Prakash Singh
A.G.A.

U.P. Gangsters and anti social Activities (Prevention) Act, 1986-Section 14 (i)-Attachment of ancestral property-not acquired by the gangster-can not be attached.

Held: Para 3

As the order attaching the property clearly states that the property belongs to Khajji's grandfather, hence it cannot be said that the property had been acquired by a gangster as a result of commission of an offence triable under the said Act.

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

1. Heard learned counsel for the appellant, learned AGA and perused the record. Counter affidavit and rejoinder affidavit have been exchanged in this case.

2. A very short submission has been made in this case that as per the order of attachment of the disputed property under section 14 (1) of the U.P. Gangsters and Anti-Social Activities (Prevention) Act, 1986, (hereinafter referred to as Act) dated 12.10.2004 passed by the District Magistrate, Kanpur Nagar, the said property was an ancestral property as it belonged to the applicant, Prabhu Dayal's father, Bhagwandin, and even if it is accepted for the sake of argument that the appellant Prabhu Dayal's son Khajji @ Rupesh has spent money in the renovation of the said property, as the property had been acquired in a legal manner, the property could not have been attached. In this connection reliance has been placed on section 14 (1) of the Act, which is being quoted hereinbelow:

"**14 Attachment of property.-(1)** If the District Magistrate has reason to believe that any property, whether moveable or immovable, in possession of any person has been acquired by a gangster as a result of the commission of an offence triable under this Act, he may order attachment of such property whether or not cognizance of such offence has been taken by any Court.

(2) ...."

3. As the order attaching the property clearly states that the property belongs to Khajji's grandfather, hence it cannot be said that the property had been acquired by a gangster as a result of commission of an offence triable under the said Act.

4. The appeal, therefore, succeeds on the aforesaid short point in the result, the impugned orders dated 12.10.2004 and 29.9.2005 are set aside and the property in dispute is directed to be released in favour of the appellant forthwith. Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 42257 of 2006

Samar Singh ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri P.V. Singh

Counsel for the Respondents:
S.C.

Arms Act-Section 17-Proceeding for cancellation of fire Arms-On the loan taken by the petitioner and his family member from Tulsi Gramin Bank not repaid-held-the suspension including the proceeding for cancellation-illegal.

Held: Para 5

In the present case, the notice itself is misconceived as even if the ground mentioned in the notice is taken to be correct then too the licence of the petitioner cannot be cancelled as the same is not a ground contemplated in law for cancellation or suspension of the arms licence. As such the order of suspension as well as the proceedings for cancellation in pursuance thereof, are both liable to be set aside.

Case law discussed:
1988 AWC-1481
1985 AWC-493
1998 All. C.J.-1449

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

1. The firearms licence of the petitioner has been placed under suspension vide order dated 29.5.2006. Aggrieved by the said order, the petitioner has filed this writ petition.

2. I have heard Sri P.V. Singh, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents. With the consent of the learned counsel for the parties, this writ petition is being disposed of at this stage without calling for a counter affidavit.

3. The sole ground for suspension of the fire arm licence is that the petitioner as well as his family members have not repaid the loan of Tulsi Gramin Bank. It is very surprising that how the non-payment of dues of a Bank would be relevant for suspension or cancellation of the fire arms licence of the petitioner. Such ground is not contemplated under the Act or Rules for cancellation.

4. Even otherwise, this Court in Civil Misc. Writ Petition No. 58216 of 2005 (Ajay Kumar Gupta Vs. State of U.P. and others) wherein, after considering the Full Bench decision of this Court in the cases of Balram Singh Vs. State of U.P. and others 1988 A.W.C. 1481, Kailash Nath Vs. State of U.P. 1985 A.W.C. 493 as well as the Division Bench decision of this Court in the case of Sadri Ram Vs. District Magistrate, Azamgarh and others 1998 All.C.J. 1449, has held that the arms license cannot be placed under suspension pending enquiry.

5. In the present case, the notice itself is misconceived as even if the ground mentioned in the notice is taken to be correct then too the licence of the petitioner cannot be cancelled as the same is not a ground contemplated in law for cancellation or suspension of the arms licence. As such the order of suspension as well as the proceedings for cancellation in pursuance thereof, are both liable to be set aside.

6. This writ petition stands allowed stands and the order dated 29.5.2006 passed by the no. 2 is quashed. If in pursuance of the suspension order the licensed weapon of the petitioner has been seized, the same shall be released to the petitioner forthwith.

No costs. Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2006

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 13495 of 1983

Asha Ram Misra and others ...Petitioners
Versus
The Joint Director of Consolidation, Allahabad and another ...Respondents

Counsel for the Petitioners:
Sri Swarajya Prakash

Counsel for the Respondents:
Sri N.D. Kesari
Sri P.K. Kesari
Sri R.R.K. Trivedi
Sri Krishna Kumar
S.C.

<u>U.P. Consolidation of Holdings Act-Section 48 (3)</u>-Demand of Chak Nali-after finalization of proceeding under Section 9 and 20 of the Act-whether such demand can be allowed for benefits of individuals? Held-'yes'.

Held: Para 14

The Deputy Director of Consolidation vide impugned order dated 4.8.1983 recalled the earlier order dated 7.6.1983 and remanded the case back to Consolidation Officer to submit a fresh report after hearing the parties and after making a spot inspection himself to ascertain whether the proposed "nali' is being carved out on the area of plot no. 256/2 which is chak out or from the area of the plot which is included in consolidation operation.

<u>Case law discussed:</u>
1982 RD-350
1982 ALJ-559
1982 AWC-160
1980 AWC-146
W.P. No.7791/80 decided on 9.5.82
1981 (2) R.D.-198
1983 RD-22
1995 RD-53

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

1. By means of this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the order dated 4.8.1983 passed by the Deputy Director of Consolidation, in exercise of power under Section 48(3) of the U.P. Consolidation of Holdings Act (for short "the Act'), remanding the proceedings back to the Consolidation Officer.

2. The facts are that after finalisation of proceedings under Section 9 as well as Section 20 of the Act an application was moved by opposite party no.2 that he has not been provided "chak nali' for

irrigation of plot nos. 257 & 259 included in his chak from his tubewell installed over his second chak no. 413 and as such he may be provided the same through plot no. 256. The Settlement Officer Consolidation vide order dated 1.1.1983 directed the Consolidation Officer to submit a report after making an inquiry and to send a proposal in case "chak nali' has not been provided. The Consolidation Officer vide order dated 7.1.1983 called for a report from the Assistant Consolidation Officer, who in his turn, called for a report from the Consolidator. Accordingly, the Consolidator submitted a report dated 14.1.1983 that no "chak nali' has been provided for irrigation from the tubewell existing in plot no. 413 and accordingly, the same may be provided which will affect the petitioner nos. 1 & 2. The Assistant Consolidation Officer forwarded the report to the Consolidation Officer on 14.2.1983. When the reference reached the Settlement Officer Consolidation he found that reports are ex-parte and as such he directed the Consolidation Officer to submit a fresh report after hearing the parties. The Consolidation Officer after hearing only the petitioner nos. 1 & 2 recorded that they have not given consent to the proposed "nali' and directed the parties to appear before the Settlement Officer Consolidation on 24.4.1983. The Settlement Officer Consolidation without hearing the parties forwarded his recommendation on 3.5.1983 to the Deputy Director of Consolidation for accepting the reference. The Deputy Director of Consolidation vide order dated 7.6.1983 accepted the reference ex-parte without any notice or opportunity of hearing to the petitioners. The petitioners thereafter, moved an application for recalling the said order.

3. The case set up by petitioner nos. 1 & 2 was that plot no. 256/2 is chak out and the same belong to all the petitioners and they have their "pucca house' & "pucca madaha' and 6 ft. high boundary wall standing on the land through which the "chak nali' is being proposed.

4. The Deputy Director of Consolidation vide impugned order dated 4.8.1983 recalled the earlier order dated 7.6.1983 and remanded the case back to Consolidation Officer to submit a fresh report after hearing the parties and after making a spot inspection himself to ascertain whether the proposed "nali' is being carved out on the area of plot no. 256/2 which is chak out or from the area of the plot which is included in consolidation operation.

5. The impugned order of remand has been challenged by the petitioners mainly on the ground that no "nali' can be provided for the benefit of an individual tenure-holder from the chak out land of the petitioners or even from the "bachat' land as such the entire exercise is futile and there was no justification to remand the case back and the Deputy Director of Consolidation ought to have rejected the reference. Reliance in support of the contention has been placed on the decision of a learned Single Judge in the case of ***Sri Ram Maharaj Dubey vs. Joint Director of Consolidation***, 1982 RD 350. It has also been urged that all the petitioners are co-tenure holders and the reports have been submitted ex-parte without hearing all of them and their pucca construction standing on the land in dispute through which "nali' is proposed is liable to be demolished.

6. In reply it has been contended that there is no specific prohibition under the provision of the Act for not providing a "nali' or chak road etc. to an individual tenure holder and as such no illegality has been committed by the Deputy Director of Consolidation in remanding the case back to the Consolidation Officer to submit a fresh report in this regard after hearing the concerned parties and making a spot inspection.

7. I have considered the argument advanced by learned counsel for the parties and perused the record.

8. The question whether the consolidation authorities have power to provide "nali' or chak road etc. for the benefit of any individual tenure-holder has drawn the attention of this court in number of cases.

9. In the case of ***Sri Ram Maharaj Dubey (Supra)*** relied upon by the petitioners, a learned Single Judge has held that chak road and "nali' etc cannot be provided for benefit of an individual tenure-holder in exercise of power under Section 48(3) of the Act and the same can be provided only if they are considered to be in the interest of tenure-holders in general. The same view was taken in two earlier decisions in the case of ***Raj Narain & others vs. Deputy Director of Consolidation***, 1982 ALJ 559 and writ petition no. 7791 of 1980 ***Udai Bhan Dubey & another vs. Sahayak Sanchalak Chakbandi & others*** decided on 9.5.1982. Again in the case of ***Ram Murat vs. Ma Saran & others***, 1982 AWC 160 and ***Sri Pat vs. Haridwar***, 1980 AWC 146, the two learned Single Judges have taken the same view.

10. In the case of ***Udai Bhan Dubey (Supra)***, it was held that application of individual tenure-holder wherein he prayed for providing "rasta' to in the chak of his father from village abadi was not at all maintainable nor such request could be considered by the Assistant Settlement Officer Consolidation in exercise of his power under Section 42A of the Act. In the case of Sri Pat (Supra) another learned Single Judge took the same view and it was observed as follows:

"No provision has been pointed out under the Act or the Rules framed under the Act for providing a "rasta' and "nali' to any private tenure-holder. In the absence of any specific provision under the Act or the Rules framed under the Act for any act to be done by any authority, nothing can be done by the Deputy Director of Consolidation in exercise of his powers under Section 48(3) of the Act. In this view of the matter, the application of the petitioner for providing "rasta' & "nali' from one chak to the other where he has got his pumping set was not maintainable".

11. The view taken in the case of ***Sri Pat (Supra)*** was considered by another learned Single Judge in the case of ***Rajpat Tiwari & others vs. Deputy Director of Consolidation***, 1981 (2) RD 198 and it was observed as follows :

"It is not correct to contend that consolidation authorities have no jurisdiction to allot a chak road to an individual tenure-holder. The broad contention put forth by the learned counsel for the petitioner in this case for attacking the impugned judgment on the ground that the rivisional court has erred in giving a chak road to o.p. no.4 is not

acceptable to me. The purpose of the U.P. Consolidation of Holdings Act is to allot compact area to an individual tenure holder. Even if there is no provision under the Act to provide road to an individual tenure-holder incidental power of providing chak road, pathway etc. to an individual tenure-holder is inherent in the consolidation authorities. If they are debarred from providing a chak road to an individual tenure-holder more harm is likely to occur than they may have jurisdiction to provide such road to individual tenure holder. In my opinion it is a necessary power in the consolidation authorities to provide a path road etc. to a tenure-holder with a view to carry out the purpose of the Act".

12. This view was again reiterated in the case of ***Rishi Narain vs. Deputy Director of Consolidation***, 1983 RD 22.

The conflicting opinion expressed by the learned Single Judge on the point was considered in the case of ***Chandrika Rai vs. Deputy Director of Consolidation, Ghazipur,*** 1995 RD 53 and it was observed as follows :

"In my opinion, wherever chak road or chak gool is provided, keeping in view the problems of individual tenure-holder, such provision sub-serves public purpose as well besides serving the purpose of individual tenure holders. Chak road or chak gool so provided does not cease to sub-serve public purpose merely because it has been provided on consideration of application filed by an individual tenure-holder vis-à-vis his difficulties."

13. The contrary view taken in the case of ***Ram Murat (Supra)*** and ***Sri Pat (Supra)*** were held to be per in curium for they were rendered in ignorance and without considering the relevant statutory provision. It was observed as follows:

"Both decisions aforestated have been considered by Hon'ble K.P. Singh, J in Rishi Narain (Supra). The decision in the aforesaid two cases relied upon by the counsel for the petitioner, are in my opinion, per in curium having been rendered without discussing the related provision discussed hereinbefore. The decision rendered in ignorance of the relevant statutory provision are cited but to be avoided and ignored on the doctrine of per in curium as explained by the Supreme Court in State of U.P. vs. Synthetic & Chemical Limited".

14. I am in respectful agreement with the view taken by the learned Single Judge in the case of **Chandrika Rai (Supra)**. There being no bar under the provision of the Act for not allotting road, pathway, nali etc. to a tenure-holder the authorities have inherent and incidental power to allot the same even to an individual tenure-holder under the general power vested in them of providing chak road, pathway etc. with the view to carry out for the purpose of the Act.

15. In view of the above, the first argument advanced by the learned counsel for the petitioners that consolidation authorities are not vested with any power to provide "chak nali', "chak road' etc. to an individual tenure-holder is not liable to be accepted.

16. In so far as the second argument advanced by learned counsel for the petitioners is concerned, the same has no legs to stand in as much as the Deputy Director of Consolidation while making

remand has directed the Consolidation Officer to ascertain, after making inspection himself, whether the proposed "nali' passes through the area of the disputed plot which is chak out or through the area which is included in the consolidation. The Deputy Director of Consolidation has also taken care to direct the Consolidation Officer to submit fresh report after opportunity of hearing to all affected parties.

17. However, in view of the allegations made by the petitioners that their pucca constructions are standing, the Consolidation Officer while reconsidering the case, shall keep in mind that in case he submits a report afresh for providing "chak nali' the same should be carved out in such a manner so as not to disturb the construction of the petitioners alleged to be existing on the plot in dispute.

18. In view of the aforesaid discussions, I am of the considered opinion that the impugned judgment of the Deputy Director of Consolidation does not call for any interference from this court. The Consolidation Officer shall carry out the order of remand made by the Deputy Director of Consolidation keeping in mind the directions issued to him hereinabove.

19. The writ petition accordingly, fails and is dismissed.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09. 2006

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 16443 of 1998

Umesh Kumar Mishra ...Petitioner
Versus
Union of India, through Secretary, Ministry of Home affairs, New Delhi and others ...Respondents

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

Counsel for the Respondents:
Sri K.C. Sinha
Sri Rajeev Joshi
S.C.

Constitution of India Art. 226-Service law-Dismissal from Service-concealment regarding pendency of Criminal case during appointment-held-found guilty of suppression of material fact. Subsequent acquittal not immaterial.

Held: Para 10

In view of the above law on the subject I do not find any merit in the submission of the learned Counsel for the petitioner that the order of dismissal of the petitioner is liable to be quashed as the petitioner has been acquitted in the criminal case. It may be relevant to note here that the petitioner has not been dismissed form service on the ground that a criminal case was pending against him or he was involved in the same. In fact his services were dispensed with after holding a departmental inquiry in which the petitioner was found guilty of misconduct of deliberately suppressing material information with regard to his involvement in the criminal case while getting himself enrolled.

Case law discussed:

AIR 1992 SC-1555, 1995 (Suppl.) 4 SCC-100, AIR 2003 SC-1709, JT 1999 (2) 456, 1997 (2) UPLBEC-1201, 2005 (6) AWC-5470, 2006 (3) ESC-1669, 2006 (1) ESC-615 (DB), 2006 (7) ADJ-240 (DB), 1998 (1) UPLBEC-730
AIR 2003 SC-1462, AIR 1963 SC-779, 1972 (4) SCC-618, AIR 2005 SC-1924

(Delivered by Hon'ble Pankaj Mithal, J.)

1. The petitioner qualified competitive test for selection as a constable in C.R.P.F. and was sent for training. After completion of training he was posted in Assam. However, before his services could be confirmed a departmental inquiry was instituted against him vide office order dated 22.10.1997 on the ground that while filling up his application form for service he has deliberately suppressed information about his involvement in a criminal case and as such has committed an act of misconduct. The Inquiry Officer after completing the inquiry submitted his report on 12.12.19967 holding the petitioner guilty of the charge of misconduct. Accordingly after issuing a show cause notice to the petitioner an order of dismissal from service was passed by the commandant 82 Bn. C.R.P.F. on 10.2.1998. The said order of dismissal from service has been challenged by the petitioner in the present writ petition.

2. Heard Sri Shashikant Shukla, learned counsel for the petitioner and Sri K.C. Sinha, Assistant Solicitor General of India, for the respondents.

3. Learned counsel for the petitioner has submitted that the criminal case in respect of which information was not given by the petitioner has finally been decided in his favour and he has been acquitted in the criminal case vide judgment and order dated 27.7.2005 (Annexure R.A.- 1 to this petition). Therefore, since the petitioner has been acquitted in the criminal case there is not justification to maintain the order dismissing the petitioner from service and the petitioner is liable to be reinstated.

"Fraud unravels everything" is one of the basic principles of law. In other words fraud avoids all judicial acts.

4. In **Smt. 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".

5. The Hon'ble Supreme Court by its various pronouncement has provided that dishonesty should not permitted to bear the fruit and benefit to the persons who played fraud or made misrepresentation and the Court should not perpetuate the fraud by entertaining the petitions on behalf of such persons.

6. In **Union of India & Ors. Vs. M. Bhaskaran (1995) (Suppl.) 4 SCC 100**, the Hon'ble Supreme Court 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".

7. It is also a settled principle that no person can claim any right arising out of his wrong doing i.e. a person having done

wrong, cannot take advantage of his own wrong.

8. In **Kendriya Vidyalaya Sangathan V. Ram Ratan Yadav, AIR 2003 SC 1709;** and **A.P. Public Service Commission V. Koneti Venkateswarulu, AIR 2005 SC 4292**, 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 the from 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 the 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.

9. The Hon'ble Apex Court in the case of **Captain P. Paul Anthoney Vs. Bharat Gold Mines & Anr. JT 1999 (2) SC 456** has held that proceedings in a criminal case and the departmental proceedings can proceed simultaneously with a little exception. The basis of this proposition is that the proceedings in a criminal case and the departmental proceedings operate in distinct and different jurisdictional areas. In the departmental proceedings, where the charge relating to misconduct is being investigated, the factors operating in the mind of disciplinary authority may be many such as enforcement of discipline or to investigate the level of integrity of the delinquent employee. The standard of proof required in departmental proceedings is also different then required in a criminal case. The little exception may be where the departmental proceedings and the criminal case are based on the same set of facts and the evidence and the proceedings are virtually common without there being any variance.

10. In view of the above law on the subject I do not find any merit in the submission of the learned Counsel for the petitioner that the order of dismissal of the petitioner is liable to be quashed as the petitioner has been acquitted in the criminal case. It may be relevant to note here that the petitioner has not been dismissed form service on the ground that a criminal case was pending against him or he was involved in the same. In fact his services were dispensed with after holding a departmental inquiry in which the petitioner was found guilty of misconduct of deliberately suppressing material information with regard to his involvement in the criminal case while getting himself enrolled.

11. Learned Counsel for the petitioner is not in a position to point out any defect or error in the procedure of the disciplinary inquiry nor it is the case of the petitioner that the findings recorded in the disciplinary inquiry are perverse. In such circumstances, the order of dismissal of the petitioner cannot be faulted with.

12. Sri Shukla, learned counsel for the petitioner in support of his contention has placed reliance upon a decision of the learned Single Judge of the Allahabad High Court reported in **Qamrul Huda Vs. Chief Security Commissioner 1997 (2) UPLBEC 1201**. He contends that mere concealment of true facts while making declaration in the form is not sufficient to order the petitioner's dismissal from service. The case law cited above is distinguishable on facts and is of no help of the petitioner in as much as in the said case the candidate was refused from being sent to the training on account of his involvement in criminal case which fact was suppressed by him, while making the declaration. The order refusing to send the candidate for training was passed in a summery manner before the recruitment of the candidate in services and as such there was no departmental inquiry or finding of any disciplinary authority with regard to misconduct of the petitioner. In the present case the petitioner after being inducted in service but before confirmation was subjected to departmental inquiry and on being found guilty of misconduct was dismissed from service.

13. Sri Shukla has next relied upon a decision in **Santosh Chaube Vs. Inspector General of Police & Ors. 2005 (6) AWC 5470**. In the said case the services of a constable of C.R.P.F. were terminated for concealing material information regarding his involvement in a criminal case. The High Court in writ jurisdiction set aside the termination as the order was passed in violation of the principles of natural justice without issuing show cause notice or affording any opportunity of hearing to the employee. The facts of the above case are entirely different as in the present case the order of dismissal has been passed after full-fledged disciplinary inquiry holding the petitioner guilty of misconduct. Therefore, the petitioner does not stand to any benefit on the basis of the above ruling.

14. On the other hand Sri K.C. Sinha, Additional Solicitor General has placed very heavy reliance upon a division bench judgment of the Allahabad High Court reported in **Ramesh Prasad Patel Vs. Union of India & Ors. 2006 (3) ESC 1669**. The facts of this case squarely applies to the present case. In this case also the delinquent employee had obtained employment in Army by furnishing false declaration at the time of his enrollment, to the effect that no criminal case was pending against him and on verification it was found to be incorrect and as such was dismissed from service. The Division Bench of this Court considering the entire case law on the subject held that as the petitioner has suppressed material information and had made a false statement in seeking the employment, he cannot be permitted to reap the fruits of his own mistakes and as such his dismissal from service was upheld. The High Court further held that in such cases of misrepresentation or making a false declaration, amounts to playing fraud and as such even opportunity of hearing is not required to be given and it would be a futile exercise in view of the admitted fact that the declaration was false. The above view is fully supported by two other division bench decisions of this Court in case of **Ashok Kumar Vs. DIG, C.R.P.F. & Ors. 2006 (1) ESC 615 (Alld.) (DB)** and **Arvind Kumar Vs. State of U.P. & Ors. 2006 (7) ADJ 241 (DB)** wherein in

similar circumstances the employee, guilty of suppression of material fact and furnishing false information was not given any relief even though he was acquitted in the criminal case and the order of dismissal from service was maintained. Therefore, the impugned order of dismissal dated 10.2.1998 calls for no interference under Article 226 of the Constitution of India.

15. Learned counsel for the petitioner next submitted that the order of punishment of dismissal from services is too harsh and is disproportionate to the gravity of the misconduct found proved against the petitioner. In support of this he has placed reliance in a decision of the Allahabad High Court reported in **Ram Bechan Yadav Vs. Commandant, P.A.C. 20th Bn. Azamgarh 1998 (1) UPLBEC 730**.

16. The above submission is not tenable in as much as in the present case the order of dismissal from service was passed against the petitioner after hearing him on the quantum of punishment also. The authority after considering the gravity and misconduct of the petitioner, and the fact that he had not been confirmed in service has come to the conclusion that he is not a fit person to be retained in service. The appointing or disciplinary authority in such circumstances is required to consider various factors such as the enforcement of discipline, level of integrity of the delinquent employee, the nature of misconduct and, therefore, if the authority finds that the delinquent employee is not a person fit enough to be kept in service, the punishment of dismissal cannot be said to be disproportionate to the charge more particularly when the employee has not been confirmed and is in temporary service.

17. The Apex Court in case of **Regional Manager, UPSRTC Vs. Hoti Lal AIR 2003 SC 1462** following its earlier decision **State of Orissa Vs. Bidyabhushan Mohapatra, AIR 1963 SC 779** and **Union of India Vs. Sardar Bhadur AIR (1972) 4 SCC 618** has held that the High Court, under Article 226 of the Constitution of India has no power to review the penalty imposed and to substitute its own punishment and the order of the disciplinary authority is to be treated as final unless it shocks the very conscience of the Court. A similar view has been expressed in Madhya Pradesh Electricity Board Vs. Jagdish Chandra Sharma AIR 2005 SC 1924. In the instant case the petitioner after due inquiry has been found guilty of misconduct and was not even confirmed in service, therefore, the punishment of dismissal is in no way disproportionate to the charge proved. It is in larger public interest to weed out bad elements at the very beginning instead of confirming them on the post. Therefore, the second submission of the learned counsel for the petitioner also fails.

In view of the above discussion, the writ petition lacks merits and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 25601 of 2003

Om Veer Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri J.J. Munir

Counsel for the Respondents:
Sri Anil Bhushan
S.C.

Constitution of India Art. 14, 16 readwith U.P. Public Service (Reservation for S.C./S.T. and Other Backward Classes) Amendment Act, 2002-Section 3 (1)-Reservation Quota-out of 13 sanctioned post of class 4th employee-6 persons already working-3 as Backward candidate and 3 from S.C./S.T. candidates-while under SC/ST Quota only 2 persons could be appointed-even then the impugned direction of D.I.O.S. to fill up the fresh 2 vacancies from reserved category-exceed 50%- held illegal-consequential direction issued.

Held: Para 8

Coming to the facts of the case in hand, it is apparent that out of the total sanctioned strength of 13 in class IV cadre, 6 are already occupied by OBCs though as per 27% reservation, only 3 vacancies could have been filled from the OBC. Similarly 3 posts are occupied by the candidates belonging to scheduled castes, though their reservation, being 21%, only 2 appointments could have been made from scheduled caste candidates. Thus the cadre already having candidates belonging to reserve category beyond the prescribed quota, it cannot be said that the two vacancies available could be filled in by applying reservation.

Case law discussed:
AIR 1993 SC-477
1992 (Supp.) 3 SCC-217
AIR 1995 SC-1371
1995 (2) SCC-745
1995 (6) SCC-684
1999 (7) SCC-209
1996 (2) SCC-715

civil Appeal No.2903 of 2001 decided on 27.7.06

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

1. Heard Sri J.J. Munir, learned counsel for the petitioner, Sri Anil Bhushan, the learned counsel for respondent Nos. 3 and 4 and the learned Standing Counsel appearing for respondent Nos. 1 and 2.

2. A counter affidavit has been filed on behalf of respondent nos. 3 and 4 but no reply has been filed on behalf of respondent nos. 1 and 2 despite repeated opportunity is granted. Even a stop order was passed on 6.10.2004 permitting six weeks and no more time to respondent nos. 1 and 2 to file counter affidavit. Still the same has not been filed. This Court also granted indulgence on 30.8.2006 to the learned standing counsel to seek instructions but today, the learned standing counsel representing the respondent nos. 1 and 2 has stated at the bar that despite information, he has not received any instruction. The learned counsel for the parties however agreed that the writ petition may be heard and decided finally on the basis of the material available on record. In the circumstances, with the consent of the

learned counsel for the parties, I have proceeded to hear this matter finally to decide under the Rules of the Court at this stage.

3. The petitioner has filed this writ petition under Article 226 of the Constitution of India challenging the order dated 6.3.2003 passed by the District Inspector of School, Aligarh permitting the Principal, Adarsh Lag Sama Inter College, Canthal, Aligarh to fill up two vacancies of Class IV employees only from Backward candidates by direct recruitment. He has also challenged consequential advertisement published on 12.5.2003 advertising the said two vacancies to be filled in from OBC category candidates.

4. In brief, the case of the petitioner is that there are 13 sanctioned posts of Class IV in the institution in question, out of which six employees belong to OBC category, three belong to Scheduled Caste and two are General already working. Therefore, advertising two vacancies of Class IV to be filled in only from the reserved quota of OBC candidate is violative of the Act as also Articles 14, 16 and 21 of the Constitution and also contrary to law laid down by the Hon'ble Apex Court in **Indra Sawney Vs. Union of India and others-AIR 1993 SC 477=1992 Supple. (3) SCC 217**.

5. Since the total sanctioned strength in the institution in respect to class IV cadre is 13 only out of which 9 are occupied by the reserved category candidates, therefore, it cannot be said that any vacancy in reserved quota is still available and could have been filled by reserved category candidates.

Reservation of scheduled castes, scheduled tribes and other backward classes, admittedly, is governed by U.P. Public Services (Reservation for Scheduled Castes, Schedules Tribes and Other Backward Classes) Act, 1994 (hereinafter referred to as the "Act' in short). The aforesaid Act was amended by U.P. Public Services (Reservation for Scheduled Castes, Schedules Tribes and Other Backward Classes) (Amendment) Act, 2002. Section 3 has been amended by the aforesaid Act and as provided under Section 1(2), the aforesaid amendment has been given effect with effect from 15.9.2001. It provides as under:

3. Amendment of Section 3. *In Section 3 of the principal Act,-*

(a) for sub-sections (1), (2) and (3) the following sub-section shall be substituted, namely :-

"(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Schedules Castes, Schedules Tribes and Other Backward Classes of citizens,-

(a) in the case of Scheduled Casts
-Twenty-one per cent;
(b) in the case of Scheduled Tribes
-Two per cent;
(c) in the case of other Backward Classes of citizens
-Twenty-seven per cent;

Provided that the reservation under clause (c) shall not apply to the category of Other Backward Classes of citizens specified in Schedule II :

Provided further that reservation of vacancies for all categories of persons shall not exceed in any year of recruitment fifty per cent of the total vacancies of that year as also fifty per cent of the cadre strength of the service to which the recruitment is to be made :

(2) If, in respect of any year of recruitment any vacancy reserved for any category of persons under sub-section (1) remains unfilled, such vacancy shall be carried forward and be filled through special recruitment in that very year or in succeeding year or years of recruitment as a separate class of vacancy and such class of vacancy shall not be considered together with the vacancies of the year of recruitment in which it is filled and also for the purpose of determining the ceiling of fifty per cent reservation of the total vacancies of that year notwithstanding anything to the contrary contained in sub-section (1);

(3) Where a vacancy reserved for the Scheduled Tribes remains unfilled even after three special recruitments made under sub-section (2), such vacancy may be filled from amongst the persons belonging to scheduled castes";

6. A perusal of the second proviso of Section 3(1) makes it clear that in any year of recruitment, reservation shall not exceed either 50% of the total vacancies in that year of recruitment or even 50% of the cadre strength of the service to which the recruitment is to be made. It clearly means that in a particular year of recruitment, the number of vacancies advertised shall not be reserved more than 50%. However, if 50% reservation of the vacancies in that particular year may result in making recruitment of reserved category candidates to the extent of more than 50% of the cadre strength of the service, in such case the reservation of the vacancies shall be reduced so as not to allow it to exceed 50% of the cadre strength of the service. It may be demonstrated as hereinafter. If in a cadre, the sanctioned strength is 100 and 10 vacancies occurred, not more than 5 shall be reserved under 1994 Act. However, if out of 100 sanctioned strength, more than 45 persons working belong to reserved category, e.g., if 48 candidates belong to reserved category, in that event reservation of 5 vacancies out of 10 would result in exceeding 50% of reserved category candidates qua cadre strength and, therefore, though against the total 10 vacancies, 50% could have been reserved, but considering the cadre strength position, only two shall be reserved and rest shall be filled in from general candidates. A plain reading of Section 3(1) second proviso of the Act of 1994 as amended in 2002 makes it clear and I do not find any ambiguity in the language of the provision. This provision, in fact, appears to have been enacted by the legislature to give effect to the view expressed by the Apex Court in **Indra Sawhney (Supra) and R.K.Sabharwal Vs. State of Punjab, AIR 1995 SC 1371= (1995) 2 SCC 745, Union of India & others Vs. Virpal Singh Chauhan & others, (1995) 6 SCC 684, Ajit Singh & others (II) Vs. State of Punjab & others (1999) 7 SCC 209 and Ajit Singh Januja & others Vs. State of Punjab & others, (1996) 2 SCC 715**.

In **Indra Sawhney**, the Apex Court observed (SCC Page-737, Para 814) as under:

"Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by the members of these classes, i.e, 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Schedules Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/service/category is only 50, a shortfall of 220. Similarly the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the members of open competition category would become age-barred and ineligible, Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the rule of 50% a year should be taken as the unit and not the entire strength of cadre, service of the unit, as the case may be."

(para 96 in AIR)

7. In **Ajit Singh Januja (Supra),** after referring to **Indra Sawhney** and **R.K. Sabharwal**, the Apex Court clearly observed than in any cadre, reservation should not exceed beyond 50 percent. It has also been provided where 50% reserved category candidates have already been recruited, the reservation roster shall stand suspended till a vacancy occur in the cadre itself, which may be filled in from reserved category candidates without exceeding 50% limit in the cadre as well as of the vacancies in a recruitment year. Recently, in ***R.S. Garg Vs. State of U.P. & others, Civil Appeal No. 2903 of 2001 decided on 27.07.2006***, the Apex Court, while considering Section 3 of the Act as well as the provision pertaining to reservation under the Constitution, observed that the cadre consisted of only 6 posts and applying reservation for Other Backward Classes in accordance with the Act and as per roster, two posts would have been available for Schedules Castes candidates meaning thereby 1/3 of the cadre would have to filled in by Scheduled Castes candidates. Negativing it, the Court observed that Article 15(4) and 16(4) profess to bring socially and educationally backward people to the forefront. The Constitution makers thought of protective discrimination and affirmative action only for the purpose of invoking equality clause. Such recourse to protective discrimination and affirmation action had been thought of to do away with social disparities. Therefore, policy of reservation once applied is imperative in public employment and where even by application of roaster, the result goes

beyond 21 per cent, the same cannot be allowed to operate, since it would be unconstitutional. The Apex Court in Para 28 of the judgment of **R.S. Garg (Supra)** concluded as under:

"21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation and the roaster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements."

8. Coming to the facts of the case in hand, it is apparent that out of the total sanctioned strength of 13 in class IV cadre, 6 are already occupied by OBCs though as per 27% reservation, only 3 vacancies could have been filled from the OBC. Similarly 3 posts are occupied by the candidates belonging to scheduled castes, though their reservation, being 21%, only 2 appointments could have been made from scheduled caste candidates. Thus the cadre already having candidates belonging to reserve category beyond the prescribed quota, it cannot be said that the two vacancies available could be filled in by applying reservation.

9. The aforesaid observations may not be taken to attach invalidity to the appointments already made, since they are neither disputed in this writ petition nor the persons likely to be affected are party to this case and, therefore, I am not invalidating the appointments already made. It is sufficient for the purpose of this writ petition to notice that out of 13 posts in the cadre sufficient number thereof are already filled in by reserved category candidates and, therefore, two vacancies sought to be filled in by means of the impugned order/advertisement cannot be permitted to be filled in only from the reserved category candidates. Recruitment has to be made in the aforesaid vacancies from the general category candidates. Therefore, in my considered view, the order of the District Inspector of Schools, impugned in the writ petition cannot be sustained and is liable to be set aside being in violation of Article 14 and 16 (1) of the Constitution of India read with Section 3(1) second proviso of the Act of 1994 as amended by U.P. Public Services (Reservation for Scheduled Castes, Schedules Tribes and Other Backward Classes) (Amendment) Act, 2002. Consequently, the advertisement, impugned in the writ petition published by the institution pursuant to the order of District Inspector of Schools also cannot be sustained and is liable to be set aside.

10. In the result, the writ petition succeeds and is allowed. The impugned order dated 6.3.2003 (Annexure-2 to the writ petition) and the order dated 12.5.2003 (Annexure-3 to the writ petition) are hereby quashed. The respondents are directed to make recruitment in the aforesaid vacancies from general category candidates in accordance with law. This exercise shall be completed within four months from the date of production of a certified copy of this order before the respondent-authorities. There is no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2006.

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

Civil Misc. Writ Petition No. 57396 of 2006

Smt. Mansa Singh ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Vikas Budhwar
Sri Ramesh Chandra Tiwari

Counsel for the Respondent:
Sri Tarun Varma
Addl. Solicitor General of India.

Constitution of India, Art 226-Rejection of Application-on pretext of medical certificate-petitioner had already mentioned in column 4 of application about the medical certificate-despite of receiving the application no objection raised for considerable period-No reason disclosed for withholding the certificate by the petition-great possibility of misplacement due to negligence of the official-No bar regarding acceptance of such document in subsequent stage-held rejection not proper.

Held para 7 and 10

There was no question of not filing this certificate-dated 22.7.2006 when it was with the applicant on 28.7.2006 and she had mentioned in the column no. 8 that she was enclosing it. There is no assertion from the side of the respondents that the photocopy of the form filed by the petitioner (Annexure-2) is not a true copy of the application submitted to the respondents. Under this circumstance there is no reason to disbelieve the assertion made in column no. 8 of the application that the medical certificate was enclosed with the form, and as such when the Corporation did not raise any objection at the earliest on receipt of the form on 28.7.2006 that it did not contain the medical certificate, the subsequent assertion made on 11.9.2006 that it was not received along with the form cannot be believed and it appears that medical certificate had been misplaced or lost in the office of the respondents.

We are therefore permitting the petitioner to file a copy of the medical certificate because when a document has been lost in the office of the respondent, there is no legal bar to file its copy at the subsequent stage.

(Delivered by Hon'ble A.K. Yog, J.)

1. Heard leaned counsel for the petitioner and the learned standing counsel representing I.O.C.(Indian Oil Corporation).

2. Petitioner has come up before this Court being aggrieved by the impugned order dated 11.9.2006/Annexure-9 to the writ petition passed by the respondents no. 2 and 3, whereby, Indian Oil Corporation intimated the petitioner that her application has been rejected on the ground that medical certificate was not enclosed therein.

3. According to the petitioner she had submitted her application-dated 28.7.2006 in order (including medical certificate). Referring to the photocopy of the application, it is pointed out that in relevant column no. 8 requiring medical certificate it was stated that the certificate was enclosed and the petitioner had replied in affirmative that she was physically and mentally fit. Petitioner submits that she had obtained medical certificate dated 22nd July 2006 after her

examination being conducted by Dr. Sri A.K. Gadpayle, consultant in Medicine in Dr. Ram Manohar Lohia Hospital, New Delhi (photocopy of which is annexed as Annexure 4 to the writ petition). There appears to be no reason to disbelieve the Doctor's certificate nor any circumstance is pointed out as to why the petitioner shall withhold the medical certificate.

4. The photocopy of the receipt (page 40 of the writ petition) further shows that the said application was received by, an Official of the Corporation on 28th July, 2006 which was the last date for receipt of the application (refer to para 8 of the writ petition).

5. The normal person/authority conducting its affairs with normal prudence/diligence is expected to check the application while it is being submitted and point out the defect at the earliest. This has not been done in the instant case and the so called non receipt of the medical certificate was pointed out on 11.9.2006. Hence we find no reason to disbelieve the petitioner when possibility of medical certificate being misplaced or lost for so many reasons cannot be ruled out.

6. It was submitted by the learned counsel for the respondent the under the rules and instructions of the Corporation contained in the advertisement of which the applicant should be aware, no correction, amendment or new documents can be permitted to be incorporated later on so it was not permissible for the petitioner to file the medical certificate at this stage. He also referred to the ruling of this Court in **Civil Misc. Writ petition No. 54400 of 2006-Smt. Omitri Rai Vs. General Manager & another** and submitted that the court is taking a different view in the present case, which is not permissible under law.

7. We do not agree with the above contention that we are taking a view different from the ruling in the case of **Smt Omitri Rai (supra).** It is to be seen that when there is any discrepancy in the form or when any document had not been filed alongwith the form, the same cannot be filed at a later stage nor the discrepancy can be rectified and we have taken this view in the case of **Smt. Omitri Rai (supra),** but here the facts are different. In the present case applicant had asserted in column No. 8 of her application dated 28-7-2006 that she had enclosed the medical certificate. The medical certificate is dated 23.7.2006. There was no question of not filing this certificate-dated 22.7.2006 when it was with the applicant on 28.7.2006 and she had mentioned in the column no. 8 that she was enclosing it. There is no assertion from the side of the respondents that the photocopy of the form filed by the petitioner (Annexure-2) is not a true copy of the application submitted to the respondents. Under this circumstance there is no reason to disbelieve the assertion made in column no. 8 of the application that the medical certificate was enclosed with the form, and as such when the Corporation did not raise any objection at the earliest on receipt of the form on 28.7.2006 that it did not contain the medical certificate, the subsequent assertion made on 11.9.2006 that it was not received along with the form cannot be believed and it appears that medical certificate had been misplaced or lost in the office of the respondents.

8. Under these circumstances when it is sufficiently proved that the medical certificate had been filed with the form, the permission to file its copy does not amount to admission of a new document and so the bar which was prescribed in the advertisement regarding filing of new documents does not apply to the present case and to acceptance of the prayer of the petitioner.

9. We may further add that in **writ petition No. 58636 of 2006 Ravi Pratap Singh Vs. Union on India and others** in which also the form was rejected on the ground of non-submission of the medical certificate. We refused to allow the prayer of the petitioner to file the medical certificate because in this case column no. 8 of the application, had been left blank by the petitioner and it had not been asserted that medical certificate was being filed along with the form. But in the present case it is sufficiently proved that medical certificate was being filed along with the form. But in the present case it is sufficiently proved that medical certificate had been filed along with the application.

10. We are therefore permitting the petitioner to file a copy of the medical certificate because when a document has been lost in the office of the respondent, there is no legal bar to file its copy at the subsequent stage.

11. The writ petition, is therefore, allowed and the petitioner is permitted to file the photocopy of the medical certificate dated 22.7.2006. The respondents shall consider that medical certificate and shall not reject the application form of the petitioner on the ground of non-filing of the medical certificate.

Writ Petition Stands allowed subject to the above observations.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2006.

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

Civil Misc. Transfer Application No. 277 of 2006

Smt. Seema Dubey ...Applicant
Versus
Principal Judge Family Court, Lucknow and others ...Opposite Parties

Counsel for the Applicant:
Sri R.P. Upadhyay

Counsel for the Opposite Parties:

Code of Civil Procedure-Section 23, 24-**Transfer of suit-from Lucknow to Jaunpur-admittedly the case is pending before Principal judge family Court at Lucknow-held-in view of Nasruddin's case-application for transfer at Allahabad not maintainable-returned for presentation before the concerned Bench.**

Held: Para 7, 8

Therefore, in my opinion, in view of Section 23 of Code of Civil Procedure and the above observations of the Hon'ble Supreme court in Nasiruddin's case (supra), the application for transfer of case pending at Lucknow within the territorial jurisdiction of Hon'ble Judges at Lucknow, shall lie at Lucknow and not at Allahabad. Therefore, office objection in regard to the jurisdiction is sustainable.

However, Hon'ble Supreme Court in Nasiruddin's case (supra) has observed that if a case is wrongly presented at Allahabad, the Judges at Allahabad cannot dismiss it but the case should be returned for filing before the Judges at Lucknow.

Case law discussed:

1975 (2) SCC-671 relied on

(Delivered by Hon'ble O.P. Srivastava, J.)

1. This is an application by Smt. Seema Dubey purported to be under Section 24 of the Code of Civil Procedure praying that Regular Suit no. 397 of 2006 Shri Kant Dubey Versus Seema Dubey under Section 13 of the Hindu Marriage Act, be Transferred from the Court Of Principal Judge, Family Court, Lucknow to the court of competent jurisdiction at Jaunpur.

2. The office has raised following objection regarding maintainability of the application:-

"S.R. has to submit that this application is not maintainable in this Hon. High Court at Allahabad. It should be filed at Lucknow Bench."

3. Under Section 24 Code of Civil Procedure the High Court, on the application of any of the parties, may at any stage withdraw any proceedings pending in any court subordinate to it and transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same. However, question is as to where application for transfer would lie. In my opinion, the relevant provision is contained under section 23 of the Code of Civil Procedure, which is as follows:

"**23. to what Court application lies.-**(1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under Section 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Court but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court, in which the suit is brought, is situate."

4. From the above provision it is clear that where the Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court and where such Courts are subordinate to different High courts, the application shall be made to the High court within the local limits of whose jurisdiction the Court, in which the suit is brought, is situate.

5. The matter of jurisdiction has to be examined in light of the above facts, provision of law and the judgment of Hon'ble Supreme Court rendered in **Sri Nasiruddin Vs. State Transport Appellate Tribunal- (1975) 2 SCC 671** in regard to the jurisdiction at Lucknow and Allahabad in relation to High Court. Hon'ble Supreme Court in the said case has held that the case falling within the jurisdiction at, Lucknow are to be presented at Lucknow and not at Allahabad. Relevant portions of the said judgment are extracted here below to facilitate the proper appreciation.

"…………..The conclusion as well as the reasoning of the High court that the permanent seat of the High Court is at Allahabad is not quite sound.

…………………………………

A case falling within the jurisdiction of Judges at Lucknow should be presented at Lucknow and not at Allahabad.

…………………A case pertaining to the jurisdiction of the Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at Allahabad in absence of an order contemplated by the second proviso the Article 14 of the Amalgamation Order, 1948."

6. From the above, it is apparent that the Judges at Lucknow and Allahabad have to exercise jurisdiction over the cases cognizable at the two places in relation to their territorial jurisdiction.

7. Therefore, in my opinion, in view of Section 23 of Code of Civil Procedure and the above observations of the Hon'ble Supreme court in Nasiruddin's case (supra), the application for transfer of case pending at Lucknow within the territorial jurisdiction of Hon'ble Judges at Lucknow, shall lie at Lucknow and not at Allahabad. Therefore, office objection in regard to the jurisdiction is sustainable.

8. However, Hon'ble Supreme Court in Nasiruddin's case (supra) has observed that if a case is wrongly presented at Allahabad, the Judges at Allahabad cannot dismiss it but the case should be returned for filing before the Judges at Lucknow.

9. Therefore, while holding that the application is not entertainable at Allahabad, it is hereby directed that the same be returned for presentation at Lucknow.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE VIKRAM NATH, J.

Civil Misc. Writ Petition No. 11550 of 2003

Virendra Kumar Srivastava ...Petitioner
Versus
State of U.P. through its Secretary Mahila Kalyan & Bal Vikas U.P. Government Bapu Bhawan, Lucknow and others ...Respondent

Counsel for the Petitioner:
Sri Yogesh Agarwal
Sri S.C. Budhwar
Sri V.B. Yadav
Sri J.P. Tripathi

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

Constitution of India, Art-226—Service law-Process of selection-period-explained-petitioner being placed at serial No.10 in waiting list-claimed appointment-as nine candidates not joined and 11 candidates resigned after joining-whether is the refusal from joining of petitioner valid? Held-'Yes'-after joining of selected candidates-selection process end-candidates from waiting list can be appointed if within one year candidature from waiting list can be appointed if within one year candidature of selected candidates cancelled by any reason-petitioner can not be appointed.

Held-Para 12 and 14

Having given our anxious consideration to the above facts, we do not find any flaw in the decision of the State Government as contained in the office order dated 23.12.1997. After the appointment letter is issued and upon fulfillment of other requirements prior to joining, when the selected candidate joins the post, the process of selection for that post is completed. From the stage of advertisement of the said post till the joining of the selected candidate is the period when the selection process can be said to be continuing, however, upon joining , the process is completed. The post so advertised for filling up no longer remains vacant upon joining of the candidate. Where after joining, the post again falls vacant on account of resignation, death, termination or for any other reason, whether on the next day, or subsequently then, it is a fresh vacancy created at the time of such happening. Such vacancy was not in existence at the time when the advertisement was issued for which select list/waiting list has been prepared and would be of subsequent period and, therefore, can only be covered by a fresh advertisement. The decision of the State Government in this regard as contained in the office order dated 23.12.1997 is, therefore, upheld.

In view of the above, it is only those lists where the selected candidates had not joined, and their candidature had been cancelled within one year and request sent to the Commission within one year, which Could be said to be covered by the waiting list. According to the State Government during the life of the select list/ waiting list as no candidature was cancelled within a period of one year and no request was sent to the Commission within the same time, therefore, there was no occasion to make appointment from the waiting list.

Case law discussed:

AIR 1970 SCC-470
S.T. (2004) SCC-467
1992 (1) SCC 28,
1991 (1) Sec. 662
1197 (2) ESC 1011
1985 (4) SCC-417
AIR 1993 SC 796
AIR 2003 SC 2475
2006 (3) SCC-330
AIR 2001 SCC-3757
1997 (7) JJ (SCC) 537
1997 (4) Sec 283

(Delivered by Hon'ble Vikram Nath, J.)

1. This writ petition has been filed with a prayer to quash the Office Memorandum dated 31.01.2003 by which the representation of the petitioner was rejected by the State Government and further for quashing the advertisement dated 20.09.2002 published in the Employment news. The second is for issuing a direction in the nature of mandamus commanding the opposite parties to give appointment to the petitioner against the vacancies existing for the year 1997 for the post of Child Development Project Officer.

2. The State Government issued Advertisement No.A-6/E-1/97-98 inviting applications for filling up the posts of Zila Karyakram Adhikari (District Programme Officer) and Bal Vikas Pariyojana Adhikari (Child Development Project Officer). The said advertisement was published in the newspapers, pursuant to which the petitioner applied and was allotted Roll No. 010704. The petitioner appeared in the written examination which was held in April, 1198 the result of which was declared on 13.10.1998 in which the petitioner was declared successful. The petitioner was called for interview by the U.P. Public Service Commission and he was interviewed on 07.11.1998.

3. The final result was declared on 16.11,1998 in which the petitioner was not found selected. According to the petitioner he had secured 626 marks out of a total of 900 marks. Further according to the petitioner in the waiting list prepared by the commission his name found place at serial No. 10. According to the petitioner more than ten candidates had not joined and 11 candidates had left after joining pursuant to the declaration of the result, as such he was entitled to be issued the appointment letter. The petitioner submitted a representation which was not being decided whereupon the petitioner filed Writ Petition No. 41674 of 2002 the said writ petition was disposed of by order of this Court dated 30.09.2002 with the direction to the State Government to decide the representation of the petitioner by a speaking order. Pursuant to the said direction the State Government had passed the impugned order dated 31.0102003 rejecting the claim of the petitioner relying on the office order dated 31.01.1994 and 23.12.1997. It is this order, which is sought to be challenged in the present writ petition. Further, as the State Government issued a fresh advertisement for filling up 64 posts of Child Development Project Officer, the petitioner has challenged the said advertisement also. The petitioner has further prayed for a direction to the respondents to appoint him against the vacancies of 1997.

4. We have heard Sri S. C. Budhwar, learned counsel assisted by Sri J.P. Tripathi, Advocate appearing for the petitioner, Sri M.A. Qadeer, learned counsel appearing for the U.P. Public Service Commission and the learned Standing Counsel appearing for the respondent nos. 1 and 2. We have also perused the original record which was summoned by this Court vide order dated 19.09.05.

5. The submission of the learned counsel for the petitioner is that the respondents committed illegality in not issuing appointment letter to the petitioner. According to him from the declared list of successful candidates more than ten had not joined within the period of one year which was the life of the select list/waiting list and, therefore, the petitioner should have been offered the appointment. The petitioner had been agitating for his claim from the very beginning and the respondents having not taken any timely action in this regard and having to acted in time by not issuing the appointment letter cannot subsequently turn around and say that as the life of the select list has expired due to the fact that more than one year has elapsed therefore, the petitioner cannot be issued the appointment letter.

6. Further submission of the counsel for the petitioner is that even after the expiry of the waiting list appointment letter could be issued and therefore the respondents are not right in saying that after the lapse one year and expiry of the life of the waiting list appointment letters cannot be issued. The learned counsel for the petitioner has placed reliance upon the following three decision of Hon'ble Apex Court in support of his contention that even after the expiry of the life of the waiting list the candidates from the waiting list could be given appointments. The cases relied upon are:

(i) **Rabindra Nath Bose and others Vs. Union of India & others** reported in **AIR 1970 S.C. 470**,

(ii) **Sheo Shyam & others Vs. State of U.P. & others** reported in **J.T (2004) 2 (SC) 467, and**
(iii) **Ashok alias Somanna Gowda & another Vs. State of Karnataka** reported in **(1992) 1 SCC 28**.

7. On the other hand the learned Standing Counsel on behalf of the State Government has submitted that after the expiry of the life of the waiting list nothing further could be done and no appointment can be made thereafter. He has referred to various Office Order issued by the Government from time to time in this regard laying down its policy in matters relating to the life of the select list.

8. It has further been urged by the learned Standing Counsel that as the waiting list had never been requested for from the Commission, there is no waiting list with the State Government and in fact no consideration was ever made on the waiting list. Even if it is assumed that the name of the petitioner finds place in the waiting list he has no vested right to seek appointment on its strength.

9. The life of select list and the manner in which the waiting list if any prepared is to be used is governed under the Office Order dated 31.01.94 filed as Annexure CA-1 to the counter affidavit filed by Sri Bhuiyadin, Special Secretary, personnel Department. According to the same appointment letters would be issued within 3 months, the character verification and medical examination should be obtained at the earliest. Clause 5 of the said office order provides that the life of the waiting list will be one year whether it is for annual competitive examinations or for special selections. It also mentions that request can be made to the Commission within one year only, however where the commission despite request being sent within one year does not send the waiting list has not been used within the prescribed period or the waiting list has not been used within the prescribed period or the waiting list is not called for from the Commission within the prescribed time then all the remaining vacancies will stand merged with the vacancies of the next year.

10. According to the learned Standing counsel after receipt of the recommendation from the Commission on 16.11.1998 the life of the select list was for a period of one year and was valid till 15.11.1999. Further according to the State Government during this period of one year only those vacancies where the selected candidates had not joined and their candidature were cancelled on account of non joining within the stipulated period, could be filled up from the waiting list, if any, prepared by the commission for providing the waiting list within one year. After lapse of one year no request could be sent to the Commission.

11. It is further the stand of the State Government that where a candidate joined and subsequently resigns even though within the period of one year, such vacancy would stand exhausted upon joining of the candidate and subsequently resignation would not leave a vacancy for being filled up from the waiting list. All vacancies/posts which were filled up upon joining and subsequently vacated would not be covered by the waiting list from the same selection and they were treated to be vacancies after the advertisement under which selections were being made. Such

vacancies were to be carried forward for the next year and could be filled up pursuant to the next advertisement for selection. In this regard our attention was invited to clause 3 of the Office Order dated 23.12.97 filed as Annexure CA-2 to the counter affidavit filed by Sri Bhuiyadin, Special Secretary, Personnel Department, which clearly mentions that the State Government has taken a decision that waiting list cannot be utilized for filling up vacancies caused upon the resignation or otherwise by the selected candidates after joining as upon joining the vacancy advertised stand fulfilled or exhausted.

12. Having given our anxious consideration to the above facts, we do not find any flaw in the decision of the State Government as contained in the office order dated 23.12.1997. After the appointment letter is issued and upon fulfillment of other requirements prior to joining, when the selected candidate joins the post, the process of selection for that post is completed. From the stage of advertisement of the said post till the joining of the selected candidate is the period when the selection process can be said to be continuing, however, upon joining, the process is completed. The post so advertised for filling up no longer remains vacant upon joining of the candidate. Where after joining, the post again falls vacant on account of resignation, death, termination or for any other reason, whether on the next day, or subsequently then, it is a fresh vacancy created at the time of such happening. Such vacancy was not in existence at the time when the advertisement was issued for which select list/waiting list has been prepared and would be of subsequent period and, therefore, can only be covered by a fresh advertisement. The decision of the State Government in this regard as contained in the office order dated 23.12.1997 is, therefore, upheld.

13. Along with the writ petition, the petitioner has annexed copies of two judgments of this court as Annexure 12 and 13. Based on these judgments, it is contended that the vacancies, which are caused due to resignation of the selected candidates, are to be filled up from the waiting list. The judgment annexed as Annexure 13 is a judgment of learned Single Judge dated 04.01.2000 passed in Civil Misc. Writ Petition No. 12921 of 1999, **Shivendra Nath Singh &others Vs. State of U.P. & ors.** Firstly, this order was passed in the absence of any counter affidavit. Secondly the waiting list in this case was sent by the commission. Thirdly, this judgment did not lay down any law of its own, but only relied upon the judgment dated 09.04.98 passed in Civil Misc. Writ Petition No. 32389 of 1997, **Yogendra Kumar Pal Vs. State of U.P. & Anr**. Filed as Annexure 12 to the writ petition. Coming to this judgment, we find that in this case also the learned Single Judge relied upon another decision of this court in the case of **Abdul Wasim Vs. Collector, Budaun, 1997(2) ESC 1011**. In the case of **Abdul Wasim** (Supra), the issue as to whether vacancies caused due to resignation of selected candidates, who had joined, could be filled up from the waiting list was not directly in issue. In that case, the vacancies caused due to retirement were partly filled from the waiting list was cancelled during its life, and such order of cancellation was under challenge on the ground of discrimination. Any observation made in the course of

discussion would not amount to any ratio of law laid down.

We are, therefore, of the view that these decisions are clearly distinguishable and do not help the petitioner.

14. In view of the above, it is only those lists where the selected candidates had not joined, and their candidature had been cancelled within one year and request sent to the Commission within one year, which Could be said to be covered by the waiting list. According to the State Government during the life of the select list/ waiting list as no candidature was cancelled within a period of one year and no request was sent to the Commission within the same time, therefore, there was no occasion to make appointment from the waiting list.

15. In para 8 of the 2nd supplementary counter affidavit filed on behalf of the respondent, sworn by Smt. Neelam Ahlawat, Additional Director, Bal Vikas Sewa Evam pushtahar, details have been furnished with regard to the candidates to whom appointment letters were issued and upon their failure to join, their candidature were cancelled. We find that in all cases, the cancellation took place in the year 2000, i.e., after the expiry of one year. It may, thus, be concluded that the State Government had no occasion to call for the waiting list and as rightly contended by it, no request was sent by the State Government to the Commission to send the waiting list.

16. Now coming to the contention of the petitioner with regard to the averments made in paragraph nos. 13 and 14 of the writ petition wherein the petitioner has given a list of candidates who either did not join or after joining tendered their resignations. Paragraph no 13 contains only 9 names which is the list of the selected candidates who did not join whereas paragraph no. 14 contains 11 names of those candidates who after joining lift the employment and/ or tendered their resignations. As already observed above the law with regard to panel of waiting list candidates is applicable only where the candidates have not joined and their candidature is rejected within the life of the select list. It is not applicable to situations where after joining the candidates have subsequently left even though within the life time of the waiting list. Such posts falling vacant upon resignation or otherwise cannot be filled up from the waiting list as selected candidates upon joining have exhausted that posts and subsequently even if on the next day it falls vacant upon resignation or otherwise, such vacancy will be for the future and cannot be counted for the vacancies which were advertised

17. Thus, at best only the contention with regard to the averments made in paragraph 13 of the petition, according to which only 9 candidates who had not joined remains to be determined in the present controversy. In this regard, from a perusal of second supplementary counter affidavit sworn by Smy. Neelam Ahlawat, it is apparent that the candidature of the 9 candidates mentioned in para no.13, were cancelled only in the year 2000 and , therefore, being beyond the last date of the life of the waiting list, i.e. 15.11.99, no benefit could be given to any of the candidates of the waiting list even if it was prepared and sent to the State Government. Further with regard to the candidates mentioned in para 14 of the writ petition adequate reply has been

given in para no 8 of the second supplementary counter affidavit which gives the date of their joining and the date of their resignation or the reasons for not continuing. All these dates extend beyond the life of the select list barring one candidate Pramod Kumar Singh who is said to be still working.

18. Even though the petitioner cannot succeed in view of the above discussion, but as the original record was summoned from the Commission, we proceed to examine the same.

19. The Commission was requested to produce in a sealed cover the position of the petitioner in the merit list in the examination of 1998 conducted by it for the posts against which the petitioner had applied. The record was produced and from a perusal of the same it transpires that in the combined merit list the last selected candidate was at serial no. 85 whereas the petitioner's position was at serial no. 104 and in the general category to which the petitioner actually belongs the last selected candidate was at serial no. 58 whereas the petitioner was placed at serial no. 70. Thus we see that under both the lists the petitioner was below the 10th position from the last selected candidate. There could not have been any justification for issuing the appointment letter to the petitioner even if 10 candidates had not joined within the life of he select list.

20. Considering the decisions relied upon by the counsel for the petitioner, we find that the case of **Rabindra Nath bose & ors**. (Supra) related to preparation of seniority list and has, therefore, no application to the present case.

21. In the case of **Sheo Shyam & Ors,** (Supra), the Supreme Court in the facts and circumstances peculiar to that case, wherein the State Government and the Commission had taken inconsistent and varying stands and the moves adopted by the State Government and the Commission were different for different stages and different purposes, had directed for consideration of the appellant's case for appointment, if otherwise, found suitable. The Apex Court in the said case had held that one year validity should be computed from the State Government had made the appointments in installments and the difference of time in the first installment and last installment was two and a half years. From perusal of the writ petition, we find that no such plea has been raised nor any foundation had been laid with regard to the date of first requisition or last requisition and even otherwise in the facts of the present case, the petitioner, who was almost placed after 20 candidates from the last selected candidates in the combined merit list and after 12 candidates in the general category list, to which he belongs and their being only 9 vacancies, he could not have been called. Although, in the rejoinder affidavit and supplementary rejoinder affidavits, the petitioner has tried to allege the dates regarding issue of first appointment letter and the last appointment letter, but in view of the above facts cannot gain any advantage from the decision for the Apex Court as in the said case, the question was of first requisition and last requisition. In the present case, there was only one requisition.

22. In the case of **Ashok alias Somanna Gowda & Anr.** (supra), we find that the Apex Court directed for

appointment of the appellants therein, who had challenged the selection on the ground that the allotment of marks in the viva voce was 33.3%, which was much beyond the maximum number of marks for viva voce determined by the Apex Court in the case of **Ashok Kumar Yadav Vs. State of Haryana** reported in (1985) 4 SCC 417 and **Mohindra Singh Garg Vs. State of Punjab** reported in **(1991) 1 SCC 662** and upon reduction of the viva voce marks proportionately of all the candidates, who were selected including those of the petitioners, the Apex Court come to the conclusion that the marks obtained by the petitioner would be more than those selected candidates. In the present case, there is no such claim made by the petitioner that the candidates with lesser marks have been selected nor has he challenged the selection any ground. Thus, this case also does not help the petitioner.

23. It would not be out of place to mention here that the law is well settled that even a selected candidate has no indefeasible right to be appointed. In the present case, petitioner is not one of the selected candidate whose name has been recommended by the Commission in the select list, but he claims to be in the waiting list. Since it is well settled that a selected candidate does not have a vested right of appointment, the petitioner on his own claim being in the waiting list cannot be said to have any right much less vested or indefeasible right to be appointed. In this regard, the Apex Court in the case of **Union Territory of Chandigarh Vs. Dilbagh Singh & Ors**, reported in AIR 1993 SC 796 has held as follows:

"A candidate who finds a place in select list as a candidate selected for appointment to a civil post, does not acquire an indefeasible right to be appointed in such post in absence of any specific rule entitling him for such appointment and he could be aggrieved by his non-appointment only when the Administration does so either arbitrarily or for no bona fide reasons, it follows as a necessary concomitant that such candidate even if has a legitimate expectation of being appointed in such posts due to his name finding a place in the select list of candidates, cannot claim to have a right to be heard before such select list is cancelled for bona fide and valid reasons and nor arbitrarily."

Again the Apex Court in the case of **State of A.P. & Ors. Vs. D. Dastagiri & Ors**, reported in **AIR 2003 SC 2475** has held as follows:-

"Be that as it may, even if the selection process was complete and assuming that only select list was remained to be published, that does not advance the case of the respondents for the simple reason that even the candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment, do not get vested right to claim appointment based on the select list."

Recently in the case of State of U.P. & Ors. Vs. Rajkumar Sharma & Ors. Reported in (2006) 3 SCC 330, the Apex Court has held as follows:-

"Selectees cannot claim the appointment as a matter of right. Mere inclusion of candidate's name in the list does not confer any right to selected, even if some of the vacancies remained unfilled and the candidate s concerned cannot

claim that they have been given a hostile discrimination."

24. Apart from the above in the following three decisions, (1) **Sri Kant Tripathi Vs. State of U.P., AIR 2001 SC 3757** (2) **Surinder Singh Vs. State of Punjab, (1997) 7 JJ (SC) 537** (3) **Sanjoy Bhattacharjee Vs. Union of India, (1997) 4 SCC 283**, it has been held by the Apex Court that a wait listed candidate had no vested right to be appointed except when a selected candidate does not join and the waiting list is still operative. In the present case, no waiting list was called by the State Government. In the present case, no candidature was cancelled during the life time of the select list and, therefore, there was no question of inviting any name from the Commission from waiting list.

25. We may, thus, safely conclude that the petitioner does not have any case either on facts or on law and therefore the writ petition being devoid of merits is liavle to be dismissed.

26. The writ petition is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2006

BEFORE
THE HON'BLE G.P. SRIVASTVA, J.

Criminal Misc. (Second) Bail Application No. 15859 of 2006

Rahul Kumar Yadav ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri P.K. Pandey

Counsel for the Opposite Party:
A.G.A

N.D.P.S. Act- Section 8/22-recovery of tablets of 800 gram diazepam-only plea taken in second Bail Application- the applicant in jail since 26.12.05-e.g. less than half of maximum punishment-held-not entitled for release on bail.

Held: Para 5

As regards the first ground is concerned an accused cannot be entitled to bail only because he had spent some period in jail not even the half of the maximum punishment, which may attract.

(Delivered by Hon'ble G.P. Srivastava, J.)

1. Heard learned counsel for the applicant and learned A.G.A.

2. This is second bail application for bail on behalf of applicant Rahul Kumar Yadav who is involved under section 8/22 N.D.P.S Act for having been found in possession of 800 grams Diazapam Tablets kept in 4 packets.

3. The first bail application was rejected by this Court vide order dated 2.5.06 on merit.

4. Learned counsel for the applicant has argued the first ground that the applicant is in jail since 26.12.2005 therefore he should be released on bail. He has taken the second ground that the real weight of recovered Tablets are 800 gms but the weight of the contraband diazepam in the tablet form is much less than the real actual weight and after

calculation it comes less than commercial quantity.

5. As regards the first ground is concerned an accused cannot be entitled to bail only because he had spent some period in jail not even the half of the maximum punishment, which may attract.

6. As regards the next ground is concerned it was available during the disposal of the first bail application as well. There is nothing on record to show that the real weight of contraband is less than the commercial quantity.

No ground for second bail application is made out. The application is rejected.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Revision No. 5363 of 2005

Brij Lal Bhar ...Revisionist
Versus
State of U.P. and others ...Respondent

Counsel for the Revisionist:
Sri Rajesh Kumar Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section-155- Registration of Non Cognizable Report-Subsequently after getting the X-Ray Report-disclosed the cognizable offence-despite of Receiving the copy of injury report- No action taken by police-held-officer in change empowered to register and investigate–No requirement of permission from concern Magistrate.

Held: Para 6

In case the report has already been registered as non cognizable report, thereafter, if any information or material is given by any person to the officer in charge disclosing the cognizable offence, *he himself is empowered to register the case as cognizable and to investigate the same. There is no requirement of taking permission or order for investigation from the magistrate concerned.*

Code of Criminal Procedure-S-155 (2)-Right of Informant NCR Case Registered-after medical examination 'X-Ray' report left side of the chest 9th Rib found fractured first informant again given information in writing with X- Ray report-whether can the first informant possess any right to given such information and the officer in Charge empowered to consider the same?

Held: Para 7

According to the provisions of section 154 Cr. P.C. also the case is registered on the information given to the officer in-charge of a police station, relating to the commission of a cognizable offence. In default, the first informant may move an application under section 156(3) for passing the 'order' for doing investigation, it provides a right to the first informant to move an application under section 155(2) Cr. P.C.

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

1. This revision has been preferred by the revisionist Brij Lal Bhar being aggrieved from the order dated 17.11.2005 passed by the learned A.C.J.M. I Jaunpur in case no. Nil of 2005 whereby application under section 155 (2) Cr.P.C. has been rejected.

2. The facts of this case, in brief, are that the revisionist Brij Lal Bhar lodged a

non cognizable report (N.C.R.) no. 78 of 2005 on 27.10.2005. In the said incident the revisionist was assaulted and received injuries, he was medically examined on 26.10.2000 at 6.15 p.m., as per medical examination report he has received three injuries, Injury no.1 was contusion of left side of the face. Injury no. 2 was contusion on the left side of the chest and injury no. 3 was complaint of painof the left hip joint. All the injuries caused by hard and blunt object. Injury no. 1 was simple in nature and injury no. 2 was kept under observation and advised for x-ray. The injury was x- rayed at the district hospital Jaunpur on 28.10.2005, according to the x-ray report a fracture of 9th rib of left side chest was found. After obtaining the x-ray report revisionist went to the police station concerned on 30.10.2005 and handed over the x-ray report to the station officer of police station concerned and made a request to register the case as a cognizable offence and investigate the same, but after receiving the x-ray report no action was taken by the Station Officer of P.S. Newarhia, thereafter the revisionist filed an application under section 155(2) Cr.P.C. in the court of learned A.C. J.M. I Jaunpur with the prayer that the order may be passed to investigate N.C.R. No. 78 of 2005,but the same has been rejected by the learned A.C.J.M. I Jaunpur on 17.11.2005, being aggrieved by order dated 17.11.2005 the revisionist has filed the instant revision.

3. Heard Sri Rajesh Kumar Singh, learned counsel for the revisionist and the learned A.G.A.

It is contended by the learned counsel for the revisionist:-

1) that the revisionist was assaulted on 26.10.2005 by the accused, as per medical examination report injury no. 2 was kept under observation and advised for x-ray but the report of the revisionist was registered as non cognizable case on 27.10.2005 vide N.C.R. No. 78 of 2005. According to the x-ray report dated 28.10.2005, the 9th rib of the left side chest was found fractured. The revisionist went to the police station concerned on 30.10.2004, and handed over the x-ray report with a prayer that the case may be registered as cognizable offence and investigation may be done, but no action was taken by the Station O fficer of P.S. Newarhia whereas he was under obligation to register a case as cognizable offence, after receiving the x-ray report.

2) that the revisionist moved an application under section 155(2) Cr.P.C. along with copy of the x-ray report, mentioning therein that his injuries were x-rayed in district hospital Jaunpur, his 9th rib of left side chest was found fractured. The injury was grievous in nature and he had handed over the x-ray report to the police station concerned but no action has been taken by the police, even then that application has been rejected by the learned A.C.J.M. I Jaunpur on 27.11.2005 only on the ground that the revisionist being the first informant, was not competent person to move an application under section 155(2) Cr.P.C., the competent authority to move the same was a Police Officer of the P. S. concerned. The impugned order dated 17.11.2005 is illegal because the revisionist being the first informant of the N.C.R. No.78 of 2005 was also competent person to move such application under section 155(2) Cr.P.C. and there was no such legal bar.

3) that impugned order dated 17.11.2005 may be set aside and Station Officer P.S. Newarhia may be directed to register the case as cognizable and investigate the same in accordance with the provisions of law.

4. It is opposed by the learned A.G.A. by submitting:-

1. That according to the provisions of section 155 Cr.P.C. the information of registering N.C.R. is referred to the magistrate concerned and no police officer shall investigate a non cognizable case without the order of the magistrate having power to try such case or commit the case for trial Therefore, only in-charge of the police station concerned was the competent person to get the permission from the magistrate concerned for doing the investigation of a case of non cognizable offence. The first information was having no right to move an application under section 155(2) There is no illegality in the impugned order dated 17.11.2005 so the same may not be set aside.

After hearing the learned counsel for the revisionist and the learned A.G.A.and from the perusal of the report, it appears that in the present case two important "issues" are involved as;

(1) whether the officer in charge of the police station concerned himself is empowered to convert the report of non-cognizable offence into the report of cognizable offence upon receiving sufficient material disclosing the commission of a cognizable offence without the order of the magistrate concerned.

(2) Whether for getting, the order to investigation the non-cognizable case, the first informant has any right to move an application, before the magistrate concerned under section 155 (2) Cr. P. C. or it can only be moved by a police officer of a police station concerned.

5. To deal with the issue involved it necessary to discuss and consider the provisions of section 154.155 and 156 of the Code of Criminal Procedure, 1973:

<u>Section 154 Cr.P.C. envisages as;</u>

"154. Information in cognizable cases-(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the information; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person given it, and the substance thereof shall be entered in a book to be kept by such officer in suvh form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under sub-section (i) shall be given forthwith, free of cost, to the informant.

(3) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (i) may send the substance of such information, in writing and by post, to the Superintendent of police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an

officer in charge of the police station in relation to that offence.

Section 155 Cr.P.C. envisages as;

"155. information as to non-cognizable case and investigation of such cases(1) when information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the informant to the Magistrate.
(2) No police officer shall investigate a non-cognizable case without order of a Magistrate having power to try such case or commit the case for trial.
(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.
(4) Where a case relates to two or more offence of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the order offences are non-cognizable.

Section 156 Cr.P.C. envisages as;

156. Police officer's power to investigate cognizable case –(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XII.
(2) No proceedings of a police officer in any such case shall be at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
(3) Any Magistrate empowered under section 190 may order such an investigation as above mentioned."

6. In the light of the above mentioned provisions of the Code of Criminal Procedure 1973, I deal with issue no. 1. According to the provisions of section 154 Cr.P.C. an officer in-charge of a police station, is under obligation to reduce every information relating to commission of the cognizable offence in writing. If any such information is given to the officer in charge of the police station, he is under obligation to register and investigate the same and according to the provisions of section 156 (1) Cr.P.C. the officer in-charge of the police station may without the order of a magistrate, investigate any cognizable case, in such situation I am of the view that if any information or material is given to an officer in charge of a police station disclosing the cognizable offence, an officer in charge of a police station disclosing the cognizable offence, an officer in charge of a police station himself is empowered to register the case and investigating the same. In case the report has already been registered as non cognizable report, thereafter, if any information or material is given by any person to the officer in charge disclosing the cognizable offence, *he himself is empowered to register the case as cognizable and to investigate the same. There is no requirement of taking permission or order for investigation from the magistrate concerned.*

7. Now I deal with issue no.2. According to the provision of section 155 Cr.P.C. only officer in charge or any police officer of a police station concerned can move an application to obtain the order for investigation from the magistrate concerned for a non cognizable case and there is no legal bar for moving such application by the first informant, Section 155(2) Cr. P.C. also envisages that no police officer shall investigate a non cognizable case without the 'order' of magistrate, here the word 'order' as mentioned above, it is relevant to deal with issue no.2, in the wording of the provision of section 155 (2) the word 'without order' is used. Therefore, the order may be passed by the magistrate concerned on the application of a police officer concerned or on the application of the first informant also. According to the provisions of section 154 Cr. P.C. also the case is registered on the information given to the officer in-charge of a police station, relating to the commission of a cognizable offence. In default, the first informant may move an application under section 156(3) for passing the 'order' for doing investigation, it provides a right to the first informant to move an application under section 155(2) Cr. P.C.

8. In view of the above discussion the officer in charge of the police station Newarhia was under obligation to register the case as a cognizable offence and to investigate the same upon receiving the x-ray report showing fracture of 9th rib of the left side chest which discloses cognizable offence and there was no requirement to obtain an order from the magistrate concerned. The officer in charge of P.S. Newarhia has committed a manifest error by not taking any action on receiving the x-ray report by not converting the NCR, into cognizable offence and not doing the investigation. The learned A.C.J.M. I Jaunpur also committed the same error by rejecting the application on 17.11.2005, it appears that the impugned order has been passed in a routine manner without considering the provisions of law whereas in the impugned order itself it has been mentioned that the copy of the N.C.R. and medical examination report was perused even then no finding was recorded in respect of disclosure of a cognizable offence whereas according to the x-ray report 9th rib of left side chest of the revisionist was fractured, but by citing the decision of this court in the case of Navin Chandra Pandey and others Vs. State of U.P. which is not applicable in the case in hand and by illegally observing that power of investigation is to a police officer and it is not to the first informant.

9. The learned magistrate was empowered to direct the S.O. police concerned to investigate the matter but by not passing such order the learned magistrate committed a manifest error of law. The impugned order is illegal, it has not been passed in accordance with the provision of law, therefore, the impugned order dated 17.11.2005 is set aside and the officer in charge of P.S. Nawarhia district Jaunpur is directed to convert the NCR No.78 of 2005 into a cognizable offence, to investigate the same and to proceed further in accordance with the law.

Accordingly this revision is allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD: 09-11-2006.

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 5308 of 2006

Santosh Kumar ...Revisionist
Versus
State of U.P. and another
...Opposite parties

Counsel for the Revisionist:
Sri Sanjay Kumar Singh.

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

Prevention of food Adulteration. Act-S-16-(P)-Lesser Punishment-Revisionist found selling eatable substance-without having valid licence finding recorded by the Court below confirmed-Quantum of punishment-without consideration of second proviso- held not proper revisionist already undergone the sentenced for two month punishment of 3 month R.I. reduced to already undergone with fine of Rs.500/-.

Held: Para 11

Coming to present revision at hand it is to be noted that the revisionist is a petty shopkeeper in a small *Kasba* of a small town Jaunpur. There are no allegations against him for adulteration or misbranding of food materials. There are no allegations against him for selling insect infested food or food which was unfit for human consumption. There are also no allegations that he did not obtain license intentionally and deliberately. The shop it seems is the only source of livelihood of his family. More over the revisionist had been in jail since 6.9.2006 after the dismissal of his appeal and therefore he had already under gone two months of imprisonment. In this view of the matter I am of the opinion the interest of justice will be served by reducing his sentence of imprisonment to the period already under gone with fine of Rs. Five hundred to be paid within one month, if not already paid.

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

1. The revisionist Santosh Kumar was tried in Case No. 1055 of 1995, State Versus Santosh Kumar by ACJM, Court No. 12, Jaunpur, u/s 7/16 of Prevention of Food Adulteration Act, P.S. Jafrabad, district Jaunpur. The trial Court finding the case of the prosecution to be correct, convicted the revisionist u/s 16 (1) (A) of PFA Act and sentenced him for three months R.I. and to pay a fine of Rs.500/- vide its order dated 15.4.2002. Aggrieved by the aforesaid order the revisionist preferred an appeal before the Sessions Judge Jaunpur, which was registered as Criminal Appeal No. 86 of 2002 Santosh Kumar versus State of U.P. The aforesaid appeal was transferred to the court of Additional Sessions Judge/ Fast Track Court III, Jaunpur. The lower appellate court dismissed the appeal vide its judgment and order dated 6.9.2006 and confirmed the conviction and sentenced awarded by the trial court. The revisionist there after has challenged the both the orders in instant criminal revision, which was filed on 12.9.206.

2. The prosecution case in short is that Ram Autar Yadav, The Food Inspector, inspected the shop of the present revisionist, Santosh Kumar on 4.6.1995 at about 5 P.M. and he found that the revisionist was selling eatables without license. The Food Inspector demanded the license from the revisionist but he could not produce the same. The independent witnesses were called by the

Food Inspector but None of them became ready to be a witness. The Food Inspector prepared the notice in duplicate and gave one copy to the revisionist and obtained his signatures. However Shital Deen (BHW) signed on the notice. The Food Inspector applied for sanction to the CMO and after obtaining the same he filed a complaint in the court against the revisionist, who was summoned for committing an offence u/s 7/16 Prevention of food Adulteration Act and was charged with the said offence.

3. During the trial the Food Inspector was examined as P.W.1 and Harihar Chaubey as P.W. 2. No other witness was examined by the prosecution.P.W.1 testified regarding the absence of license for selling the eatable by the revisionist in his shop situated at Jafrabad, district Jaunpur. He also testified that CMO granted the sanction on 26.6.1995,

P.W. 2 Harihar Chaubey who is the clerk in the office of CMO had testified regarding the sanction granted by the CMO.

The revisionist his statement u/s 313 Cr. P.C. denied selling of eatable in his shop and took the defence of false implication.

4. Believing the prosecution case the trial court convicted the revisionist and the appeal filed by him was also rejected. Hence this revision.

5. Learned counsel for the revisionist contended that both the impugned orders are absolutely wrong and the revision deserves to be allowed and the revisionist be acquitted.

6. Learned AGA on the other hand contended that both the impugned orders are passed on concurrent findings of fact and none of the impugned order suffers from any illegality. He submitted that the findings of fact cannot be disturbed in a revisional jurisdiction without there being any error of law and perversity in recording the same.

7. I have considered the submissions made on behalf of rival sides.

So far as the findings of fact recorded by both courts are concerned, the said findings do not suffer from any error of law or perversity, therefore, it cannot be said that conviction of the revisionist recorded by both the courts below is bad in law, hence I confirm the conviction of the revisionist recorded by the ACJM and confirmed by lower appellate court.

8. However, on the question of sentence, which was argued by the learned counsel for the revisionist, I find that selling of eatable is offence u/s 7 (iii) of P.F.A. Act. The said offence is punishable u/s 16 (ii) us qualified with two provisos. The second proviso to the aforesaid section provides that the court may, for any adequate and special reason to be mentioned in the judgment, impose a sentence of imprisonment for a term, which may extend to 3 months and with fine, which may extend to 500/- rupees. The case of the present revisionist is covered under the said proviso.

9. The said proviso is an exception to the minimum punishment rule provided under the Act which is six months and to pay a fine of Rs. One thousand. The said proviso is quoted below:-

Sec. 16 Penalties. –(1)
(a)(i) (ii)
Provided……….

"Provided further that if the offence is under sub- clause (ii) of clause (a) and is with respect to contravention of any rule made under clause (a) or clause (g) of sub- section (1- A) of Section 24 , the court may, for any adequate and special reasons to be mentioned in the judgment, impose and sentence of imprisonment for a term which may extend to three months and with fine which may extend to five hundred rupees".

10. A bare reading of the said proviso makes it clear that so far as this proviso is concerned the legislature has not provide the minimum sentence as in that event it could have enacted that the sentence should be not be less than three months which it has not done. It provides that the sentence may extend to three months and with fine, which may extend to five hundred rupees. Thus far the offences covered under this proviso the minimum sentence is not provided by the legislature. How ever what the legislature has provided is that while granting the benefit of the said proviso the court must record adequate and special reasons for the same. What are those special and adequate reasons is left to be decided by the court, which may vary from case to case and fact to fact. The case of the present revisionist is covered under the said proviso but both the courts below had not addressed them selves to the said proviso and did not at all said any thing regarding not giving the benefit of it to the revisionist, which in my opinion is a must. The proviso is added in the Statute not only as printed letters but has been incorporated in the Statute book to be applied in appropriate cases.

(*Emphasis mine)*

11. Coming to present revision at hand it is to be noted that the revisionist is a petty shopkeeper in a small *Kasba* of a small town Jaunpur. There are no allegations against him for adulteration or misbranding of food materials. There are no allegations against him for selling insect infested food or food which was unfit for human consumption. There are also no allegations that he did not obtain license intentionally and deliberately. The shop it seems is the only source of livelihood of his family. More over the revisionist had been in jail since 6.9.2006 after the dismissal of his appeal and therefore he had already under gone two months of imprisonment. In this view of the matter I am of the opinion the interest of justice will be served by reducing his sentence of imprisonment to the period already under gone with fine of Rs. Five hundred to be paid within one month, if not already paid.

12. Resultantly this revision is party allowed. The conviction of the revisionist is under section 7/16 of the PFA Act is maintained but his sentence is reduced to the period already under gone with fine of Rs. Five hundred. He is allowed one month time to deposit the said fine, if not deposited by him already. The revisionist shall be released from jail if he is not wanted in any other case forth with. In the event of failure of the revisionist to deposit the fine awarded within one month the trial court concerned is directed to realize the same as arrears of land revenue from him with one week thereafter.

The revision is partly allowed with the aforesaid directions.

Revision Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 11194

Triloki Nath ...Petitioner
Versus
The State of Uttar Pradesh through Principal Secretary Health Department, Health Department, U.P., Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Rajendra Rai

Counsel for the Respondents:
S.C.

Constitution of India. Art. 226-Minimum Pay Scale-appointment on daily wages basis as Driver-working on the basis of interim Order if no substantive appointee joined-claim for minimum pay scale as payable to regular Drivers-held-not entitled except the minimum wages prescribed in respect of employment.

Held: Para 7 & 8

In view of the aforesaid settled legal position, the petitioner is not entitled to the minimum of the pay scale admissible to the post of driver appointed on regular basis. It is held that the petitioner may be paid wages strictly in accordance with the minimum wages prescribed in respect of such employment.

8. So far as the judgment relied upon the learned counsel for the petitioner in the case of *State of U.P. and others Vs. Putti Lal* reported in *2002 (2) UPLBEC, 1595*, is concerned, suffice is to pointed out that the same is clearly distinguishable in the facts of the present case, more so when the legal position has been clarified by subsequent judgments of the Hon'ble Supreme Court in the case of *State of Haryana & Ors. Vs. Tilak Raj & Ors.* (supra), the same must necessarily prevail.

Case law discussed:
2002(2) U.P.L.B.C-1595

(Delivered by Arun Tandon, J.)

1. Heard Sri Rajendra Rai, Advocate on behalf of the petitioner and kearned Standing Counsel on behalf of respondents.

2. From the records of the present writ petition, it is apparently clear that the services of petitioner, who was employed as daily wage employee, were terminated under an order dated 30th June, 1992. The order dated 30th June 1992 was challenged before this Court by means of Civil Misc. Writ Petition No.29855 of 1992 (Mohan Prasad and Others Vs. State of U.P. and Others). In the writ petition an interim order was granted by this Court dated 19th August, 1992, whereunder the order terminating, the petitioner's services, was stayed, and it was provided that the petitioner shall be paid salary and it was provided that the petitioner shall be paid salary and other benefits. It was further clarified that the order will be effective only if no substantive appointment has been made on the post held by the petitioner and the said post held by the petitioner and the said post has not been abolished. For ready reference interim order of this court is being quoted herein below:

"Issue notice.

Until ordered otherwise, the operation of the impugned order dated 30-6-92 shall remain stayed. The petitioner shall be entitled to the payment of the salary and other benefits, However, it is made clear that this order will be effective only if no substantive appointment has been made on the post held by the petitioner and the said post has not been abolished."

3. In compliance of the interim order of this Court dated 19th August, 1992 the petitioner was restored back as daily wage employee under an order passed by the Divisional Ayurvedic Evam Unani Officer(Kshetriya Ayurvedic Evam Unani Adhikari) Azamgarh dated 13th October, 1992. It is alleged that the petitioner continued to function as daily wage employee. Writ petition no. 29855 of 1995 was ultimately disposed of finally by this Court vide order dated 9th May, 2002, which reads as follows:

"No counter affidavit has been filed. The allegations made in the writ petition remain uncontroverted.

It is the case of the petitioner that he has been rendering continuous service since long period without any interruption and the interim order granted earlier exists, in this case. The said fact has not been denied, by filing, the counter affidavit.

The respondents shall consider the case of the petitioner for regularization of his services in accordance with law and to pay salary, if any, due to the petitioners, forthwith.

With the aforesaid observations, the writ petition stands disposed of."

4. Thereafter a fresh order was issued by, the Director, Rajkiya Evam Unnai Sewa, U.P. Lucknow (respondent no.2) dated 27th February, 2003 offering appointment to the petitioner as driver from the date of appointment on daily wage basis.

5. On the strength of the aforesaid working, the petitioner seeks minimum of the pay-scale admissible to the post of driver appointed on regular basis.

6. The issue qua the payment of minimum of the pay scale applicable to the regular employees was subject matter of consideration before the Hon'ble Supreme Court of India in the case of ***State of Haryana & Ors. Vs. Tilak Raj & Ors.*** reported in ***JT 2003 (5) SC 544*** after referring to the various judgments on the subject. The Hon'ble Supreme Court of India in paragraph nos.7, 8,9 and 10 has held as follows:

"7. At this juncture, it would be proper to take note of what was stated in Jasmer Singh's case (supra). In paragraph 10 and 11, it was noted as under:

"10. The respondents, therefore, in the present appeals who are employed on daily wages cannot be treated as on a par with persons in regular services of the State of Haryana holding similar posts. Daily-rated workers are not required to posses the qualifications prescribed for regular workers, nor do they have to fulfill the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. In other words the requirements for selection are not as rigorous. There are also other provisions relating to regular service to the disciplinary jurisdiction of the authorities

as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay scale of the regularly employed.

11. The High Court was, therefore, not right in directing that the respondents should be paid the same salary and allowances as are being paid to regular employees holding similar posts with effect from the dates when the respondents were employed. If a minimum wage is prescribed for such workers the respondents would be entitled to it if iis more than what they are being paid."

8. In Harbans Lal's case (supra) and Vikram Chaudhary's case (supra), it was held that daily rated workmen were entitled to be paid minimum wages admissible to such workmen as prescribed and not the minimum in the pay scale applicable to similar employees in regular service unless the employer had decided to make such minimum in the pay scale applicable to the daily rated workmen.

9. In a recent case this Court in State of Orissa and Ors. V. Balaram Sahu and Ors; speaking through one of us (Doraiswamy Raju, J) expressed the view that the principles laid down in the well considered decision of Jasmer Singh's case (supra) indicated the correct position of law. It was noted that the entitled of the workers concerned was to the extent of minimum wages prescribed for such workers, if it is more than what was being paid to them.

10. A scale of pay, is attached, to a definite post and in case of a daily wager, he holds no post. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

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

7. In view of the aforesaid settled legal position, the petitioner is not entitled to the minimum of the pay scale admissible to the post of driver appointed on regular basis. It is held that the petitioner may be paid wages strictly in accordance with the minimum wages prescribed in respect of such employment.

8. So far as the judgment relied upon the learned counsel for the petitioner in the case of ***State of U.P. and others Vs. Putti Lal*** reported in ***2002 (2) UPLBEC, 1595***, is concerned, suffice is to pointed out that the same is clearly distinguishable in the facts of the present case, more so when the legal position has been clarified by subsequent judgments of the Hon'ble Supreme Court in the case of ***State of Haryana & Ors. Vs. Tilak Raj & Ors.***

(supra), the same must necessarily prevail.

9. The writ petition is accordingly dismissed subjected to the observations made above. Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.08.2006.

BEFORE
THE HON'BLE M.C. JAIN, J.
THE HON'BLE K.K. MISRA, J.

Criminal Jail Appeal (Capital Case) No. 200 of 2006

Bantu ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ram Ji Saxena
(AMICUS CURIAE)

Counsel for the Respondent:
Sri Karuna Nand Bajpai.
A.G.A.

Criminal Appeal-Confirmation of death sentence-Phrase-rarest of rare case-offence under section 364/376/302 IPC-helpless girl aged about 5 yrs.-murder committed extremely brutal, grotesque diabolical revolting and dastardly manner-after committing rape on her-inserting '3' sticks inside vagina-causing extensive damage taken out only at the time of post mortem-cannot be allowed to go back to the society-death sentence affirmed.

Held: Para 42 & 43

Taking note of earlier decisions, tests to determine the rarest of rare cases in which death penalty can be inflicted were summarized by the Apex Court in the case of *State of U.P. Vs. Satish 2005 SCC (Crl) 642.* The gist is that rarest of rare cases in which death sentence should be awarded, is one when the collective conscience of the community is so shocked that it will expect the holders of judicial power to inflict death penalty.

In our considered opinion, the present case falls in the rarest of rare category calling for death penalty for the murder of helpless and hapless girl aged about 5 years who was murdered by the accused appellant after committing rape on her. The murder was committed in extremely brutal, grotesque, diabolical, revolting and dastardly manner, so as to arouse intense and extreme indignation of the community. The accused took away his neighbor's daughter aged about 5 years from the sit of '*Devi Jagran*', where she was present with her father and relatives by deceitful means of giving her a balloon. He straightaway took her to a field, committed rape on her and then brutally murdered her by inserting a stem 13 inches inside her vagina causing extensive damage. It is shuddering that more than a fl. of stick had been inserted into her vagina causing extensive damage inside and the stick could be taken out only at the time of *post mortem* of the unfortunate girl. The victim was an innocent child aged about 5 years. The accused is totally depraved. He cannot be allowed to return back to the society at all. The offence has definitely generated a deep sense of abhorrence in the society.
Case law discussed:

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

1. This is a capital case. The accused-appellant Bantu has been convicted under section 364,376 and 302 I.P.C. by the impugned judgment and order dated 24.12.2005, passed by Sri Alok Kumar Bose, Special Judge (E.C.Act)/Additional Sessions Judge,

Agra in Sessions Trial No. 83 of 2004. The sentences passed against him are as under:

S. No.	Sections under which punishment awarded	Quantum of punishment
1.	364 I.P.C.	10 years' rigorous imprisonment with a fine of Rs.10,000/- with a stipulation of two years' further simple imprisonment in default of payment of fine.
2.	376 I.P.C.	Life imprisonment with a fine of Rs.15,000/- with a stipulation of three years' further simple imprisonment in default of payment of fine.
3.	302. I.P.C.	Death Sentence

2. The genesis of the prosecution case was the written F.I.R. lodged at P.S. Tajganj of Agra District on 4.10.2003 at 10.45 P.M. by PW 2 Naresh Kumar. The offence took place at about 9.30 O' clock the same night in village Basai Khurd within the said Police Station. The victim was an unfortunate teenaged girl Vaishali of about 5 years. She was the daughter of Vishal.

3. The broad features of the case as coming to surface from the F.I.R. and evidence brought on record may be noted for proper appreciation. There was "Devi Jagran" at the house of Pw3 Chandrasen alias Taplu in village Basai Khurd in the eventful night. A number of persons of the locality had assembled there. The informant –PW2 Naresh Kumar alongwith his brother Vishal and niece Vaishali deceased had also gone there. Around 9 P.M., the accused Bantu-neighbour of the informant reached there. After exhibiting playful and friendly gestures with Vaishali with whom he was familiar from before because of neighborhood, he (Bantu Accused-appellant) enticed her away on the pretext of giving her a balloon. Several persons including PW2 Naresh Kumar and PW6 Nand Kishore saw him going away with the girl from the place of "Devi Jagran". When Vaishali did not return within reasonable time, a frantic search was made to trace her out by the members of the family. PW3 Chandrasen alias Taplu and Sanjiv son of Daulat Ram informed them that they had seen the accused Bantu going away with Km. Vaishali hoisted on his waist towards the pond. Around 9.30 P.M.., they reached near the field on one Dharma in which grown up *Dhaincha plants* (a type of bushy shrubs) were there. With the help of torches, they saw that the accused Bantu was thrusting a stem/stick of *Dhaincha* in the vagina of Vaishali, having thrown her down. An alarm was raised by them and Bantu was caught red handed in completely naked state. Vaishali was lying on the ground unconscious with a part of stem of *Dhaincha* inserted in her vagina. She was bleeding profusely. She had other injuries also on her person and was not responding at all. She was instantly rushed to S.N. Medical College, Agra where the doctors pronounced her to be dead. Upon interrogation, the accused Bantu allegedly admitted that after committing rape upon her, he inserted stem/stick in her vagina to murder her.

4. On the case being registered, the investigation was taken up by PW 7 S.H.O. Dilip Kumar Mittal. Major part of

the investigation was conducted by him but the charge sheet came to be submitted by subsequent Investigating officer PW 8 R.K. Dwivedi.

5. A panel of two doctors headed by PW 1 Dr. R.S. Chahar conducted *post-mortem* over the dead body of the deceased on 5.10.2003 at 3P.M. the deceased was aged about 5 years and about one day had passed since she died. The following *ante mortem* injuries were found on her person:

1. *Multiple contusions over face and head, more on right side, ranging in size from .5 cm to .5 cm x 3 cm. Lips were contused with swelling. Multiple nail marks present over left side on her neck and behind the left ear.*

2. *Abrasion 2 cm x 4 cm present over posterior aspect of both elbows and right wrist.*

3. *Labia minora of both sides in posterior parts contused. Hymen ruptured, free and clotted blood seen vagina.*

4. Green wooden stick found inserted in vagina. Length of external part of stick 24 cm. Incompletely broken in two parts. On internal examination, stick of 33 cm length found inside vagina in continuation with external part of stick. Thus, total length of the stick was 57 cm. X .8 cm in diameter at most of places.

Dried blood present on external part of stick.

6. Internal examination revealed that small and large intestine were perforated at places due to insertion of the stick. The stomach contained semi digested food of about 200 ml. Free and clotted blood was present in the cavity. The mesenteric vessels in the abdomen were torn due to insertion of wooden stick. Uterus was small in size and was ruptured due to the insertion of wooden stick into the vagina. The walls of cervix were lacerated. Slides of vaginal swab were prepared for examination. The wooden stick inserted inside vagina was sealed. No spot of semen was found on the part of the body. Due to precarious condition of vagina, it was not possible to say whether rape was committed or not.

7. In the opinion of the Doctor, the death was caused due to shock and haemorrhage as a result of ante mortem injuries due to insertion of the wooden stick into the vagina of the deceased.

8. In this case, the accused was also subjected to medical examination and the result of the same formed and important piece of evidence. PW 4 Dr. R.K. Yadav had conducted medical examination of accused Bantu in the District Hospital Agra at 5.10.2003 at 2.10 A.M. Following injuries were found on his person:

1. *Red abraded contusion 30 cm x 16 cm, back of chest, right side and back of right arm upper part.*
2. *Red contused abrasion 15 cm x 10.5 cm back of chest left side chest lower part.*
3. *Red contusion 9 x 2 cm on back of abdomen left side middle part.*
4. *Contused traumatic swelling 5 cm x 3.5 cm. Left side cheek.*
5. *Red contusion 3 cm x 2 cm right side of the cheek adjacent to the outer part of the right eye.*

9. Upon examination, the genitals were found well developed. Axillary and pubic hair were present. There was no matting of pubic hair and his penis was found fully developed. The glans was clean. No smegma was present. Red abrasion 0.5 cm. X .5 cm. At 4 O' clock and abrasion of .5 cm. X .5 cm at 12 O' clock position were present on glans penis with multiple linear abrasions. Slide was prepared of the swab taken from the glans penis and prepuce and the same was sent for pathological examination.

10. The jeans pant of the accused was sent for chemical analysis to ascertain marks of blood and semen. As per the Doctor examining the accused, his injuries could be caused by blunt object and were fresh in nature. The accused was fully capable of performing the act of rape. The injury report Ex. Ka-5 was prepared. According to the Doctor since no smegma was found present on the glans penis of the accused and it was clean, it was inferred that he had committed sexual intercourse. Smegma gets removed from the glans penis during sexual intercourse. The abrasions on the genitals of the accused supported his view. The doctor denied the suggestion that the injuries could be sustained at 7-8 P.M. that night. Rather, he testified that the injuries could be sustained between 10-11 P.M. that night.

11. The defence was of denial and false implication due to enmity of witnesses arising out of land dispute. The accused, owever, admitted that he was the heighbour of the informant and that there was a "*Devi Jagran*" at the house of PW 3 Chandrasen alias Taplu in the eventful night. Other facts were denied by him in his statement under section313 Cr.P.C.

12. In order to establish the guilt of the accused appellant the prosecution in all examined 8 witnesses. Out of them, pw 2 Naresh Kumar (informant and uncle of the deceased), Pw3 Chandrasen alias Taplu and PW 6 Nand Kishore were material witnesses of fact who supported the prosecution case in its entirety.

13. PW2 Naresh Kumar was a teacher by profession and knew the accused since long,. Being his neighbour. Gist of his testimony before the court below was that on 4.10.2003 there was "*Devi jagran*" at the house of PW 3 Chandrasen alias Taplu in which a number of persons of the locality had assembled. He, his brother, niece Vaishali and other relatives were also present there. Around 9 A.M. the accused Bantu came and after sometime enticed away Vaishali on the pretext of giving her a balloon. A number of persons including pw 6 Nand Kishore saw him taking away the girl. When they did not return within reasonable time, a search was made to trace out the girl. PW 3 Chandrasen alias Taplu and one Sanjiv stated that they had seen the accused Bantu accused with Vaishali hoisted on his waist going towards pond. PW 2 Naresh Mumar with his brother Vishal-father of the deceased, PW 3 Chandrasen alias Taplu (at whose house "*Devi jagran*" was organized), PW 6 Nand Kishore and many others went towards the pond. When they reached around 9.30 P.M. near the field of Dharma in which *Dhaincha* plants were grown, they saw the accused was inserting a *Dhaincha* stem/stick into the vagina of Vaishali, she being downed on the ground,. And alarm was raised by him and others. Bantu was caught red handed in complete naked state. Vaishali was lying totally unconscious with a part of

stick inserted in her vagina. She was not responding. She was rushed to S.N. Medical College where the doctors pronounced her to be dead. The accused, on being caught, allegedly stated to have raped the girl and then to have inserted the stem/stick in her vagina in order to murder her. This witness proved the F.I.R. too that he had lodged. It came down from his cross-examination that he and other witnesses had torches and had seen the accused c omitting crime from a distance of about 4-5 steps. The accused, according to him, had tried to escape from the spot but was apprehended in totally naked condition.

14. PW 3 Chandrasen alias Taplu and PW 6 Nand Kishore were wholly independent witnesses who supported the testimony of PW 2 Naresh Kumar in material particulars. To be short, PW3 Chandrasen alias Taplu stated that both the parties were known to him. In the eventful night "*Devi jagran*" was going on at his house and a number of persons had assembled including the victim Vaishali, her father, uncle and many others. The accused who was neighbour of the informant also came after some time and took away Vaishali on the pretext of giving her balloon. He had seen the accused Bantu taking away the girl towards the pond. When he and others reached near the field of Dharma, the accused was found inserting a *Dhaincha* stem/stick into the vagina of Vaishali. He and other witnesses pounced upon him and he was apprehended in complete naked state. Vaishali was aged about 5 years and she was lying on the ground in totally senseless condition. A part of the stem was inside her vagina. She was bleeding profusely. She was rushed to the Medical College by her relatives. He alongwith others had taken the accused to the Police Station. Some force was applied over him by the villagers after his arrest. In his cross-examination, this witness stated that "*Devi jagran*" had to be stopped abruptly after this incident. He categorically stated that he had seen the accused Bantu inserting *Dhaincha* stem into the vagina of Vaishali. He had tried to escape from the spot but was apprehended by search party including himself. He (the witness) had told Naresh (PW 2), Vishal and Nand Kishore (PW 6) that he had seen the accused Bantu taking Vaishali towards the pond. This witness, too, had a torch with him.

15. While supporting the prosecution case in all essential particulars, PW 6 Nand Kishore explained that he used to run a *Dhaba* (an improvised roadside restaurant) on the Fatehabad Road and used to serve non-vegetarian food there. The restaurant used to remain open till 11.30 P.M. but on the date of the incident, he kept it closed due to *Nar Ratri* because people do not take non-vegetarian food during this period. He further stated that he reached the place of "*Devi jagran*" at about 8.30 P.M. and it was around P.M. that he had seen the accused Bantu going away with Vaishali. Bantu had told him that he was taking Vaishali to give her a balloon. He informed the father of Vaishali about this when they started searching her. He had joined the search of the girl and had seen the accused inserting a stick into the vagina of Vaishali near the pond where he was caught by him and other witnesses naked.

16. PW 5 Head Constable Chandra Bhan Singh had scribed the check report on the basis of the written F.I.R. and had

made entry in the G.D. regarding registering of the case, whereas, PWs 7 and 8 were the Investigating Officers. There is nothing particular to comment about these formal witnesses.

17. Finding the case to be established to the hilt, the trial Judge held the accused appellant guilty of the offences under sections 364,376 and 302 IPC and convicted and sentenced him as mentioned above. He also held the case to be of rarest of rare category and thus imposed death sentence for the offence of murder. While the accused appellant has lodged this appeal from jail, the trial judge has made reference no. 1 of 2006 for confirmation of death sentence as per Section 366 Cr.P.C.

18. We note from the record of the lower court that at the trial, the accused was defended by an *amicus curiae.* He having no counsel or pairokar in the High Court too, we appointed Sri Ram Ji Saxena, a criminal lawyer of long standing, as amicus auriae to argue out the appeal from his side. Sri karunand Bajpai, A.D.A has advanced arguments from the side of the State.

19. We have heard the arguments advanced at the Bar and have carefully gone through the evidence on record.

20. The first argument of the learned amicus curiae is that as per the own case of the prosecution, the girl having been taken away by the accused with consent, no offence of abduction was made out. In other words, he contended that the ingredients of the offence of kidnapping or abduction were wanting in the present case. The argument, in our opinion, is wholly fallacious with no merit at all.

21. No doubt, the girl Vaishali aged about 5 years was taken by the accused from the place of "*Devi jagran"* in the presence of her uncle PW 2 Naresh Kumar and her father. PW 6 Nand Kishore was also there. All the witnesses of face have stated that he (accused) had taken the girl on the pretext of giving her a balloon. So, the tacit consent of the father/uncle for the girl to be taken away was for the purpose of a balloon to be provided to her by the accused. As per his saying, he was their neighbour. The girl also knew him from before. He had been there for a while showing playful gestures with the girl. To say shortly, the consent for taking away the girl by the accused was for the purpose of giving a balloon to her, and not for how he dealt with her immediately thereafter. Actually, since he had taken the girl for giving her a balloon, PW 2 Naresh Kumar-uncle of the girl, PW 6 Nand Kishore and Vishal-father of the girl did not object to it. It has clearly been stated by PW 2 Naresh Kumar that he did not object to the taking of the girl by Bantu because he was taking her for giving balloon to her. PW 6 Nand Kishore even stated that he had questioned the accused as to where he was taking her and he had replied that he was taking her for giving a balloon. So, obviously, the said consent of the father/uncle of the girl was for specific purpose of balloon being given to her by the accused. He being their neighbor, there was hardly any reason of their sustaining any suspicion at that juncture. But the conduct of the accused immediately thereafter speaks volumes of the evil design conceived by him right from the beginning. It was a ruse or pretext to take away the girl from the spot for giving her a balloon, but actually he wanted to translate his evil design of doing carnal act with teenaged

girl of 5 years without even a grain of humanity. After committing rape on her, he murdered her in most merciless and diabolic manner by deep insertion of a stem/stick of *Dhaincha* plant into her vagina. To come to the point, he enticed away the girl by deceitful means to carry out his evil mission. It does not admit of slightest doubt that he committed the offence under section 364 I.P.C., all the ingredients of which came to be established and cemented by the prosecution evidence. We, therefore, reject this first argument of the learned amicus curiae.

22. The second argument of the learned *amicus curiae* is that none of the witnesses saw the accused committing rape on the victim and it was not proved by the testimony of PW 1 Dr. R.S. Chahar also who conducted autopsy on the dead body of the deceased. Therefore, according to him, the offence of rape was not established. True, none of the witnesses of fact saw the accused actually committing rape on the unfortunate teenaged girl. But on consideration of their testimony in entirety, the *post mortem* report of the victim in the light of the evidence of PW 1 Dr. R.S. Chahar, medical examination report of the accused himself by PW 4 Dr. R.K. Yadav and the report of chemical examiner (Ex. Ka-22), we find that the offence of rape is established beyond any shadow of doubt.

23. We shall make our meaning clear. Needless to say, the witnesses of fact were not supposed to manufacture false evidence playing on their imagination. They truthfully narrated what they saw with their own eyes and their testimonials assertions go a long way to prove the factum of rape having been committed by the accused on the unforunate child. The panic started when the girl, who had been taken away by the accused on the pretext of giving her balloon, did not return within reasonable time. It was natural that her father, uncle and other well wishers present in "*Devi jagran*" started frantic search for her. The testimony of PW 3 Chandrasen alias Taplu (at whose house "*Devi jagran*" was taking place) stated that on 4.10.2003 at about 9.15 P.M., he had seen Bantu accused taking Vishal's daughter Vaishali towards the pond. He did not say anything to him because he was the neighbour of the father of the girl. When Naresh, Vishal and Nand Kishore were searching Bantu accused and Vaishali, he had told them that he had seen Bantu taking Vaishali towards the pond. Then all of them, i.e., victim's father, uncle Naresh, Nand Kishore, Chandra Sen alias Taplu etc. rushed towards the pond. PW 2 Naresh Kumar, Vishal, PW 3 Chandraen alias Taplu and another witness Sanjiv (not examined) had flashing torches which they showed to the Investigating Officer and with regard to which Fard Ex. Ka-4 came to be prepared. It should be pointed out at the risk of repetition that the witnesses examined before the court, namely, PW 2 Naresh Mumar, PW 3 Chandrasen alias Taplu and PW 6 Nand Kumar consistently stated that around .30 P.M. they saw in the light of flashing torches that in the field of Dharma/Lakshman near the pond the accused was inserting stem/stick of *Dhaincha* into the vagina of Vaishali who had been thrown down. An alarm was raised by all of them. The accused was caught red-handed in complete naked state. The child was bleeding profusely. Certain other injuries were also there on her person. She was unconscious and not

responding at all. She was rushed to Medical College where she was declared to be dead. On interrogation, Bantu also stated then there that he had committed rape on her and had thereafter inserted the stem of *Dhaincha* plant into her vagina to murder her. We should also point out that such statement of the accused made before the witnesses on the spot being caught red-handed in naked condition while inserting stem/stick into the vagina of the victim, is a relevant fact forming part of the same transaction and falls in the category of *res gestae* evidence under section 6 of the Evidence Act. The said Section reads as under:

"6. ***Relevancy of facts forming part of same transaction.-****Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at same time place or at different times and places."*

Its illustration (a) is relevant which is to the following effect:

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

24. The outcome of the *post mortem* has been detailed earlier. Injuries were there on the person of the deceased in the form of multiple contusions over face and head, abrasions over posterior aspect of both elbows and right wrist. Labia minora of both sides in posterior parts were contused. Hymen was ruptured. Free and clotted blood was present in vagina. Dried blood was present on the external part of the wooden stick which was inserted in the vagina. Obviously, what was found on the autopsy of the deceased, corroborates the testimony of the eyewitnesses that they had seen the accused inserting stick into the vagina of the deceased. The total length of the stem/stick was 57 cms. X .8 cm. in diameter. The length of external part of wooden stick was 24 cms. Whereas 33 cms. Of stick was inside the vagina. Stomach, large and small intestine were perforated due to insertion of the wooden stick. Mesenteric vessels in the abdomen were torn due to insertion of wooden stick. Of course, PW1 Dr. R.S. Chahar stated that on the basis of *post mortem* report it could not be said whether rape had been committed on the deceased or not. But it does not negative the commission of rape on her. The Doctor also clearly stated that the other injuries found on the person of deceased could be caused by pressure of hands, nails and scratches. It is well indicated that the accused committed rape with the teenaged girl with passionate lust and caused other injuries too in the form of abrasions and contusions on her person. The statement of Doctor on the basis of *post mortem* report whether rape had been committed or not, cannot be capitalized by the defence to argue that rape had not been committed on her. Really speaking, internal organs of the deceased through vagina had been so badly mauled and damaged by the accused by insertion of stick into her vagina after committing rape that clear evidence of rape could not possibly be found at the time of *post mortem.* But features found on the post mortem cannot and do not negate rape having been committed on her.

25. It would be recalled that as per the testimony of the witnesses, the girl

was bleeding profusely from her private part at the spot when the accused was caught red handed in complete naked condition. It was a fact that on being taken to the Medical College, the stick was still found in her vagina and the length of the stick in the vagina was as much as 33 cms. Further, medical examination of the accused himself goes a long way to indicate that he did commit rape. Contusions found on his person were well explained because it was there in the testimony of the witnesses of fact that he had tried to run away from the spot but had been caught after being given some thrashing. Such instant reaction of the witnesses was natural. The genital examination of the accused showed that glans penis was clean and there was no smegma present thereon. The smegma on the glans penis gets removed during sexual intercourse. The presence of the same proves that no intercourse was committed by the person within a perios of 12 hours. Since no smegma was present on the glans penis of the accused at the time of medical examination, it could safely be inferred that he had committed sexual intercourse within 12 hours of medical examination. In short, the absence of smegma was compatible with coitus, meaning theeby that he had committed sexual intercourse a little before his medical examination. Red abrasion .5 cm x .5 cm at 4 O'clock position and abrasion of .5 cm x .5 cim at 12 O'clock were present on glans penis with multiple linear abrasions. The clear testimony of PW 4 Dr. R.K. Yadav who examined him on 5.10.2003 at 2.10 A.M. indicated that the injuries found on her person were fresh. The Doctor also clearly stated that the abrasions found on his penis could be sustained in intercourse. The Doctor was emphatic that the abrasions found on the glans penis of the accused could not be caused in any other manner excepting intercourse. Therefore, the own medical examination of the accused further supported the factum of rape having been committed by him.

26. As repeatedly stated, the accused was found at the spot in naked condition and it is there in the testimony of PW 2 Naresh Kumar that PW 3 Chandrasen alias Taplu and others had taken him to the police station putting on clothes. The accused Bantu was not wearing any underwear. The pant putting on which he was taken to the Police Station was sealed by the Doctor who medically examined him. The same was sent for chemical examination to ascertain marks of blood, semen etc.

27. The chemical examiner in his report EX. Ka-22 found human blood stains on the jeans pant of the deceased and wooden stem/stick. Sperms and semen had also been found on the pant of the deceased. Human blood stains, sperms and semen had been found on the pant of the accused also. Blood stains on pant jeans of the deceased and on the pant of the accused were of human blood of group 'A'.

28. The above discussion renders it abundantly clear that the prosecution satisfactorily established all the features and attributes of rape having been committed by the accused on the hapless, helpless and unfortunate teenaged girl of five years. The argument advanced by the learned *amucus curiae* is lost.

29. Thirdly, the learned *amicus curiae* argued that the prosecution failed

to establish that he intended to commit the murder of Vaishali. He reasoned that the offence of murder was not proved against the accused appellant. The argument is based on sup0erficial approach and does not impress us at all. It has to be pointed out that culpable himicide is murder barring the cases covered by exceptions contained in Section 300 I.P.C. The intention to cause death is one of the four parameters enumerated in Section 300 I.P.C. rendering culpable himicie to be murder. There are three other eventualities described as "2ndly", "3rdly" and "4thly" in Section 300 I.P.C. It needs no debate that everybody is supposed to know the natural and probable consequences of his act. At times, the intention is to be gathered from the act itself. In the case at hand, after committing rape on the teenaged girl of about 5 years, the accused inserted a stem/stick deep inside the vagina of the victim causing great internal damage. The total length of the stick was 57 cms x .8 cm is diameter at most of the places, i.e., it was about 1 inch less than 2 feet. Horribly, the stick measuring 1 ft. 1 inch had been inserted into the vagina, which could only be taken out by the Doctor at the time of *post mortem*. It would be recalled that hymen was ruptured with free and clotted blood in the vagina. Stomach was perforated, small intestine were also perforated at places, large intestine were lacerated. Uterus which was of a very small size was ruptured due to stick insertion. Vaginal walls were lacerated. It admits of no doubt that ost extensive internal damage had been caused by the accused who mercilessly inserted stem/stick into the fragile vagina of the teenaged girl of about 5 years after committing rape on her. In his examination before the court, PW 1 Dr. R.S. Chahar, who conducted autopsy on the dead body of the deceased, clearly stated that the injuries found on the person of the deceased were sufficient to cause death in ordinary course of nature. He was emphatic that insertion of the wooden stick into the vagina was bound to cause death 100 per cent. To say in other words, there was no possibility of escaping the death on insertion of stick into the vagina in the manner as detailed and found at the time of *post mortem*. Therefore, the argument is not worthy of a moment's attention that the accused is not guilty of the offence of murder.

30. It is obvious that he wanted to camouflage the serious crime of rape committed by him over the teenaged girl. So, in a planned manner, after committing rape, he mercilessly inserted stem/stick deep inside the fragile vagina of the girl to the extent of 33 cms to cause her death, with a view to masquerade the crime as an accident. It was his cruel innovation that he inserted a stick deep into her vagina causing death of the victim. It was just by providence that due to timely reach of the witnesses (who were frantically searching the girl) he could be caught in naked condition while inserting stick into the vagina of the victim.

31. We are, therefore, in agreement with the trial judge that the accused committed the offence of murder and there cannot be the slightest doubt about it.

32. We should also point that the accused could not show any enmity with the witnesses of fact, namely, PW 2 Naresh Kumar-uncle of the victim, PW 3 Chandrasen alias Taplu (at whose house "*Devi jagran*" was taking place) and PW

6 Nand Kishore. They (while frantically searching the girl with flashing torches) had reached the spot and caught the accused red-handed in complete naked state while inserting stem/stick in the vagina of child Vaishali. It would be recalled that he was a neighbor of PW 2 Naresh Kumar and the father of the girl. Actually, he abused and misused this acquaintance with the girl and took her way from amongst them on the pretext of giving her a balloon. We should say as passing reference that in his statement under section 313 Cr.P.C. he stated that he had been falsely implicated due to land dispute with the witnesses. On carefully going through the testimony of the witnesses, we find that not even a suggestion was given to any of them in cross-examination about any such dispute.

33. In view of the above discussion, it is established to the hilt that the trial judge has rightly found that the accused committed the offences punishable under Section 364,376 and 302 I.P.C.

34. It takes us to the most vexed question as to the quantum of sentence to b imposed upon the accused. The trial judge has awarded death sentence to him for the offence of murder punishable under Section 302 I.P.C. Learned *amicus curiae* has argued that the extreme penalty of death is not called for in this case. He urged that the young age of the accused appellant, the fact of his having no criminal antecedents and the chances of his reformation being there are the mitigating circumstances to reduce the death sentence to life imprisonment. He has cited following three rulings to support his argument.

1. Raju versus State of Haryana: AIR 2001 SC 2043
2. Bantu alias Naresh Giri versus State of M.P. :AIR 2002 SC 70
3. Amit alias Ammu versus State of Maharashtra: AIR 2003 SC 3131.

35. We have given our anxious consideration to the matter. “To be” or “not to be” is a brain storming question. Despite the emotional and often persuasive arguments, the fact is that there are some criminals, who cannot safely be allowed back into society, lest they cause further harm and destruction. Besides, the principle of justice demand that a person must be held accountable for his actions and the punishment must fit in 6the gravity of the crime. If capital punishment were to be abolished what would we do with the prisoners who would otherwise have been executed? Should they be sentenced to life imprisonment instead, with no parole? Is this economically viable? Can any State really afford to, in effect, feed, clothe and shelter its most notorious criminals for the duration of their lives? Prisons even in the most developed economy, the U.S. are struggling to cope with an overflow of prisoners. They would find the going even more difficult if capital punishment was to be abolished altogether. And there are bound to be many taxpayers who would be extremely exercised at the thought of their hard earned money being used for this purpose. Especially if the taxpayers happened to be the relative of a person who had been murdered, and his money was being used to support the convicted prisoner.

36. There is another, humanitarian, angle of this debate. Hope is the one force that sustains every human being. But what

hope can there be for the prisoner who knows that he is condemned to spend the rest of the life inside the jail, with no chance of ever walking free again? His life is already over, it is just his demise that has been indefinitely delayed. Everyday, his spirit is crushed anew, his despair intensified further. Instead of executing him once and getting it over with, the State executes him again and again, every single day. Would not it be far more humane to put him out of his misery, as painlessly as possible?

37. Above are some aspects of the matter which may be termed to be academic. In our country, for the offence of murder, death sentence has been retained for rarest of rare cases. As Judges, we are not concerned with the ethics or morals of this punishment. We must administer the law as it is. Through a chain of decisions of the Apex Court, this case is one which falls in the rarest of rare category demanding extreme penalty of death. We shall do a little discussion to demonstrate the justification of the imposition of death penalty in this case.

38. In the case of *Kamta Tiwari Vs. State of M.P. (1997) JIC-57 (SC)* an innocent hapless girl of 7 years was subjected to rape and murdered with barbaric treatment. It was found to be rarest of rare cases and the sentence of death was inflicted. The facts of this case squarely apply to the present one.

39. At the time of medical examination on 5.10.2003 the Doctor mentioned the age of the accused as 20 years. The incident took place on 4.10.2003. In the impugned judgment dated 24.12.2005, the trial Judge has recorded his age as 22 years. He is an unmarried person with no family liability. His mere young age, having regard to the facts and circumstances of the case and diabolical manner in which the offence was committed, cannot be a ground for clemency. Relying on a *Amrut Lal Someshwar Joshi versus State of Maharashtra (1994) 6 SCC 186,* the Supreme Court held in *Om Prakash alias Raja Versus State of Uttaranchal, 2003 SCC (Crl) 412* that mere young age of the accused is not a ground to desist from imposing death penalty, if it is otherwise warranted. In that case also, none was dependent on the appellant and the Supreme Court held that there was no mitigating circumstance in his favour.

40. In the *Dhananjay Chatterjee alias Dhana Versus State of West Bengal: 1994 SCC (Crl.) 358* while approving the death sentence of the accused of rape and murder of a young girl, the Supreme Court observed as under:

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

41. The argument of the accused having no criminal antecedents and that

he is not past reformation also does not justify the reduction of death penalty to that of life imprisonment in the present case. The Supreme Court observed in the case of *Gurdev Singh and another versus State of Punjab 2003 SCC (Crl.) 1616*, ".... it is true that we cannot say that they would be further menace to the society or not as "we live as creatures saddled with an imperfect ability to predict the future". Nevertheless, the law prescribes for future, based upon its knowledge of the past and is being forced to deal with tomorrow's problems with yesterday's tools. The entire incident is extremely revolting and shocks the collective conscience of the community." With these observations, the Supreme Court rejected the argument of the possibility of the accused being reformed built on the premise that there was nothing to show that the accused might be a threat or menace to the society.

42. Taking note of earlier decisions, tests to determine the rarest of rare cases in which death penalty can be inflicted were summarized by the Apex Court in the case of *State of U.P. Vs. Satish 2005 SCC (Crl) 642.* The gist is that rarest of rare cases in which death sentence should be awarded, is one when the collective conscience of the community is so shocked that it will expect the holders of judicial power to inflict death penalty.

43. In our considered opinion, the present case falls in the rarest of rare category calling for death penalty for the murder of helpless and hapless girl aged about 5 years who was murdered by the accused appellant after committing rape on her. The murder was committed in extremely brutal, grotesque, diabolical, revolting and dastardly manner, so as to arouse intense and extreme indignation of the community. The accused took away his neighbour's daughter aged about 5 years from the sit of '*Devi Jagran',* where she was present with her father and relatives by deceitful means of giving her a balloon. He straightaway took her to a field, committed rape on her and then brutally murdered her by inserting a stem 13 inches inside her vagina causing extensive damage. It is shuddering that more than a fl. of stick had been inserted into her vagina causing extensive damage inside and the stick could be taken out only at the time of *post mortem* of the unfortunate girl. The victim was an innocent child aged about 5 years. The accused is totally depraved. He cannot be allowed to return back to the society at all. The offence has definitely generated a deep sense of abhorrence in the society.

44. In conclusion, we see no merit in this appeal and it is bound to be dismissed. The conviction with sentences of the appellant passed by the trial court are upheld including that of death penalty for the offence of murder under Section 302 I.P.C.. We affirm the death sentence passed by the trial court as also the other sentences passed under sections 364 and 376 I.P.C.

45. Resultantly, the accused appellant Bantu shall be hanged by neck till he is dead. He is already in jail.

Reference No. 1 of 2006 stands decided accordingly.

46. Sri Ram Ji Saxena, learned *amicus curiae* who argued out the appeal for the accused appellant, shall get Rs.3000/- as his fee.

47. Let judgment be certified to the lower court immediately with transmission of the record of the case. The court below shall report compliance within one month. Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2006

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 27077 of 1993

Smt. Vijaya Nigam ...Petitioner
Versus
District Judge and others ...Respondent

U.P. Act No. 13 of 1972-Art-226 Constitution of India-Renewal of lease-implied extension-not available-Month to Month Tenancy-of Not extended By Mutual Consented Agreement-No Implied-Renewal.

Held-Para 9

The option for renewal even if exercised by the lesseee, who continued to remain in use and occupation of the premises, could not claim that he was holding over as a lessee since it cannot be said to be a conduct signifying assent of the lessor to continue the tenancy even on expiry of lease period. The renewal has to be done with express agreement or assent of the lessor and hence there can be no implied renewal in the absence of such agreement or assent of the lessor and hence there can be no implied renewal in the absence of such agreement or assent.

Case law discussed:
1994 (Supp) (3) S.C.C. 694
1995) 5 S.C.C. 314
2002 (1) A.R.C. 319 Alld. H.C.
2005 (61) A.L.R. 865 Alld. H.C.

(Delivered by Hon'ble Sanjay Misra, J.)

1. The petitioner has filed this writ petition for quashing the judgment and order dated 16.4.1990 passed by the court of Judge Small Causes Kanpur nagar in S.C.C Suit No. 598 of 1983 (Smt. Vijaya Nigam Versus Sudama Kumar) Whereby the suit has been dismissed for ejectment of the defendants and allowed for recovery of arrears of rent and the judgment and order dated 12.4.1993 passed by the Xth Additional district Judge Kanpur in S.C.C. Revision No. 99 of 1990 (Smt. Vijaya Nigam Versus Sudama Kumar) whereby the revision of the petitioner has been dismissed.

2. Heard Sri Avinash Swaroop learned counsel for the petitioner and Sri Ramendra Asthana, learned counsel appearing on behalf of the respondents. The petitioner who clains herself to be owner and landlord of the shop No. 3 situate in Premised No. 62/3 Block 7, Govind Nagar Kanpur filed the suit on the allegations that the shop was constructed in the year 1978 and was given on a rent of Rs. 225 per month to the respondent no.3 for a period of 11 months by a written agreement. The period of tenancy was extended by subsequent agreements of 11 months each. The period of the last agreement came to an end on 30.4.1983 where after the petitioner sent a notice dated 7.5.1983 to quit which was received by the respondent no. 3 on 16.5.1983. The tenancy is alleged to have been terminated upon the expiry of thirty days from the date of service of notice.

3. The respondent no. 3 contested the suit claiming therein that a permanent irrevocable tenancy had been created by virtue of the agreement and it would

therefore continue forever unless any terms of the agreement were violated by the respondent. The trial court framed issues and on issue no. 1 as to whether plaintiff is owner and landlord of the premises in question, it held that the petitioner was not owner and landlord of the premises in question, it held that the petitioner was not owner of the disputed shop in as much as it has been taken by the petitioner on lease of 99 years from the kanpur development Authority. However, the trial court found that the petitioner was landlord of the premises in question. On issue no. 2 as to whether the tenancy was permanent and irrevocable or a month to month tenancy, the trial court found that it was not a permanent irrevocable tenancy it being dependent upon the terms of the agreement and further held that it was a tenancy for 11 months created by separate agreements from time to time. On the issue as to whether the provisions of U.P. Act No. 13 of 1972 would apply to the premises, the trial court found that the shop in question was not governed by the Act on the date of institution of the suit. On the issue as to whether tenancy of the defendant had been legally terminated and whether notice was legal and valid, the trial court found that tenancy was not legally terminated and the notice was illegal and invalid. With respect to the issue of default in payment of rent, the trial court decided in favour of the tenant and found that he was not in arrears of rent. It also found that question of title was not involved in the suit and the defence of the respondent was not liable to be struck off under Order XV Rule 5 Code of Civil Procedure. It therefore, decreed the suit for recovery of arrears of rent from 1.5.1983 to 18.7.1983 at the rate of Rs. 225/-permonth and for rent pendent elite from 19.7.1983 to 15.4.1990 at the same rate. However, he suit for ejectment of the defendant from the shop in question was dismissed.

4. The revisional court found that the finding recorded by the trial court on the question of fact and law were in accordance with law and therefore, it has dismissed the revision filed by the petitioner.

5. The argument on behalf of learned counsel for the petitioner is that the notice under section106 of the Transfer of Property Act served by the petitioner upon the tenant was valid and legal and both the courts below have committed error in law in holding that the notice was invalid and therefore, the tenancy was not terminated. It is this question alone which has been canvassed by the learned counsel for the parties.

6. Upon going through the findings recorded by the courts below the tenancy by virtue of the last agreement admittedly was up to 30.4.1983 where after no fresh agreement was entered into between the parties. The notice to quit was served on the respondents on 16.5.1983 and therefoe, the tenancy stood terminated after expiry of thirty days of service. The courts below have concurrently held that the tenancy was not a permanent irrevocable tenancy but was governed by the terms of the agreement. The agreement period of 11 months expired on 30.4.1983. The courts below have however, held that since thee has been no breach of any condition of the lease deed, therefore, the notice to quit could not have been given to the respondents validly and legally. The courts below found that the terms and conditions as enumerated in the

lease had not been violated by the respondents and therefore, the petitioner was not entitled in law to terminate the tenancy. It also found that since no default had been committed in payment of rent the notice to quit was illegal.

7. In support of their contention learned counsel for the parties have placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Jiwan Dass Versus Life Insurance corporation of India and another reported in 1994 (Supp) (3) SCC 694*** and contended that a notice to quit under section 106 of the Transfer of Property Act in a month to month tenancy does not contemplate of giving any reason for terminating the tenancy. It is therefore, contended that upon expiry of the 11 months lease period, the occupation of the tenant would be month to month. Placing reliance upon a decision of the Hon'ble Supreme Court in the case of ***Janki Devi Bhagat Trust Agra Versus Ram Swarup Jain (dead) by LRS reported in (1995) 5 SCC 314*** it has been contended that when a lease was for a period not exceeding one year it was not registerable and could be looked into only for collateral purposes.

8. Relying upon a decision of this Court in the case of ***Bank of Baroda Versus Sardar Arvinder Singh and another reported in 2002 (1) ARC 319,*** it has been contended that after expiry of the lease period when no fresh lease deed is executed the tenancy becomes a month to month tenancy and can be terminated by giving notice under section 106 of the Transfer of Property Act. Placing reliance upon a decision of this Court in the case of ***Smt. Prakash Rami Versus Vith Additional District Judge and others reported in 2005 (61) ALR 865*** it has been contended that for termination of month to month tenancy one month's notice under section 106 of the Transfer of Property Act can be validly given and it is not necessary that the tenant must be a defaulter.

9. It is settled law that when a lease is of a fixed period with a stipulation that it can be extended by consent of the parties, then, in the absence of such consent there cannot be any implied renewal of the tenancy. The option for renewal even if exercised by the lesseee, who continued to remain in use and occupation of the premises, could not claim that he was holding over as a lessee since it cannot be said to be a conduct signifying assent of the lessor to continue the tenancy even on expiry of lease period. The renewal has to be done with express agreement or assent of the lessor and hence there can be no implied renewal in the absence of such agreement or assent of the lessor and hence there can be no implied renewal in the absence of such agreement or assent. In the present case the petitioner has neither expressly nor impliedly agreed for renewal. There was no mutual agreement for renewing the lease after it had expired on 30.4.1983. Therefore, in the present case the respondent cannot even claim to be a lessee by holding over within the meaning of section 116 of the Transfer of Property Act since the essential ingredient of the lessors assent to his continuing in possession is absent, and therefore, possession of the lessee in the absence of any agreement to the contrary would only amount to a month to month tenancy as specified under section 106 of the Transfer of Property Act which could be terminated by notice. The courts below found that the tenancy was governed by

the terms of the agreement which expired on 30.4.1983. It has also found that the tenancy was not permanent nor irrevocable. It was a month to month tenancy after expiry of the term. Reasoning given by the courts below that since no violation was committed by the tenant of the terms of the lease and since the tenant was not in default in payment of rent therefore notice under section 106 of the Transfer of Property Act was invalid and illegal is clearly not sustainable. The said view of the courts below is illegal.

10. For the aforesaid reasons, the writ petition succeeds and is allowed. The impugned judgment and orders dated 16.4.1990 passed by the court of Judge Small Causes Kanpur in S.C.C. Suit No. 598 of 1983 and the judgment and orders dated 12.4.1993 passed by the Xth Additional District Judge Kanpur Nagar in S.C.C. Revision No. 99 of 1990 are hereby quashed. The suit of the petitioner for ejectment stands decreed. No order is passed as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.09.2006

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

Civil Misc. Writ Petition No. 47083 of 2006

Battu Lal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.K. Pandey

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Principle of Natural Justice-cancellation of fair price shop licence-after service of charge sheet-petitioner given explanation without evidence-recording the reasons are must for adjudging the validity of order-the appellate authority also can not record any reason for agree on disagreement with the finding-matter remitted back to the lisencing authority-fresh decision within three month-till then cancellation order be kept in abeyance.

Held: Para 6, 7 & 8

The licensing authority was required to mention the charges and then explanation given by the petitioner and then evidence and thereafter the reasons on which the explanation given by the petitioner is not being accepted.

Thus it is clear that it is the first concern and the duty of first court/authority to critically examine the evidence/record and by assigning reason to agree or not to agree with the submission of a party and then to pass order. If this is not there then exercise can be safely said to be faulty.

Accordingly this court is of the view that instead of keeping the matter pending before the appellate authority this court straightway may intervene by exercising its extraordinary powers which will save time of everybody and thus the order of the Sub Divisional Office/Licensing authority dated 7th June, 2006 by which fair price shop license has been cancelled is to be kept in abeyance. The matter has to go back to the concerned licensing authority again to revive the proceedings for cancellation of fair price shop license and he is to proceed to deal the same by undertaking the process of evaluation as indicated. It is for the petitioner to cooperate in the proceedings and in the event there is non-cooperation the licensing authority will be free to proceed without waiting for cooperation from the petitioner.

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

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

2. Challenge in this petition is the order passed by the appellate authority dated 10.8.2006 by which appeal filed by the petitioner against the cancellation of the fair price shop license was admitted but prayer for grant of stay has been rejected.

3. Learned counsel for the petitioner submits that appellate authority in not granting stay to the petitioner has committed a manifest error as licensing authority while passing order of cancellation has not examined the merits in the explanation so given by the petitioner against the show cause notice/charge sheet and in a cryptic and arbitrary manner order has been passed. Submission is that petitioner by giving details and by placing documents before licensing authority has fully proved that charges against him are false, motivated and superfluous and therefore, as that was not considered, it was for appellate authority to have applied his mind to the facts and detail and then he should have rejected/allowed petitioner's application.

4. Learned Standing Counsel in response to above, submits that it was in discretion of appellate authority to grant stay or not and therefore, if on facts he was not satisfied that it is case for stay then no exception can be taken to rejection of stay application.

5. In view of the aforesaid the matter was examined in presence of the learned Standing Counsel and order of the licensing authority was also read in presence of all concerned besides the impugned order of appellate authority.

6. On perusal of the order of licensing authority this court finds that there is mention of service of the charge sheet on the petitioner and thereafter his reply dated 18.5.2006 and then there is just a mention that "matter was examined and explanation has not been found to be satisfactory" and thereafter all kind of irregularities i.e. non opening of shop in time, unfair distribution, charging the higher rate and unsatisfactory behavior of the petitioner has been just mentioned. Thus it is clear that no reason has been given and no analysis has been made not to accept the explanation which is said to have been filed by the petitioner. Needless to say that satisfaction of the court/authority is to be judged on perusal of the analysis of the explanation/arguments, the record and then reasons so given in the order to accept/not to accept the same. Higher forum may not be in position to go into the reasons which remains recorded in the mind of the concerned authority unless it comes out in writing in the order. Here is the case in which this court finds that satisfaction so recorded by the licensing authority for holding explanation given by the petitioner not to be satisfactory remains his personal satisfaction as no analysis and reason appears in the order. The licensing authority was required to mention the charges and then explanation given by the petitioner and then evidence and thereafter the reasons on which the explanation given by the petitioner is not being accepted.

7. As this has not been done, this court is of the view that keeping matter pending even before the appellate

authority may be just a futile exercise as appellate authority may not be in a position to record findings in detail in respect to factual aspects which was required to be recorded by the first authority first and it is only thereafter appellate authority can be in a position to examine the merits in those findings in the light of the record and straightly proceed to record findings as that may cause prejudice to either of the two sides. A party has a right to get a finding on question of facts in his favour first by first court/authority and then by second court/authority so that if matter goes to higher forum there may be concurrent finding of two courts in his favour, if it is in his favour. It is in exceptional cases, the appellate authority is to be permitted to act like a first court for the purpose of recording of finding by going into record and evidence. Power of appellate court/authority may be the same as of trial court but that do not mean that trial court/first authority will not discharge his job/part and deprive a party of getting a finding in his favour by that court. Thus it is clear that it is the first concern and the duty of first court/authority to critically examine the evidence/record and by assigning reason to agree or not to agree with the submission of a party and then to pass order. If this is not there then exercise can be safely said to be faulty.

8. Accordingly this court is of the view that instead of keeping the matter pending before the appellate authority this court straightway may intervene by exercising its extraordinary powers which will save time of everybody and thus the order of the Sub Divisional Office/Licensing authority dated 7th June, 2006 by which fair price shop license has been cancelled is to be kept in abeyance. The matter has to go back to the concerned licensing authority again to revive the proceedings for cancellation of fair price shop license and he is to proceed to deal the same by undertaking the process of evaluation as indicated. It is for the petitioner to cooperate in the proceedings and in the event there is non-cooperation the licensing authority will be free to proceed without waiting for cooperation from the petitioner. The proceeding is to be concluded within a period of three months from the date of receipt of certified copy of this order which petitioner undertakes to produce before the licensing authority within a period of two weeks from today. In case the copy of order is not produced within two weeks then the effect of this order will remain in abeyance and the order of the licensing authority will become operative. As and when final order is passed by concerned authority that will prevail and it will be for the party feeling aggrieved to take recourse as permissible in law.

9. In view of the direction as given in this order the appeal filed before appellate authority becomes infructuous and thus now that is not to be proceeded any more.

10. With the aforesaid, this writ petition stands allowed/disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2006

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

Civil Misc. Writ Petitioner No.48242 of 2006

Shresth Shiksha Sanstha ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi
Sri Shashi Nandan

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

Indraprastha University Act, 1998- Section 26 (2)-No objection grant by State of U.P.-for establishment of National University-withdrawn by state on pretext that the certificate granted by Secretary Medical Education and not by Higher Education-order passed without application of mind-can not sustain-matter requires re-consideration.

Held: Para 18 & 19

In the facts .of the case where the State of Uttar Pradesh has granted 'No Objection Certificate' mentioned above to petitioner, it was incumbent upon the State to apply mind in the matter of, granting/withdrawing 'No Objection Certificate' for establishing an Institution in the National Capital Region. 'No Objection Certificate' once granted to the petitioner cannot be withdrawn by the State only on the ground that the State of U.P. through Secretary, Medication Educations and Special Secretary to the Chancellor of U.P. State Universities granted 'No Objection Certificate' and not the Higher . Education Department. Considering the facts mentioned above, this Court is of the view that the impugned orders suffer from error of law apparent on the face of record and was passed without application of mind and on non-consideration of relevant facts stated above and as such matter requires reconsideration afresh in accordance with law.

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

1. Petitioner-Shresth Shiksha Sanstha has preferred this writ petition challenging orders dated 19.8.2004, 17.5.2006 and 31. 7 .2006, passed by the State of U.P. in the matter of cancellation of 'No Objection Certificate' for imparting higher education course by the petitioner in Ghaziabad with affiliation to Guru Gobind Singh Indraprastha University, Delhi (hereinafter referred to as Indraprastha University).

2. Heard learned counsel for the petitioner and learned Standing Counsel.

3. Sri Shashi Nandan, learned Senior Advocate, assisted by Sri Anoop Trivedi, learned counsel for petitioner, urged that the Indraprastha Vishwavidyalaya Act, 1998 'was enacted by the Legislative Assembly of Delhi and the jurisdiction of the University is defined under Section 4 of the Act. The University is competent to exercise powers within the area of National Capital Region as defined in the National Capital Region Planning Board Act, 1985, which is an Act of Parliament. National Capital Region has been defined under Section 2(f) of the National Capital Region Planning Board Act, 1985 which comprises whole of District of Bulandshahr comprising the Tehsils of Anupshahr, Bulandshahr, Khurja, Sikanderbad, whole of District of Meerut

comprising the Tehsils of Meert, Bagpat, Mawana and Sardhana and the whole of District of Ghaziabad comprising the Tehsils of Ghaziabad and Hapur. He further urged that National Capital Region Planning Board consists of members which includes Union Minister for Works and Housing, the Chief Minister of the State of Haryana, the Chief Minister of the State of Rajasthan, the Chief Minister of the State of Uttar Pradesh and the Administrator of the Union Territory. Under the provisions of Indraprastha Vishwavidyalaya' Act, 1998 in order to establish a College under the Indraprastha University Act, 1998 within the periphery of National Capital Region 'No Objection Certificate' of the State is necessary. It was urged that 'No Objection' was granted to the petitioner, but subsequently it was wrongly and illegally withdrawn without any valid reason and, thus, the orders withdrawing 'No Objection' as well as rejecting petitioner's representation for granting 'No Objection Certificate' are liable to be quashed.

4. In reply to the same, learned Standing Counsel urged that petitioner wants to establish and run Educational Institution within the territorial limit of the State of Uttar Pradesh which could be granted under the provisions of law enacted by the Legislature of the State of Uttar Pradesh. It is further urged that for establishing any Institution within the territorial limits of the State of Uttar Pradesh, petitioner is bound to comply the provisions of the U.P. State University Act, 1973 and not the Indraprastha University Act, 1998, which is not the Act to regulate and control Universities established within the limits of State of Uttar Pradesh. He further urged that petitioner who has relied upon the judgment reported in 2002 (8) SCC, 481, T.M.A. Pai Foundation and others v. State of Karnataka and others cannot establish any Professional Institution ignoring Rules and Regulations of the State of Uttar Pradesh to control such institutions and as such 'No Objection Certification' was rightly withdrawn which is strictly in accordance with law. Petitioner is bound to comply the terms and conditions contained in U.P. State University Act, 1973 before establishing any Professional Institution in the State of Uttar Pradesh.

5. In Rejoinder, learned counsel for petitioner referred Paragraph7 of the writ petition, to the effect, that the National Capital Region Planning Board Act, 1985 was enacted with, concurrence of the Legislatures of the all concerned States including State of U.P. The Legislature of State of Uttar Pradesh also passed resolutions to constitute National Capital Region Planning Board to develop infrastructure in the National Capital Region to be regulated by the Parliament by National Capital Region Planning Board Act. He urged that Pargraph-7 of the writ petition has (lot been denied in Paragraph-6 of the Counter Affidavit, hence in the State of Uttar Pradesh cannot refuse for 'No Objection Certificate' to petitioner for affiliation to Indraprastha University which has jurisdiction in the National Capital Region.

6. I Carefully considered argument~ of learned counsel for the parties and perused the materials on record.

7. It is clear from the record that by an order dated 17.6.2004, State of Uttar Pradesh granted 'No Objection Certificate' to affiliation of petitioner with Indraprasth University, Delhi to teach professional

Courses such as Bachelor of Journalism, Mass Communication, LL.B., B.Ed., B.B.A and B.C.A. on certain conditions in Ghaziabad/Greater NOIDA. Aforesaid 'No Objection Certificate' was withdrawn by the Principal Secretary (Education), State of U.P under the impugned order dated 19.8.2004. Representations of the petitioner for granting 'No Objection Certificate' which was directed to be considered by an order of this' Court dated 13.2.2006 passed in Writ Petition No. 8541 of 2005 were also rejected by an order dated 17th May, 2006.

8. For consideration of arguments of learned counsel for the parties certain provisions of Indraprastha University Act, 1998 are necessary to be quoted. For ready reference Section 4 of the Indraprastha University Act, 1998 is being reproduced below:

"4(1) Save as otherwise provided by or under this Act, the limits of the area within which the University shall exercise its powers, shall be those of The National Capital Region as defined in the National Capital region Planning Board Act, 1985 (2 of 1985)."

9. The powers of the University has been defined under Section 5 of the Act, the relevant portion is being reproduced below:

"5. The University shall have the following powers, namely:-

x x x

(14) to declare colleges and institutions, with their consent, in the manner prescribed, as autonomous colleges and institutions, and determine the extent of the autonomy and the matters in relation to which they may exercise such autonomy."

10. Sections 5(21) and 5(21A) of the Indraprastha University Act are also relevant, same are being reproduced below for ready reference:-

"(21) to admit to its privileges colleges and institutions, not maintained by the University, in accordance with such conditions as may be prescribed and to withdraw all or any of these privileges;

(21 A) to establish and maintain colleges, institutions and such other centres of education, research, training and extension as deemed appropriate by the University."

11. The National Capital Region Planning Board Act, 1985 was enacted by the Parliament. Under this Act, National Capital Region has been defined under Section 2(f) of the Act according to which "National Capital Region" means the areas specified in the Schedule, provided, that the Central Government with the consent of the Government of the concerned participating State and in consultation with the Board, may, by notification in the Official Gazette, add any area to the Schedule or exclude any area therefrom.

12. Preamble of the National Capital Region Planning Board Act, 1985 mentions that this Act was enacted after receiving resolutions from all the Houses of concerned State Legislatures. Relevant of the Preamble of the National Capital Region Planning Board Act, 1985 is being quoted below:-

"And Whereas in pursuance of the provisions of clause (1) of article 252 of

the Constitution, resolutions have been passed by all the Houses of the Legislatures of the States of Haryana, Rajasthan and Uttar Pradesh to the effect that the matters aforesaid should be regulated by those States by Parliament law."

13. The Schedule of the area prepared under Section 2(f) of the National Capital Region Planning Board Act, 1985 specifies the areas of different States, Le., Delhi, Haryana, Rajasthan and Uttar Pradesh which shall be governed by the National Capital Region Planning Board Act, 1985. Section 3 of the Schedule is relevant which mentions areas of State of Uttar Pradesh, the same is being reproduced below for ready reference:-

"3. Uttar Pradesh

(i) The whole of District of Bulandshahr comprising the Tehsils of Anupshahr, Bulandshahr, Khurja and Sikanderabad;
(ii) The whole of District of Meerut comprising the Tehsils of Meerut, Bagpat, Mawana and Sardhana; and
(iii) The whole of District of Ghaziabad comprising the Tehsils of Ghaziabad and Hapur."

14. It· was also brought to the notice of the Court that under Section 26(2) of the Indraprastha University Act, 1998, the Board of Management of the Guru Gobind Singh Indraprastha University, with the prior approval of the Chancellor, may make the statute relating to the conditions under which colleges and institutions may be admitted to the University and the conditions under which same may be withdrawn. Statute (ii) makes it clear that no college or institution shall be admitted to the privileges of the University unless it has been granted a no-objection certificate by the concerned state government and recognized by the appropriate statutory authority, wherever applicable, for the subjects and courses of study for which affiliation is being sought.

15. Considering the facts borne out from the different statutes and different provisions of law, it is clear that· by resolutions of all the Houses of concerned Legislatures including the State of Uttar Pradesh, National Capital Region was established and the Chief Minister of Uttar Pradesh is also a Member of the National Capital Region Board. It is also clear from the record that Guru Gobind Singh Indraprastha University could establish an Institution affiliated with the Indraprastha University in the National Capital Region only after a 'No Objection Certificate' is granted by the concerned State. In the instant case, petitioner proposed to establish a Professional Institution in the National Capital Region falling within the territory of State of Uttar Pradesh. The State of Uttar Pradesh, though earlier granted a 'No Objection Certificate' on certain conditions, but subsequently said 'No Objection Certificate' was withdrawn on the ground that under the U.P. State University Act there is no provision for granting 'No Objection Certificate' to the Institutions affiliated with the Universities established outside the State.

16. I have also carefully gone through the impugned orders,' which state that on reconsideration at higher level 'No Objection Certificate' issued to Shresth Shiksha Sansthan for conducting higher educational courses in Ghaziabad with

affiliation of Guru Gobind Singh lndraprastha University was withdrawn. The impugned order passed on 19th August, 2004 does not assign any reason for withdrawing 'No Objection Certificate' to the petitioner.

17. From the materials on record, it transpires that State of Uttar Pradesh through Secretary, Medical Education, has already granted 'No Objection Certificate' to Army Welfare Society and State of Uttar Pradesh granted 'No Objection Certificate' to Vaccine Homeopathy College, Greater NOIDA. Similarly, Special Secretary to the Chancellor had also granted 'No Objection Certificate' to B.L.S. College of Management, Mohan Nagar, Ghaziabad. The only ground mentioned in the order of State of U.P. dated 17th May, 2006 is that 'No Objection Certificate' was given to Army Welfare Society as an exceptional case and further there was no evidence to show that 'No Objection Certificates' were granted to two other Institutions. Subsequently by a representation dated 12th June, 2006, petitioner brought to the notice of the Secretary (Higher Education), U.P. Government, Secretariat, Lucknow annexing the 'No Objection Certificate' dated 13.6.2003 granted to Vaccine Homeopathy College, Greater NOIDA and 'No Objection Certificate' granted to B. L.S. Institute of Management, Mohan Nagar, Ghaziabad dated 17.2.2000 by the Special Secretary to the Chancellor. It was also brought to the notice of the State that those Institutions were granted 'No Objection Certificate' for affiliation to Gur Gobind Singh Indraprastha University and B.L.S. Institute of Management, Mohan Nagar, Ghaziabad was granted 'No Objection Certificate' for affiliation to Guru Gobind Singh Indraprastha University and thereafter its affiliation to Chaudhary Charan Singh University, Meerut was withdrawn. The State of Uttar Pradesh while deciding petitioner's representation dated 12.6.2006 did not consider these relevant facts at all and rejected the representation on the ground that these 'No Objection Certificates' were not granted by the Higher Education Department, but by other Departments of State of Uttar Pradesh.

18. In the facts .of the case where the State of Uttar Pradesh has granted 'No Objection Certificate' mentioned above to petitioner, it was incumbent upon the State to apply mind in the matter of, granting/withdrawing 'No Objection Certificate' for establishing an Institution in the National Capital Region. 'No Objection Certificate’ once granted to the petitioner cannot be withdrawn by the State only on the ground that the State of U.P. through Secretary, Medication Educations and Special Secretary to the Chancellor of U.P. State Universities granted 'No Objection Certificate' and not the Higher. Education Department.

19. Considering the facts mentioned above, this Court is of the view that the impugned orders suffer from error of law apparent on the face of record and was passed without application of mind and on non-consideration of relevant facts stated above and as such matter requires reconsideration afresh in accordance with law.

20. With the result writ petition succeeds and is allowed. Impugned orders dated 19.8.2006, 17.5.2006 and 31.7.2006 are quashed and the matter is relegated to

the State of Uttar Pradesh to pass an appropriate reasoned order in accordance with law after hearing the petitioners and considering all relevant factors mentioned in the judgment including 'No Objection Certificate' given to other Institutions and in the light of the observations made in the judgment within six weeks' from the date of production of a certified copy of this order.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2006

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 55257 of 2004

Dukhan Prasad Singh ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena
Sri P.N. Saxena
Sri D.K. Singh

Counsel for the Respondents:
Sri K.C. Sinha, Asst. S.C. India
S.S.C.

(A) C.C.S. Rules 1972-Rule 9 (4)-Pension-with held-on the ground of pendancy of judicial proceeding-for same occurrence in departmental proceeding petitioner was found innocent-continuance of judicial proceeding even after the retirement-can not be basis for denying the pensionary benefits-except the in case of conviction in serious crime or guilty of grave mis conduct.

Held: Para 22

Thus, it is well settled by the Apex Court that the pension is not a bounty. It is a legal entitlement which can only be curtailed by an express provision of law and not otherwise. Non-mention of the word 'continued' in respect of the judicial proceeding in sub-rule(4) of Rule 9 of the Pension Rules is significant. As sub-rule (4) of Rule 9 of the Pension Rules does not contemplate a situation where judicial proceedings have been instituted prior to the superannuation of the Government servant and are continued after his superannuation, we are of the considered opinion that the order of provisional pension as provided in Rule 69 of the Rules could not have been passed and instead the regular pension ought to have been given. It may be mentioned here that under Rule 8 of the Pension Rules future good conduct is an implied condition of every grant of pension and its continuance and if the pensioner is convicted of a serious crime or is found guilty of grave misconduct, the appointing authority may, by order in writing withhold or withdraw a pension or a part thereof, whether permanently or for a specified period. Thus, the authorities have been given sufficient powers to withhold or withdraw the pension either in full or in part, permanently or for a specified period in case of conviction of a pensioner in a serious crime or he being found guilty of grave misconduct.

Case law discussed:
1971 (2) SCC-330
1983 (1) SCC-305
1985 (3) SCC-345
1987 (2) SCC-179
1992 (2) SCC-664
1996 (10) SCC-148
2001 (8) SCC-71

(B) Constitution of India, Art. 226-Interest-pension-delayed due on pendancy of judicial proceeding against the petitioner-held illegal-petitioner entitled for full pension and not for provisional pension-held-entitled for 10 % interest per annum on difference of amount.

Held: Para 24

We do not find any good ground for not compensating the petitioner for withholding the payment of full pension for a period of about five and a half years, we, therefore, hold that the petitioner is entitled for the interest at the rate of 10% per annum on the difference amount after 30 days as and when it became due and till the date of its actual payment.

Case law discussed:

1987 (4) SCC-328 relied on.

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

1. By means of the present petition filed under Article 226 of the Constitution of India, the petitioner Dhukhan Prasad Singh, seeks the following reliefs:

"(a) issue a Writ, Order or Direction in the nature of Certiorari quashing the Judgment and Order dated 23.7.2004 passed by the Respondent No.5 (Annexure No.10) and also the order dated 1.5.2003 (Annexure No.3) passed by the Respondent No.2.

(b) issue a Writ, Order or Direction in the nature of Mandamus commanding the Respondent No.2 to release the full pension of the petitioner along with the arrears and also release all the retiral benefits including gratuity.

(c) issue any other or further Writ, Order or Direction, which the Court may deem fit and proper in favour of the petitioner.

(d) award the cost of the petition."

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

2. According to the petitioner, he was appointed on 6th July, 1959 in the Railway Mail Service on the post of Mail Man in Gaya Division. He was reitred on 31st July, 2000 from the post of HSG-II SA from the office of HRO, RMS 'C' Division, Gaya. After his retirement the petitioner was not granted full pension nor he was given his post retiral benefits including gratuity and other entitlements. The Senior Superintendent, RMS 'C" Division, Gaya, respondent No.3, however, vide order dated 5.9.2000 granted provisional pension to the petitioner w.e.f. 01.8.2000. It is alleged by the petitioner that at the time of his retirement no departmental proceedings, whatsoever, were pending nor any disciplinary proceedings have been initiated against him after his retirement. The petitioner made several representations for the release of the full amount of retiral benefits, however, no action was taken on them whereafter the petitioner filed Original Application No.1417 of 2002 before the Central Administrative Tribunal, Allahabad, hereinafter referred to as "the Tribunal", which vide order dated 5th December, 2002 directed the authorities concerned to take a final decision on the representations made by the petitioner within two months from the date of receipt of the copy of the order and to pay his retiral benefits in case there was no impediment under law. Pursuant to the directions given by the Tribunal, the Director of Accounts (Postal), Patna-1, respondent No.2, vide order dated 1st May, 2003 had rejected the representation of the petitioner on the ground that he was facing trial in Case No.932 of 1992, which is related to his services during his employment with the respondent authorities. The aforesaid case relates to the period when the petitioner was in service and was working at Hazari Bagh

Road RMS, when certain insured articles were lost from the custody of the RMS Hazari Bagh for which a First Information Report was lodged at police station Bagapur against six persons including the petitioner. According to the petitioner, pursuant to the aforesaid F.I.R. he was issued a memorandum of charge for imposition of minor penalties under Rule 16 of CCS (CCA) Rules, 1965 along with a statement of imputation to which he submitted his reply in which he had stated that he was not even on duty when the articles were allegedly lost. After a full fledged enquiry, the disciplinary authority came to the conclusion that the petitioner could not be held guilty of any misconduct and vide orders dated 13.8.1998 he was exonerated of all the charges levelled against him. However, a charge sheet was submitted by the police authorities on 30.11.1994. The trial is still going on. After the rejection of the petitioner's representation vide order dated 1st May, 2003, the petitioner challenged the same by filing Original Application No.757 of 2003 before the Tribunal, which was allowed vide judgment and order dated 5th September, 2003. The Tribunal had quashed the orders dated 1st May, 2003 and directed the respondents to release the full pension of the petitioner and also to make payment regarding commutation of pension and gratuity payable to the petitioner along with interest at the rate of 10 per cent per annum. The order of the Tribunal dated 5th September 2003 was challenged by the respondent-authorities by means of Writ Petition No.268 of 2004 before this Court and this Court vide judgment and order dated 8th January, 2004 had allowed the writ petition on the ground that the petitioner therein had not been given proper opportunity to file counter affidavit and consequently order dated 5th September, 2003 was set aside and the matter was remanded. After the exchange of the pleadings, the Tribunal vide its judgment and order dated 23rd July, 2004 had dismissed the Original Application filed by the petitioner, which order is under challenge in the present writ petition. The Tribunal vide impugned order has rejected the claim made by the petitioner on the following ground:-

"....Perusal of Rule-9 of CCS (Pension) Rules, 1972 shows that President has the right of withholding a pension of gratuity or both either in full or in part, whether permanently or for specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the government if, in any departmental or judicial proceedings, pensioners is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement. This rule makes it clear that if in the judicial proceedings any pensioner is found to be guilty of grave misconduct of negligence during the period of service, President has right to withhold the pension or gratuity or both. He can even order recovery of the amount of pecuniary loss caused to the Government. Therefore, the contention of applicant's counsel that even if applicant is ultimately convicted in the criminal case, department cannot pass any orders against the applicant is not valid, the same is accordingly, rejected."

3. The Tribunal was further of the view that sub-rule (4) of Rule 9 nowhere says that the departmental or judicial proceedings should be instituted after the retirement as is being read by the counsel for the petitioner.

4. We have heard Sri P.N. Saxena, learned Senior Counsel, on behalf of the petitioner and Sri K.C. Sinha, learned Assistant Solicitor General of India appearing on behalf of the respondents.

5. Sri Saxena, learned Senior Counsel, submitted that once the department has exonerated the petitioner, it is no longer open to the authorities to stop or withhold the retiral benefits. He further submitted that from the perusal of sub-rule (4) of Rule 9 of the Pension Rules, hereinafter referred to as the Pension Rules, it is absolutely clear that in order to justify sanctioning of provisional pension judicial proceedings should be instituted after the retirement of the Government servant. Further, it does not apply to a case where the judicial proceedings are pending or continued from before the date of retirement of a Government servant as the words "judicial proceeding" are missing in the second para of sub-rule (4) of Rule 9 of the Pension Rules.

6. Sri K.C. Sinha, however, submitted that even if the petitioner has been exonerated in the departmental proceedings that would not entitle him to claim full retiral benefits in view of the specific provisions of sub-rule (4) of Rule 9 of the Pension Rules. According to him, as per sub-rule (4) of Rule 9 of the Pension Rules, the Government servant is entitled for only provisional pension where the judicial proceedings are instituted or after his retirement the same are continued. According to him, the Tribunal had given good reasons for rejecting the claim of the petitioner and it does not call for any interference under Article 226/227 of the Constitution of India.

7. Having given our anxious consideration to the various pleas raised by the learned counsel for the parties, we find that it is not in dispute that the petitioner has been exonerated in the departmental proceedings. He has been found by the authorities to be not on the duty on the date on which the alleged incident of loss of insured articles from Hazari Bagh Road RMS. It is also an admitted fact that the petitioner is facing trial in Criminal Case No.932/92 which is related to his services during his employment with the respondent-authorities. The question is as to whether when the petitioner has been exonerated in the departmental proceedings, merely because a criminal case is pending against him, he can be deprived of his full retiral benefits including full pension or not. The grant of pension is governed by the Pension Rules. Rule 9 of the aforesaid Rules empowers the President to withdraw or withhold the pension. For a ready reference Rule 9 is reproduced below:-

"9.Right of President to withhold or withdraw pension.

(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement.

Provided that the Union Public Service Commission shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees One thousand two hundred and seventy-five per mensem.

(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service:

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment.—

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) Deleted.

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned.

(5) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

(6) For the purpose of this rule.—

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the Government servant or pensioner, or if the Government servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted—

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court."

8. From the reading of the aforesaid Rule, we find that under sub-rule (1) the President has reserved to himself the following rights where any any departmental or judicial proceedings the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:

(1) Right to withhold the pension or gratuity, or both, either in full or in part;
(2) Right to withdraw a pension in full or in part, whether permanently or for a specified period; and
(3) Right to order recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government.

9. However, under the first proviso, before any final orders are passed, the Union Public Service Commission has to be consulted. The second proviso provides that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of Rupees one thousand two hundred seventy five.

10. Sub-clause (a) of sub-rule (2) provides for continuance of departmental proceedings instituted against the Government servant while in service by treating the same as if the Government servant had continued in service and by fiction it has been treated as proceedings under Rule 9.

11. Clause (b) of sub-rule (2) deals with the cases, where the departmental proceedings have not been instituted before the retirement of a Government servant. It provides that it cannot be instituted without the sanction of the President and it shall not be in respect of any event which took place more than four years before such institution and shall be conducted by such authority and in such place as the President may direct in accordance with the procedure applicable to departmental proceedings relating to the Government servant has been made applicable.

Sub-rule (4) provides for sanction of a provisional pension as provided in Rule 69 in the following circumstances:-

(1) where any departmental proceedings are instituted instituted against the Government servant, who has retired on attaining the age of superannuation or otherwise;

(2) where any judicial proceedings are instituted against the Government servant, who has retired on attaining the age of superannuation; or
(3) where the departmental proceedings are continued under sub-rule (2) against the Government servant who has retired on attaining the age of superannuation or otherwise.

However, under the proviso the findings recorded by the authorities be reported to the President.

Sub-rule (5) of Rule 9 provides for the amount of pension for which recovery can be ordered where the pension has not been withheld or withdrawn. It provides that the recovery should not exceed one-third of the pension admissible on the date of retirement of the Government servant.

Sub-rule (6) of Rule 9 provides for the point of time when the department

proceedings or the judicial proceedings shall be deemed to have been instituted.

12. Having analyzed the various provisions of Rule 9 of the Pension Rules, we find that under sub-rule(4) of Rule 9 of the Pension Rules, provisional pension as provided under Rule 69 has to be sanctioned only in cases where the departmental proceedings are instituted, after the Government servant has retired on attaining the age of superannuation or where the judicial proceeding are instituted against the Government servant, who has retired on attaining the age of superannuation or otherwise. The words "judicial proceedings are instituted" do not speak of judicial proceedings being continued it has not been specifically mentioned whereas in the case of departmental proceedings it has been specifically provided.

13. A Constitution Bench of the Apex Court in the case of **Deokinandan Prasad vs. The State of Bihar and others**, (1971) 2 SCC 330 while agreeing with the view of majority in the Full Bench decision of the Punjab and Haryana High Court in **K.R. Erry v. The State of Punjab**, ILR 1967 Punj. & Har 278, has held that the pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a Government servant.

14. In the case of **D.S. Nakara and others vs. Union of India**, (1983) 1 SCC 305, another Constitution Bench of the Apex Court had occasion to consider the nature of the pension. In paragraph 22 of the reports the Apex Court had held as follows:

"22. In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from undeserved want was recognised and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered unto master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount."

15. While summing up the Apex Court in paragraph 29 of the reports held as follows:

"Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give you best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service of or a surrender of rights or emolument to one retired from service. Thus the pension payable to a government employee is earned by rendering long and

efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered..."

16. It had further held that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to the rules.

17. In the case **Poonamal v. Union of India**, (1985) 3 SCC 345, the Apex Court has held that pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and anyone entitled to the pension under the rules can claim it as a matter of right.

18. In the case of **State of Uttar Pradesh v. Brahm Datt Sharma and another**, (1987) 2 SCC 179, the Apex Court has held that though pension is not a bounty but it is a right earned by the government servant on the basis of length of service, nonetheless grant of full pension depends on the approval of service rendered by the employee.

19. In the case of **All India Reserve Bank Retired Officers Association and others v. Union of India and another**, 1992 Supp.(1) SCC 664, the Apex Court has held that the pension is not a charity or bounty nor is it gratuitous payment solely dependent on the whim or sweet will of the employer. It is earned for rendering long service and is often described as deferred portion of compensation for past service. It is in fact in the nature of social security plan to provide for the December of life of superannuated employee. Such social security plans are consistent with socio-economic requirements of the Constitution when the employer is a State within the meaning of Article 12 of the Constitution.

20. In the case of **Vasant Gangaramsa Chandan v. State of Maharashtra and others**, (1996) 10 SCC 148, the Apex Court has held that the pension is not a bounty of the State. It is earned by the employee for the service rendered to fall back, after retirement. It is a right attached to the office and cannot be arbitrarily decided.

21. In the case of **Subrata Sen and others v. Union of India and others**, (2001) 8 SCC 71, the Apex Court has held as follows:

"....Payment of pension does not depend upon pension fund. It is the liability undertaken by the Company under the Rules and whenever becomes due and payable is to be paid. As observed in Nakara case(1983)1 SCC 305) pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer nor an ex gratia payment. It is a payment for the past services rendered. It is social welfare measure rendering socio-economic justice to those who in the hey-dey of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch..."

22. Thus, it is well settled by the Apex Court that the pension is not a bounty. It is a legal entitlement which can only be curtailed by an express provision of law and not otherwise. Non-mention of the word 'continued' in respect of the judicial proceeding in sub-rule(4) of Rule 9 of the Pension Rules is significant. As

sub-rule (4) of Rule 9 of the Pension Rules does not contemplate a situation where judicial proceedings have been instituted prior to the superannuation of the Government servant and are continued after his superannuation, we are of the considered opinion that the order of provisional pension as provided in Rule 69 of the Rules could not have been passed and instead the regular pension ought to have been given. It may be mentioned here that under Rule 8 of the Pension Rules future good conduct is an implied condition of every grant of pension and its continuance and if the pensioner is convicted of a serious crime or is found guilty of grave misconduct, the appointing authority may, by order in writing withhold or withdraw a pension or a part thereof, whether permanently or for a specified period. Thus, the authorities have been given sufficient powers to withhold or withdraw the pension either in full or in part, permanently or for a specified period in case of conviction of a pensioner in a serious crime or he being found guilty of grave misconduct.

23. The question still arises as to whether the petitioner should be compensated by award of interest for wrongful withholding of the pension. In the case of **O.P. Gupta v. Union of India and others**, (1987) 4 SCC 328 the Apex Court has held as follows:

"Normally, this Court, as a settled practice, has been making direction for payment of interest at 12 per cent on delayed payment of pension. There is no reason for us to depart from that practice in the facts of the present case."

24. We do not find any good ground for not compensating the petitioner for withholding the payment of full pension for a period of about five and a half years, we, therefore, hold that the petitioner is entitled for the interest at the rate of 10% per annum on the difference amount after 30 days as and when it became due and till the date of its actual payment.

25. In view of the foregoing discussion, we are of the considered opinion that the orders dated 1.5.2003, filed as Annexure No.3 to the writ petition and passed by the Senior Superintendent RMS 'C' Division Gaya, respondent No.3 and the orders dated 23rd July, 2004 passed by the Tribunal, filed as Annexure No.10 to the writ petition, cannot be sustained and are set aside.

26. The writ petition succeeds and is allowed. A writ of mandamus is issued directing the Director of Accounts (Postal) Patna-1, respondent No.2, to release full pension of the petitioner including arrears along with interest as mentioned above within three months from the date a certified copy of this order is filed before the said respondent no.2. However, the parties shall bear their own costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.4.2006

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 17382 of 2006

Ram Naval ...Petitioner
Versus
The Board of Revenue and others ...Respondents

Counsel for the Petitioner:
Sri A. Chaturvedi,
Sri R.S. Mishra

Counsel for the Respondents:
Sri V.K. Singh,
Sri Vimlendu Tripathi
Sri Rahul Sripat
S.C.

U.P. Consolidation of Holdings Act-Section-5 (2)-Abatement of revision arises out from Restoration Application in suit under 229-B of U.P.Z.A. 8C L.R. Act- if stay has been granted in revision against the order allowing Restoration-suit would revive and the suit would abate-but if no stay granted–No question of abatement.

Held- Para 5

However the ratio of the case only is that if there is an order in the revision against the restoration order staying the operation of the restoration order the suit would not revive and the subsequent issuance of the notification under Section 4 of the Act would have no effect on the pending revision, which would not abate. This view does not affect the view that I am taking.

Case law Discussed:
1985 R.D. 163
1992 R.D. 100
2003 (5) AWE-4296

(Delivered by Hon'ble Janardan Sahai, J.)

1. A suit under Section 229-B of the U.P. Zamindari Abolition & Land Reforms Act was filed by Binda and Lalita transferors of respondent no.6 against the petitioner and other defendants. The suit was decreed. An appeal was filed by the petitioner, which was allowed, and the suit was remanded to the trial court for fresh decision. According to the petitioner the suit was dismissed in default but it was restored on 26.10.1976 and that it was again dismissed on 21.4.1977 but was restored on 18.8.1997 and that thereafter on that date itself the trial court passed a compromise decree. The factum of restoration as well as of the compromise between the parties is disputed by Shri Rahul Sripat counsel for respondent no.6. This dispute about the facts however does not have any bearing on the controversy requiring decision in this writ petition and therefore the dispute about these facts can be left here. An application for setting aside the compromise decree was filed by respondent no.6 on 2.5.2000, which was allowed by the trial court by its order-dated 24.6.2002. The trial court took the view that no notice was served upon the respondent no.6 the transferee and that consolidation proceedings were going on when the compromise decree was passed, a finding, which in effect is that the compromise order could not have been passed as the suit had abated. Against the order of the trial court the petitioner preferred a revision, which was allowed by the Additional Commissioner. The Additional Commissioner took the view that the consolidation proceedings started in the year 1986 and the revision in proceedings for setting aside the decree therefore would not abate. Against the order of the Additional Commissioner, a revision was preferred by respondent no.6. The Board of Revenue in its impugned order dated 28.2.2006 has taken the view that as the consolidation proceedings had started in the year 1986 the revision ought to have been abated and it passed an order abating the revision as well as the suit. Aggrieved the present writ petition has been filed.

2. I have heard Shri R.S. Mishra, counsel for the petitioner and Shri Rahul

Sripat counsel for respondent no.6. Counter and rejoinder affidavits have been exchanged in this petition and the counsel for the parties agree that the writ petition may be disposed of finally.

3. The only controversy involved in the present case is whether the Board of Revenue was right in taking the view that the proceedings had abated. The restoration application was filed by respondent no.6, which was allowed by the trial court. The law upon the point that a restoration application does not abate on the issuance of a notification under the Consolidation of Holdings Act is settled, but doubt has been raised upon the question whether a pending appeal or revision arising out of an order allowing restoration would abate. In **Sheo Pujan Singh and another Vs. Smt. Bhagesara Kunwari and others** (1985 RD 163) it has been held that restoration application and revisions arising there from do not abate under section 5 (2) of the U.P. Consolidation of Holdings Act. Section 5 (2) of the Act provides for abatement of proceedings relating to correction of the records and of cases in which declaration of rights over land is involved. An application for restoration or to set aside an ex parte decree does not by itself involve a declaration of rights of the parties over land as what is to be decide in these proceedings is whether sufficient cause for absence has been shown and therefore such an application does not abate under section 5(2)(a) of the Act. An application for setting aside a compromise decree too does not involve declaration of rights over land.

4. The question which however has arisen in this case is if an ex parte decree or a compromise decree is set aside and the suit is restored but a revision against the order of restoration is pending whether the suit and the revision against the restoration order would abate on account of notification under section 4 being issued or on account of pendency of consolidation proceedings. The language of Section 5 of the Act is clear that unless there is an order of abatement passed the suit does not automatically abate. Upon this point counsel for the petitioner has cited the case of Ram Charit Singh Vs. Dy. Director of Consolidation, Azamgarh and others, 1992 RD 100 in which it has been laid down that there is no automatic abatement and it is only when an order of abatement is passed that the suit or proceedings abate. This proposition is not disputed by counsel for the respondents. It is nobody's case that any order for abatement of the suit had been passed. The result therefore is that the suit had not abated in this case. An appeal or revision against the order of restoration or of setting aside a compromise decree is a continuation of the restoration proceedings. It is well settled that an order, which is challenged in appeal puts the order impugned into jeopardy. If subsequently the appeal/ revision is allowed the consequences of the order set aside would, unless there are indications otherwise in the statute, be set at nought either automatically or on an application filed by the party in whose favour the appellate order is passed and the parties would be restituted to their original position. The intention of the legislature is clear firstly Section 5 (2) (a) does not provide for abatement of the restoration application or of an appeal or revision arising out of a restoration application which means that the appeal or revision whether against an order rejecting or allowing a restoration application would

have to be decided on merits. This is also clear from the fact that it is only when an order of abatement is passed that the suit abates. There being, no automatic abatement, it cannot be said that there was any automatic revival of the suit in consequence of the order of restoration. The order of the restoration having been put into jeopardy in the revision, it cannot be said that the revision would become infructuous in the absence of anything to the contrary in Section 5 (2). The view that I take is also in line with the decision in Sheo Poojan Singh's case (supra) cited by the petitioner's counsel.

5. Counsel for the respondents relied upon a Single Judge decision of this court in Smt. Dhanpati (D) Through L.R. Vs. Board of Revenue & Others 2003 (5) AWC, 4296. In that case a compromise decree was set aside on an application filed by one of the parties. Against that order a revision was filed in which operation of the order restoration was stayed and also further proceedings in the suit. On these facts this court took further proceedings in the suit. On these facts this court took the view that as the operation of the order of restoration had been stayed and also the proceedings, the suit did not revive and consequently there was no abatement on account of notification of consolidation operations. It is no doubt true that this court expressed the views that if no stay order is passed in the revision against the restoration order the suit would revive in consequences of the order of restoration and would abate under section 5 (2) (a). However the ratio of the case only is that if there is an order in the revision against the restoration order staying the operation of the restoration order the suit would not revive and the subsequent issuance of the notification under Section 4 of the Act would have no effect on the pending revision, which would not abate. This view does not affect the view that I am taking. The case is therefore distinguishable. For these reasons, the writ petition is allowed. The orders dated 15.4.04 and 28.2.06 passed by the Board of Revenue are aside. The Board of Revenue is directed to decide the revision on merits expeditiously and if possible within six months from the date a certified copy of this order is produced before it. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2006

BEFORE
THE HON'BLE R.P. MISHRA, J.
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 282 of 1999

Kewla Prasad ...Petitioner
Versus
Bank of Baroda & others ...Respondents

Counsel for the Petitioner:
Sri S.C. Dwivedi
Sri Radhey Shyam
Sri R.S. Dwivedi

Counsel for the Respondents:
Sri V.B. Singh
Sri U.P. Singh
Sri D.K. Pandey
Sri Manoj Kumar
Sri A.K. Rathore
Sri C.S. Singh
Sri Vimlesh Srivastava

Constitution of India, Article 226- Recovery of loan for purchase of Trakker- not under state sponsored scheme-cannot be recovered as arrears of land revenue.

Held- Para 35

The last submission made by Shri Radhey shyam has also to be countenanced. Relying on the decision of the Apex Court in the case of *Ekbal Nasir Usmani Vs. C.B.I. reported in 2006(2) Alld. Daily Judgements, 603* it has been urged that the loan, which had been advanced to the petitioner, was not under any State Sponsored Scheme and therefore, it could be recovered as arrears of land revenue. The decision relied on by the learned counsel for the petitioner clearly supports his submission and therefore, the writ petition even otherwise can succeed on this ground as well. The loan was admittedly advanced for the purchase of a vehicle, which was not an agricultural loan and appears to be according to the facts disclosed in the counter affidavit of the bank, not a loan under any State Sponsored Scheme.

Case law discussed:
2006(2) ADJ-603

U.P.2A 8C LR Rules- 285-H-(C)-Objection filed within 30 days from the date of auction sale- remained pending till confirmation of sale-malafide-illegal-contrary to law.

Held-Para 30

The non-disposal of the petitioner's application within 30 days, therefore, appears to be a malafide act on the part of the respondent nos. 2 to 5 who some how the other wanted to confirm the auction in favour of the respondent no.63. The process adopted by the respondent nos. 2 to 5 was, therefore, untenable and is contrary to the law laid down in the case of Ghanshyam (supra) and which squarely applies on the facts of this case.

Case law discussed:
1999 RD 203
AIR 1990 SC-219

(Delivered by Hon'ble A.P.Sahi, J.)

1. The petitioner, a villager and a farmer has filed this writ petition to save his prized possession of a small parcel of land by filing this writ petition, challenging the auction proceedings in favour of the respondent no.6 Rama Kant Patel, which property had been auctioned against a loan advanced by the Bank of Baroda to the petitioner for the purchase of a vehicle (make trekker of Hindustan Motors Ltd.) bearing Registration No. UGV 521 way back in the year 1986.

2. The loan was approximately Rs.70,000/- which the petitioner attempted to return by making certain initial deposits but later on defaulted as a result whereof the respondent bank proceeded to issue a recovery certificate addressed to the Collector for recovery of unpaid dues from the petitioner as arrears of land revenue under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950. The recovery appears to have been initiated as per the terms of the agreement with the bank.

3. The agricultural land of the petitioner appears to have been mortgaged with the bank being plot no.212 area 0.656 hectares and plot no. 898 area 0.113 hectares situated in Village Badhwa Tahsil Meja District Allahabad. According to the records, which have been produced before the Court pertaining to the auction proceedings, plot no.898 is situate beside the road and is a prime land.

4. The default appears to have been made way back in the year 1994 whereupon the certificates of recovery

was issued by the bank on 7th Jan., 1994 for a sum of Rs.1,56,990/-

5. The revenue authorities after receipt of the aforesaid certificates of recovery from the bank issued the relevant proclamations contained in Zamindari Abolition form Nos. 69,70,73 and 74 on 6.2.97, 11.2.97, 1.3.97 and 12.3.97 respectively whereby the aforesaid two plots of the petitioner was proposed to be auctioned. The auction was to be held in terms of Section 284 of the U.P. Zamindari Abolition and Land Reforms Act, read with rules 281 to 285-E. Rule 282 contains the provisions for issuance of proclamation of sale in Z.A. Form No.74 Rule 283 clearly provides that the Collector shall state the estimated value of the property to be calculated in terms of the revenue manual.

6. After the proclamation of sale had been issued it appears that the petitioner filed a suit being Suit No. 629 of 1997 as a result whereof the auction came to be postponed but the suit was ultimately dismissed on 15.09.98 and the appeal preferred by the petitioner is also indicated to have been dismissed. The date of auction thereafter was fixed on 22.7.98. The respondent no.6 Rama Kant Patel was indicated as the higher bidder as his bid was of Rs.1,23,000/- I appears certain objections were raised with regard to the inadequacy of the bid amount and certain reports were called for, which indicated the inadequacy of the amount, as a result whereof the bid of Rama Kant Patel was rejected on 26.8.98. The petitioner it appears found some breathing time and subsequently utilize the same by making good the deposits which were due against him in order to avoid any further trouble of auction. From the records And from the affidavits exchanged between the parties it appears that the petitioner deposited a sum of Rs.1,15,000/- on 31.8.98 and a further sum of Rs.10,000/- on 26.9.98

7. Thereafter it appears, that since the amount due against the petitioner stood reduced up to the aforesaid extent, a fresh auction notice was issued against the petitioner on 29.10.98 which indicated a realization of the principle amount of Rs.32,990/- plus interest and recovery charges.

8. From the records there appears to be some difference in the amount as projected by the bank. However from the note sheet of the records maintained by the Sub Divisional Officer and the Tehsildar Meja it appears that out of the total balance of Rs.1,57,990/- an adjustment was made of the amount deposited by the petitioner referred to herein above which was Rs.1,25,000/- and the balance of Rs.32,990/- was sought to be recovered through the auction. This is evident from the orders contained on record dated 31.8.98 and 26.9.98 by the order dated 26.9.98 the next date for auction was fixed as 29.10.98. A very strange noting appears in the file below the order-dated 26.9.98. The said noting appears to have been prepared by some official which states that today i.e. on 29.10.98 in spite of repeated announcements being made no one turned up and as such the next date fixed for auction was 2.12.98. From a perusal of the records which have been produced by the learned standing counsel, it is evident that the order was issued on 26.9.98 under the signature of the sub Divisional Officer, Meja and countersigned by the Tahsildar Meja fixing 29.10.98 as the date

of auction and the auction officer, who was to conduct the auction, was also nominate, namely the naib Tahsildar Lal Tara. The note which has been prepared by the said auction officer and referred to herein above, postponing the date of auction to 2.12.98, does not indicate any approval from the Sub Divisional Magistrate or Tahsildar as was done in the past and the date endorsed by the said auction officer in the aforesaid note is 26.9.98. The aforesaid note, therefore, appears to have been manipulated and the date 26.9.98 clearly indicates that the note was manipulated with some motive in as much as if the note was being prepared on 29.10.98, the signature below the said note could not have been made on 26.9.98. There is a separate sheet of paper, thereafter in records, which is an order of the Sub Divisional Magistrate and Tehsildar dated 29.10.98 fixing date of auction on 2.12.98. The manner in which the order sheet has been maintained causes a serious doubt on the procedure adopted by the respondents in view of the facts indicated herein above and the auction cannot be said to have been conducted fairly. The aforesaid apprehension is reaffirmed on account of the fact that on the date of fresh auction i.e. on 2.12.98 the same Rama Kant Patel again turned up to be the highest bidder who offered a sum of Rs.2,18,000/- which bid came to be accepted and has given rise to the present proceedings.

9. The petition was initially filed with a prayer of mandamus directing the respondents to permit the petitioner to deposit the entire amount which was due against him under Rule 285-H but later on the petition was amended for quashing of the order dated 4.1.99 passed by the respondent no.3 Sub Divisional Officer, rejecting the application of the petitioner for making the deposit under Rule 285-H and also simultaneously confirming the auction in favour of the respondent no.6.

10. All the respondents have filed their counter affidavits to which a reply has been filed by the petitioner.

11. We have heard Shri Radhey Shyam learned counsel for the petitioner, learned standing counsel for the respondent nos.2 to 5 and the learned counsel for the respondent no.6.

12. We have also perused the counter affidavit filed on behalf of bank on whose behalf Shri V.B. Singh had appeared on earlier occasions but nobody turned up on its behalf when the matter was finally heard on the date when judgement was reserved.

13. Shri Radhey Shyam learned counsel for the petitioner has urged that the order dated 4.1.99 is erroneous in law in as much as the same is in violation of the provisions of Rule 285-H of the Z.A. and L.R. Rules, 1951. He further contends that the entire recovery proceedings stand vitiated in view of the recent pronouncement of the Apex Court to the effect that unless and until the money advanced by the bank is under a State Sponsored Scheme, the same could not be realized as arrears of land revenue. He further contends that the respondents without disposing of the application and permitting the petitioner to deposit the entire amount under a fresh auction notice dated 29.10.98; they could not have proceeded to conform the auction in favour of the respondent no.6. He further submits that the auction has been confirmed without recording any

satisfaction as contemplated under Rule 285-J and lastly that the respondents have proceeded to sell the entire property mortgaged when it was not necessary in view of the fact that the petitioner had bonafidely deposited a major part of the amount sought to be recovered as a result whereof a sum of Rs.32,990/- plus other expenses was only required to be recovered. According to Shri Radhey Shyam even if it was necessary to proceed with the auction then the respondent revenue authorities ought to have considered this aspect of this matter before issuing a fresh proclamation on 29.10.98.

14. He has supplemented the aforesaid arguments by futher stating that Rama Kant Patel respondent no.6 was a long time political rival of the petitioner on account of the contest to the election of the office of Village Pradhan and was trying to corner the petitioner by humiliating him and seeking to usurp the petitioner's property by motivating and manipulating the auction in his favour.

15. From a perusal of the counter affidavit of the bank it appears that the bank is pressing for the amount which according to them has again swelled up and as such it was urged on behalf of the bank that the amount realized from fresh auction proceedings be remitted to it without any further delay in order to clear all the dues outstanding against the petitioner.

16. We have also perused the entire records of the auction proceedings in respect of the property in dispute as produced by the learned standing counsel. We have also perused the counter affidavit of Ram Datt filed on behalf of the respondent nos. 2to 5.

17. Learned standing counsel for the respondents has urged that since the petitioner failed to make the deposits as required under rule 285-H therefore, the auction proceedings cannot be set aside and as such have been rightly confirmed.

18. Learned standing counsel has pointed out that an undated application is on record stated to have been signed by the petitioner praying for setting aside the sale on which an order was endorsed, on 17.12.98 by the S.D.M. Meja.

19. We have perused the said order endorsed on the said application. The application is undated.

20. Shri Radhey Shyam learned counsel for the petitioner has out rightly denied the moving of any such application on behalf of the petitioner and it has been urged that it bears the forged signatures of the petitioner.

21. Even assuming for the sake of arguments that such an application was moved, the order endorsed thereon dated 17.12.98 by the Sub Divisional Officer indicates that the application shall be kept on record and the details of account shall be obtained from the bank by the concerned official who had been called upon by the Sub Divisional Officer to do so. Neither the order sheet nor the records indicate any attempt made by the official to have complied with the aforesaid order stated to have been endorsed on 17.12.98.

22. The petitioner contends that the only application moved by him for setting aside the certificate under Rule 285-H

was on 21.12.98 before the District Magistrate who marked the said application to the A.D.M (Finance), which in turn was marked to the Sub Divisional Magistrate, Meja respondent no.3 take appropriate action in the matter. The Sub Divisional Magistrate appears to have directed the officer subordinate to him to place the said application on record on 22.12.98.

23. The date of auction was 2.12.98 and as such both the applications referred to herein above were well within the time prescribed under Rule 285-H. A perusal of the endorsement made on both these applications do not indicate any direction or any order by the Sub Divisional Magistrate or the Tehsildar directing the petitioner or permitting him to deposit the amount referred to therein.

24. The contention of the learned standing counsel and the learned counsel for the respondent no.6 is that both the applications stood rightly rejected by the order dated 4.1.99 as no deposits had been made by the petitioner nor the receipt of any such deposit accompanied the said application as required under Rule 285-H. In these circumstances, it has been urged that the non-deposit of the amount under Rule 285-H disentitles the petitioner to get his claim considered for setting aside the sale.

25. In order to appreciate the aforesaid contention, Rule 285-H is quoted herein below:

"***285-H.(1) Any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale, apply to have the sale set aside on his depositing in the Collector's office-***

(a) or payment to the purchaser, a sum equal to 5 percent of the purchase money; and

(b) for payment on account of the arrear, the amount specified in the proclamation in Z.A. Form 74 as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been paid on that account and

(c) The costs of the sale

On the making of such deposit, the Collector shall pass an order setting the sale:

Provided that if a person applies under the 285-I to set aside such sale, he shall not be entitled to make an application under this rule."

26. A perusal of the said rules, leaves no room for doubt that the certificate will be set aside only after the amount referred to therein is deposited. However, the rule requires moving of an application followed by deposit to be made as indicated therein.

27. Shri Radhey Shyam learned counsel for the petitioner relying on the decision of this Court in the case of ***Ghanshyam Vs. Addl. Commissioner, reported in 1991 Rd 203*** has urged that the condition precedent is that an application shall be moved within 30 days of the date of auction. He further contends that the aforesaid decision clearly holds that the actual deposit need not be made within 30 days.

28. We have perused the aforesaid judgement of the learned single Judge and we clearly find that the view expressed therein is inconformity with law. The decision in para 6 states thus "…..***the person can only express willingness and***

make offer to deposit but no deposit can be made unless an order to that effect is passed by the Collector."

29. The court went on to hold that a person cannot be allowed to suffer because of inaction or mistake of the authorities.

Learned standing counsel and the learned counsel for the respondent no.6 could not point out any order having been passed by the Sub Division Magistrate or any other authority for that matter, directing the petitioner and permitting him to deposit the amount as required under Rule 285-H. The respondents, therefore, have failed to comply with the provisions of law and it appears that the same was done deliberately in order to allow the period of 30 days to lapse in order to confirm the sale in favour of the respondent no. 6. The procedure therefore, having not been followed and the petitioner having been not allowed to make the deposit by a specific order, it was not open to the Sub Divisional Officer to have rejected the application of the petitioner after the expiry of 30 days on 4.1.99. The Sub Division Magistrate has no where indicated any reason for not having allowed the petitioner to have deposited the amount either in the alleged order dated 17.12.98 or in the order dated 4.1.99. There is no explanation coming forth in the counter affidavit of the respondent nos. 2 to 5 as to why the petitioner's application had not been disposed of before the expiry of 30 days. In the absence of any such explanation the only inference, which can be drawn, is that the petitioner was denied the right to get the sale set aside even though he had filed the application well within time. The inaction on the part of the respondent revenue authorities by not passing any order permitting the petitioner to deposit the amount with the respondents clearly indicates a clear lapse on their part for which the petitioner cannot be penalized.

30. The non-disposal of the petitioner's application within 30 days, therefore, appears to be a malafide act on the part of the respondent nos. 2 to 5 who some how the other wanted to confirm the auction in favour of the respondent no.63. The process adopted by the respondent nos. 2 to 5 was, therefore, untenable and is contrary to the law laid down in the case of Ghanshyam (supra) and which squarely applies on the facts of this case.

31. The stand taken by the respondents, however, that the petitioner did not make the deposit cannot be accepted as the petitioner was clearly denied the aforesaid opportunity by a deliberate inaction on the part of the respondent nos. 2 to 5.

32. The next issue raised by Shri Radhey Shyam is that no satisfaction was recorded by the Sub Division Magistrate as per Rule 285-J before proceeding to confirm the auction in favour of the respondent no.6 on 4.1.99. A perusal of the order dated 04.1.99 which is endorsed on the file in the records produced before us does not indicate any such deliberation by the Sub Division Magistrate. The order, therefore, confirming the auction in favour of the respondent no.6 cannot be sustained in view of law laid down by this Court in the case of ***Thakurji Maharaj Vs. collector reported in 1991 Rd 203 (Hindi Section).*** The aforesaid view has been further endorsed by the Apex Court in the case of Smt. Shanti Devi Vs. State of U.P., 1997 Rd 583. A perusal of the

two decisions clearly indicate that an auction cannot be confirmed unless and until the Sub Division Magistrate records a clear finding about the satisfaction in respect of the compliance or otherwise of the provisions of Section 154. In the instant case, there is no such satisfaction recorded and therefore, the order confirming the sale on 4.1.99 is unsustainable on this score as well.

33. The third issue raised by Shri Radhey Shyam also deserves consideration which is that the respondents after having taken a decision to issue a fresh auction notice upon a deposit of Rs. 1,25,000/- having been made by the petitioner, the same could have been proceeded after a consideration of the fact as to whether it was necessary to put to auction the entire mortgaged property for satisfying the reduced amount. It is evident that the amount according to the fresh auction notice stood considerably reduced as is evident from a perusal of the Z.A. Form No. 74 dated 29.10.98

34. Shri Radhey Shyam learned counsel for the petitioner is right in his submission by placing reliance on the decision of the Apex Court in the case of ***A. Narriya Vs. M. Subbarao reported in AIR 1990 Sc 219.*** The Apex Court in the said decision has clearly indicated that the tendency to blind foldedly sell the entire property mortgaged without assessing the necessity of doing so, would be sufficient to set aside the sale proceedings. The said decision clearly supports the stand taken by the petitioner in the facts of the present case as well, in as much as once the amount was considerably reduced on account of the bonafide attempts made by the petitioner in depositing a substantial amount of money as is evident from the records then the respondents should have assessed the necessity of putting the entire property to auction before issuing of fresh auction notice. The aforesaid exercise does not appear to have been under taken and the fresh auction notice was again issued in a cyclostyled fashion which action cannot be sustained in law.

The writ petition, therefore, deserves to succeed on the ground as well.

35. The last submission made by Shri Radhey shyam has also to be countenanced. Relying on the decision of the Apex Court in the case of ***Ekbal Nasir Usmani Vs. C.B.I. reported in 2006(2) Alld. Daily Judgements, 603*** it has been urged that the loan, which had been advanced to the petitioner, was not under any State Sponsored Scheme and therefore, it could be recovered as arrears of land revenue. The decision relied on by the learned counsel for the petitioner clearly supports his submission and therefore, the writ petition even otherwise can succeed on this ground as well. The loan was admittedly advanced for the purchase of a vehicle, which was not an agricultural loan and appears to be according to the facts disclosed in the counter affidavit of the bank, not a loan under any State Sponsored Scheme.

36. Thus on all scores it is evident that the auction of the petitioner's agricultural land was carried out unfairly and was in violation of law as recorded herein above.

37. The writ petition, therefore, must succeed and accordingly the order rejecting the application of the petitioner for depositing the amount as required

under Rule 285-H as also the order confirming the auction in favour of the respondent no.6 dated 4.1.99 is quashed.

38. The writ petition succeeds and is allowed. Since we have found the auction proceedings to be in violation of law, therefore, the same also stands set aside. The respondent no.6 dated 4.1.99 is quashed.

39. However, before parting with the case we would observe that the petitioner should immediately approach the respondent bank and negotiate to clear all the entire dues out standing against the petitioner so that the petitioner's property may again not receive the same fate at the hands of the respondents as has happened in the past. However, in the event the petitioner fails to clear all the dues then it shall be open to the respondent bank to recover the amount keeping in view of the law referred to herein above in the case of Ekbal Nasir Usmani Vs C.B.I.(supra) and the other decisions in this respect pronounced by the Apex Court.

Writ Petition is allowed. No orders as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.5.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 5169 of 2006

Gulzar Ahmed and others ...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri V. P. Srivastava
Alpana Dwivedi

Counsel for the Opposite Parties:
A.G.A

Code of Criminal Procedure–S.482-Quashing of charge sheet-offence under section 147/148/149/307 IPC–On the ground-the matter has been referred to CBCID who had completed the investigation- but the submission of final report has been stayed by High court-cognizance taken by the C.J.M.-held proper-entrusting the matter for further investigation by CBCID-its report cannot be ground for Quashing the criminal proceeding.

Held- Para 5

Therefore, on the basis of entrusting the matter to further investigation or its report shall not be any ground for setting the order of cognizance or quashing the criminal proceedings. Therefore, the prayer for quashing the criminal proceedings and the impugned orders dated 14.9.05 and 28.2.06 is refused.

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

1. Heard Sri V.P. Srivastava, Senior Advocate assisted by Alpana Dwivedi, learned counsel for the applicants and the learned A.G.A.

2. This application has been filed by the applicants Gulzar, Ikrar, Arif Ali, Ahmad Ali, Hazi Mustaq Ali Khan, Mohd. Yaseen alias Jaggu, Mihd. Shakeel Khan alieas Phool Miyan with a prayer that the proceedings of case no. 2069 of 2005 State Vs. Gulzar and others arising out of the charge sheet submitted in case Crime No. 343 of 2005 under sections 147, 148,149,307 and 302 I.P.C. P.S. Bhongaon district Mainpuri, pending in the court of learned C.J.M. Mainpuri and

the order dated 14.9.2005 and 28.2.2006 passed by the learned C.J.M. Mainpuri may be quashed.

3. It is contended by the learned counsel for the applicants that in the present case local police has submitted charge sheet but the State Government has referred the matter to the CBCID for doing further investigation which is pending. But the order of the **Government** referring the matter to the CBCID for investigation is under challenge before this court, in Criminal Misc. in writ petition No. 12719 of 2005, in which it has been ordered that "till further orders inquiry by the CBCID may go on but they will not file any report in the court." In such a situation no report has been filed by the CBCID in the court concerned. Therefore, the aforesaid criminal proceedings may be quashed.

4. It is opposed by the learned A.G.A. by submitting that even the report of the CBCID is submitted in favour of the applicants, they will have to face the trial because the learned magistrate concerned has already taken cognizance on the police report submitted under section 173 (2) Cr.P.C.

5. Considering the facts and circumstanced of this case and the submissions made by the learned counsel for the applicants and the learned A.G.A. and from the perusal of the record, it appears that in the present case FIR was lodged by Mohd. Muqeem Khan on 9.6.05 at abourt 11.15 pm. In respect of the incident which had occurred on 9.6.05 at about 10.30 pm, the FIR was lodged against the applicants under sections 147,148,149,307 and 302 IPC in case crime no 343 of 2005 P.S. Bhongaon district Mainpuri, in the present case one Shagir Ahmad, Advocate, has been shot dead by the applicants, the matter was investigated by the local police and after collection the material submitted the charge sheet against the applicants, on the basis of that charge sheet the learned C.J.M. Mainpuri has taken cognizance on 14.9.05 and summoned the applicants to face the trial. Thereafter, at the instance of the applicants the State of U.P. has decided to entrust the matter for investigation to CBCID. And the decision has been communicated to the Director General of CBCID. vide letter dated 16.11.05. Thereafter on behalf of the applicants an application dated 27.2.2006 has been moved in the court of the learned C.J.M. Mainpuri with a prayer that cognizance order dated 14.9.05 may6 be recalled or set aside because the matter has been entrusted to the CBCID for doing the investigation which is still pending and N.B.W. issued against the applicants may also be recalled, but the same was rejected by the learned C.J.M. on 28.2.06 the order of the State **Government** entrusting the investigation to the CBCID has been challenged by the complainant Sri Mohd. Muqeem Khan by way of filing Criminal Misc. Writ Petition No. 12719 of 2006 which is still pending. From the perusal of the orders dated 14.9.05 and 28.2.06 passed by the learned C.J.M., it appears that the impugned orders are not suffering from any illegality or irregularity, "*because in any criminal matter if the cognizance has been taken by the magist5rate on the basis of the police report submitted under section 173(2) Cr.P.C., thereafter the matter is referred to further investigation it will not effect the order of cognizance but the report submitted under section 173(8) Cr.P.C. may be used only for*

corroboration and contradiction purposes, even the report of further investigation shows that the accused has not committed alleged offence even then it will not effect the order of cognizance in any manner. Therefore, on the basis of entrusting the matter to further investigation or its report shall not be any ground for setting the order of cognizance or quashing the criminal proceedings. Therefore, the prayer for quashing the criminal proceedings and the impugned orders dated 14.9.05 and 28.2.06 is refused.

6. It is further contended by the learned counsel for the applicant that the applicants have moved stay vacation application before this court in writ petition No. 2719 of 2005. The applicants are peace loving persons they want to appear before the court concerned and they undertake that they shall appear before the court concerned on or before 10th July, 2006. till then the N.B.W issued against them maybe kept in abeyance.

7. However, is directed the applicants shall appear before the court concerned on or before 10th July, 2006. till then the N.B.W. issued against them shall be kept in abeyance.