ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2006

BEFORE
THE HON'BLE BHARTI SAPRU, J.

Civil Misc. Writ Petition No. 40249 of 2002

Javed Alam Khan ...Petitioner
Versus
M.R. Sherwani Higher Secondary School and others ...Respondents

Counsel for the Petitioner:
Sri Vipin Saxena

Counsel for the Respondents:
Sri Brij Raj Singh
Sri H.N. Singh
Sri B. Narain Singh
S.C.

U.P. Intermediate Education Act, 1921-Chapter II Regulation-17-Selection of Asstt. Teacher-in minority institution-petitioner being M.A. B.Ed.-applied well within time-No call for interview given-respondent no. 6 being son of the clerk of institution in question recommended for appointment-D.I.O.S. granted approval-ignoring the objection raised by petitioner-held-authorities failed to discharge their statutory obligations-approval granted in violation of regulation 10 f and 11-deserves to be quashed.

Held: Para 14

Having heard learned counsel for the petitioner and the learned counsel for the respondents, I am of the opinion that the respondents authority failed to perform their obligations properly as are envisaged under Regulation 17 Chapter II read with Regulations 10 (f), 11 and therefore the order of approval was granted in violation of the same. As such the order of approval dated 17.5.2002 deserves to be quashed.

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

1. Heard learned counsel for the petitioner, learned counsel for the respondent no.5, learned counsel for the respondents no. 1 and 2 and respondent no. 6.

2. The petitioner has filed this writ petition seeking a writ of certiorari to quash entire selection process adopted by the respondent no. 2 for the post of Assistant Teacher in the institution namely M.R. Sherwani Higher Secondary School in pursuance of the advertisement dated 21.6.2001 and also to quash the selection and advertisement of the respondent no. 6 and to quash the financial approval granted by the respondent no. 3 to the appointment of the respondent no. 6 granted on 17.5.2002. The petitioner has also made a prayer for a writ of mandamus commanding the respondent no. 2 to make a fresh selection on the post of Assistant Teacher (Sociology) in the institution in question. The other prayers are also consequential prayers for writ of mandamus.

3. The institution M.R. Sherwani Higher Secondary School (hereinafter referred to as the institution) is a minority institution, which is governed by the U.P. Intermediate Education Act, 1921 and as it is a minority institution, the provision of section 16FF of the Act, 1921 have special application to the institution in question. The procedures for filling up the vacancies of the head of the institution and teachers by direct recruitment of a minority institution are regulated under Chapter II of Regulation 17 of the Act. The Regulation 17 (e) provides as under:

"The provisions of clause (e) and (f) of Regulation 10 and those Regulations 11, 12 and 16 shall mutatis mutandis apply to selections made under this regulation."

4. Learned counsel for the petitioner has argued that in the present case, the provisions of Regulation 10 (f) and Regulation 11 have been violated.

5. The facts of the case are that an advertisement was made on 26.1.2001 by which the respondent institution inviting applications for the post of Assistant Teachers for teaching subject of the Sociology. The advertisement also mentions that the candidate should apply at least for two subjects from Geography, History, Political Science and Economics in B.A. and should be trained.

6. The petitioner who is M.A., B.Ed. also applied and made an application for the post on 29.6.2001. According to the petitioner, an interview took place on 26.7.2001 but the petitioner was not given an interview call. It is the allegation of the petitioner that the respondent no. 6 was the son of one of the clerks of the institution and simply in order to accommodate him, the application of the petitioner was not even considered even though he had the requisite qualifications. The petitioner did not get an interview call. The respondent no. 6 was appointed on 1.8.2001 and he joined the post on 1.8.2001. When the petitioner came to know all this, he sent a detailed representation to the District Inspector of Schools, Etah stating his grievance and saying that the respondent no. 6 was not even a proper candidate and yet he was being accommodated whereas the petitioner who was fully qualified has not been even called for interview.

7. It is the petitioner's contention that the petitioner's objection dated 3.8.2001 was sent to the District Inspector of Schools but no orders were passed on the said objection and in fact when the committee of management sent papers of the respondent no. 6 for approval, the petitioner's objections were not considered rather they were ignored.

8. The approval was granted by the Joint Director of Education to the appointment of the respondent no. 6 on 17.5.2002 as has been stated earlier. It is the argument of the learned counsel for the petitioner that this approval dated 17.5.2002 was made in violation of the provision of Regulation 10 (f) Chapter II which enjoins that while supplying information in Appendix "C', the committee of management shall mention all applications including those of the candidates who have not been called for interview and the same shall be placed before the selection committee.

9. Learned counsel for the petitioner also relied on Chapter II Regulation 11, which qualifies that it will be bounden duty of the experts attending the selection of head of the institution and the teachers to scrutinize all papers and in particular to examine that the candidates who had been called for interview, had been rightly called as per the provisions of the Act and Regulations and no candidate has been deprived of the opportunity of interview, which should rightly have given to him. A certificate in this behalf is to be made by the experts attending the selection committee.

10. Learned counsel for the petitioner has argued that in absence of the filing of such certificate, entire proceedings of the interview would stand vitiated.

11. The third limb of the argument of the learned counsel for the petitioner is that if approval is granted to the appointment of any teacher in contravention of the provision of Chapter II, the District Inspector of Schools can decline to pay the salary and allowances to such a person and therefore he has argued that Regulation 19 Chapter II should be invoked in this particular case and the salary of the respondent no. 6 must be ceased.

12. The State has filed counter affidavit in this matter and in para 5 of the said counter affidavit, it has not denied that the petitioner has filed representation dated 3.8.2001 but has not stated as to how they have dealt with the said objection. The objection as raised by the petitioner was a valid one. Para 8 of the counter affidavit also does not disclose that as to how the objection of the petitioner was disposed of or dealt with.

13. In view of the averment made in the counter affidavit, it appears that the contention of the petitioner is fully justified and the respondent District Inspector of Schools as well as the Joint Director of Education failed to comply with the provisions of Regulation 17 Chapter II and Regulations 10 (f) and 11. It was bounded duty of the respondent District Inspector of Schools and Joint Director to go into this as the institution in question is receiving grant-in-aid from the State and therefore before releasing salary of any incumbent, it is expected that the State will make a proper consideration of the issues which are placed before them, so that only worthy candidates are selected and even though a minority institution may have a right to manage itself and to administer itself, that in itself does not give to minority institution a right to give a go bye to the Statutes and Regulations, which govern their very existence particularly in cases where the minority institution is receiving grant-in-aid from the State.

14. Having heard learned counsel for the petitioner and the learned counsel for the respondents, I am of the opinion that the respondents authority failed to perform their obligations properly as are envisaged under Regulation 17 Chapter II read with Regulations 10 (f), 11 and therefore the order of approval was granted in violation of the same. As such the order of approval dated 17.5.2002 deserves to be quashed.

15. Since the impugned order of approval dated 17.5.2002 was granted in violation of Regulation 17 Chapter II read with Regulations 10 (f), 11, it is expedient in the interest of justice that the matter is remanded to the respondent no. 3 Joint Director of Education to reconsider and decide the matter afresh after taking into consideration the objection of the petitioner dated 3.8.2001. It is needless to say that the respondents no. 1 and 2 and respondent no. 6 will also be given an opportunity of hearing. The respondent no. 3 will give a notice for the date of the hearing to all parties concerned within a week from the date of issuance of a certified copy of this order and thereafter he will decide the matter within a period of next three months. The authority concerned is also directed to invoke the

provisions of Regulation 19 Chapter II of the U.P. Intermediate Education Act, 1921 with immediate effect.

The writ petition is allowed as above. The impugned order of approval dated 17.5.2002 is quashed. There will be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2006

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 35795 of 1991

Thakur Ram Chandra Ji Mahraj
...Petitioner
Versus
Board of Revenue & others ...Respondents

Connected with
Civil Misc. Writ Petition No. 2499 of 1992
Thakur Ram Chandra Ji Mahraj Vs. Board of Revenue and others.

Counsel for the Petitioner:
Sri O.P. Kulshrestha
Sri R. Asthana
Sri S.S. Upadhyaya
Smt. Sadhna Upadhyaya
Sri H.N. Sharma
Sri V.K. Singh
Sri R.S. Misra
Sr. G. Bhatt
Sri B.N. Upadhyaya
Sri R.P. Goyal

Counsel for the Respondents:
Sri Satya Prakash
Sri R.N. Sharma
Sri G.N. Verma
Sri Anoop Trivedi
Sri Gajendra Pratap
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S.C.

(A) U.P. Zamindari Abolition and Land Reform Act-Section 331 (4) read with Code of Civil Procedure 1908 Section-100-Second Appeal decided by Board of Revenue-without framing substantial Question of law-whether the amended provision of Civil Procedure applicable in the pending second appeal under U.P.Z.A. & L.R. Act also? Held-'yes'.

Held: Para 7

The question whether a particular enactment, which refers to a previous enactment, is legislation by reference or legislation by incorporation is often a difficult one. To remove as far as possible any uncertainty on this count it appears the legislature has introduced Sub Section 30 by amendment in the definition clause Section 3. The definition clause has to be applied unless there is anything repugnant in the context. It is plain that the burden of showing contrary context lies upon him who asserts that the definition is inapplicable. There is nothing in Sub Section 4 of Section 331 on the basis of which an interpretation different from that given in Sub Section 30 of Section 3 be adopted. Taking it that the reference made in Section 331 (4) to Section 100 Civil Procedure Code is by way of legislation by incorporation the reference would be deemed to be to the amended Section 100 Civil Procedure Code in view of the definition clause Section 3 (30) of the U.P. Zamindari Abolition and Land Reforms Act. That definition expresses the legislative intendment to apply the amended provision and carves out an exception to the rule about the effect of legislation by incorporation similar to one of the exceptions carved out by the Supreme Court in Narsimhan's case (supra). The other exception carved out by the Supreme Court, which we have noticed is where both the Acts are supplemental to each other. While it is true that the U.P. Zamindari Abolition and Land Reforms Act does not supplement the Civil Procedure Code and the two Acts are

thus not supplemental to each other but on the subject of suits, appeals and other proceedings the Civil Procedure Code does supplement the U.P. Zamindari Abolition and Land Reforms Act. The definition in Section 3 (30) of U.P. Zamindari Abolition and Land Reforms Act carves out an exception to the general rule of interpretation that in legislation by incorporation an amendment in the Act referred to does not affect the incorporated provision. The M. R.T.P. Act which, was considered by the Supreme Court in Mahindra's case (supra) does not have any provision like Section 3 (30) or Section 341 U.P. Zamindari Abolition and Land Reforms Act nor does the Civil Procedure Code supplement the proceedings under the M.R.T.P. Act. For the reasons given above I am of the view that the amended Section 100 Civil Procedure Code would be applicable to second appeals in the Board of Revenue.

(B) U.P. Zamindari Abolition and Land Reform Act 1955-Section 331 (4)-substantial question of law-second appeal can not be decided and heard without framing substantial question of law-as the amended provisions of Section 100 C.P.C. are equally applicable-held-Second Appeal can not be decided without framing substantial questions of law-matter remitted back before the Board with necessary direction.

Held: Para 9

The Board of Revenue has not examined the matter from the point as to whether a substantial question of law was involved in the case or not. That apart the parties are to be heard only on the question framed. As no question was framed the appeal could not have been heard and allowed and the whole exercise was in vain. It is not a feasible course to fill up this omission by framing questions in this court and then hearing the parties. I am of the view that the matter should be sent back to the Board of Revenue

Case law discussed:
2001 (3) AWC-2258
2004 (9) RD-119
2006 RD-831
1979 SCC-526
AIR 1975 SC (2)-1835

(Delivered by Hon'ble Janardan Sahai, J.)

1. Sub Section 4 of Section 331 of the U.P. Zamindari Abolition and Land Reforms Act creates a right of second appeal to the Board of Revenue on any of the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 of the Civil Procedure code was drastically amended in the year 1976 by Act No. 104 of 1976 whereby the grounds of appeal were restricted to those which involve a substantial question of law to be formulated by the High Court. After the amendment in Section 100 Civil Procedure Code doubts arose as to whether the amended Section 100 Civil Procedure Code would be applicable to second appeals in the Board of Revenue or the unamended one, which contained wider grounds for interference. In Ram Sanehi Vs. Board of Revenue 1993 RD 208 a single Judge of this Court held that it is Section 100 Civil Procedure Code as amended from time to time, which would govern second appeals in the Board of Revenue. In Sri Net Bharti and others Vs. Board of Revenue and others 2001 (3) A.W.C. 2258 and in Ved Pal Vs. Board of Revenue 2004 (9) R.D. 119 the same view was taken. In fact not a single decision of this court taking a different view has been cited at the Bar.

2. In a recent decision Baikunth Nath Kaushik Vs. Anand Swaroop Kaushik 2006 RD 831 the Uttranchal

High Court has taken the view that the reference to Section 100 Civil Procedure Code made in sub Section 4 of Section 331 of the U.P. Zamindari Abolition and Land Reforms Act is legislation by incorporation and, therefore, the amendment in Section 100 Civil Procedure Code, would not apply to second appeals in the Board of Revenue. The Uttranchal High Court placed reliance upon the decision of the Apex Court in Mahindra Vs. Mahindra 1979 SCC 529 which was a case under the Monopolies and Restrictive Trade Practices Act. Section 55 of that Act refers to the grounds specified in Section 100 of the Civil Procedure Code as being the grounds on which an appeal would lie to the Supreme Court. The Supreme Court having examined the scheme of the Monopolies and Restrictive Trade Practices Act held that the reference to Section 100 Civil Procedure Code made in Section 55 of the Monopolies and Restrictive Trade Practices Act was by way of legislation by incorporation and therefore the subsequent amendment made in Section 100 Civil Procedure Code was not applicable to appeals under Section 55 of the Monopolies and Restrictive Trade Practices Act.

3. The difference between legislation by incorporation and legislation by reference is well known. In legislation by incorporation provisions of the Act to which reference is made are deemed to be bodily incorporated in the statute, which refers to them. The logical corollary of this fiction as we may call it is that an amendment subsequently made in the Act referred to would not affect the provisions deemed to have been incorporated in the Act, which refers. The rule, however, is not an inflexible one. In A.I.R. 1975 SC (2) 1835 The State of Madhya Pradesh Vs. M.V. Narasimhan four exceptions to the rule have been carved out. Two of them which may have some relevance to this case are;. One: where the two Acts are supplemental to each other and two: where the amendment in the Act referred to by express or implied intendment applies to the incorporated provisions in the Act in which the reference is made. In this context it is necessary to examine the provisions of the U.P. Zamindari Abolition and Land Reforms Act.

4. Section 3 sub section 30 of the U.P. Zamindari Abolition and Land Reforms Act reads as follows;

(30) any reference to any enactment shall be construed as a reference to that enactment as amended from time to time in its application to Uttar Pradesh, and in the case of the Code of Civil Procedure, 1908, as a reference to that Code subject also to any annulments alterations and additions to the rules contained in the First Schedule thereto made from time to time under Section 122 thereof by the High Court."

5. In view of this provision the amendment in Section 100 Civil Procedure code would be applicable to second appeals to the Board. Sri Gajendra Pratap, learned counsel for the respondents however submits that Section 3 (30) is in two parts separated by a disjunctive "and' occurring before the words "in the case of the Code of Civil Procedure." According to him the word "enactment' occurring in the first part does not include the Civil Procedure Code for which specific provision has been made in the second part and the annulments,

alterations and additions in reference to the Civil Procedure Code are confined to the rules in the First Schedule as amended form time to time by the High Court in exercise of powers under Section 122. If so interpreted the amendment made by Parliament in Section 100 Civil Procedure Code by act 104 of 1976 would not apply to second appeals under the U.P. Zamindari Abolition and Land Reforms Act. But I am not inclined to accept this narrow interpretation placed on the section. The opening words "any reference to any enactment' are words of the widest amplitude and in their plain meaning would also cover the Civil Procedure Code, which undoubtedly is an enactment. Nor is the reference in the sub section to amendments in the enactment, confined to amendments, which are applicable to U.P. alone. The expression "enactment as amended from time to time in its application to Uttar Pradesh" means the amended enactment as applicable to U.P. The definition is wide enough to cover any amendment in the enactment referred to whether by a Central Act or by a State Act if it extends to U.P. irrespective of the fact that it does or does not apply to other areas also. The second part of Sub section 30 is merely clarificatory of the legislative intent that not only amendments by the legislature but even amendments in the rules of the First Schedule of the Civil Procedure Code made by the High Court in the exercise of power under Section 122 of the Civil Procedure Code would be applicable to that provision of the U.P. Zamindari Abolition and Land Reforms Act, which refers to the Civil Procedure code. I am therefore not inclined to give the narrow meaning to Section 3 (30) sought to be given by Sri Gajendra Pratap. The view that I am taking also appears to be in line with the scheme of the Act as we shall presently see.

6. Section 341 of the U.P. Zamindari Abolition and Land Reforms Act applies the provisions of the Civil Procedure to proceedings under the U. P. Zamindari Abolition and Land Reforms Act unless otherwise expressly provided. The Zamindari Abolition and Land Reforms Act has made provision for suits, appeals, second appeals, revisions etc. The Civil Procedure Code thus has been made applicable to them unless otherwise expressly provided. No express provision making the Civil Procedure Code inapplicable has however been cited. On the subject of suits, appeals, revisions and other proceedings the Civil Procedure code supplements the U.P. Zamindari Abolition and Land Reforms Act by force of Section 341. In the earlier Tenancy laws of the State namely in the U.P. Tenancy Act, 1939, Agra Tenancy Act, 1926 and N.W.P. Tenancy Act 1901 there were provisions similar to Section 341 of U.P. Zamindari Abolition and Land Reforms Act. Although the nature of suits that can be instituted in the revenue courts has been specified in the U.P. Zamindari Abolition and Land Reforms Act as was also done in the earlier tenancy laws of the State but the question of jurisdiction of the Revenue Court vis-à-vis the civil court in particular cases has been a complex question and a constant source of litigation traveling up to the highest court of the land. Suits for which relief can be obtained in the revenue court are frequently instituted and tried in the civil court and vice versa. Faced with this situation the legislature has made provision in Section 331 (1A) U.P. Zamindari Abolition and Land Reforms Act that the question of jurisdiction if not

raised in the trial court at the earliest possible opportunity shall not be entertained in appeal and unless there has been a consequent failure of justice. Provisions quite similar to this existed in the earlier tenancy laws of the State. The legislative intent behind such a provision appears to have been that as the trial, appeal and second appeal whether in the civil court or revenue court is regulated by a substantially similar set of provisions on account of the Civil Procedure Code applying both to civil courts and revenue courts no injustice is likely to be caused by a trial in the wrong court. Just like the U.P. Zamindari Abolition and Land Reforms Act the N. W. P. Tenancy Act 1901, the Agra Tenancy Act, 1926, the U.P. Tenancy Act, 1939 also contained provision for second appeal on the grounds specified in Section 100 Civil Procedure Code. Undoubtedly Section 341 U.P. Zamindari Abolition and Land Reforms Act, which applies the Civil Procedure code as a whole to proceedings under the U.P. Zamindari Abolition and Land Reforms Act is legislation by reference. It supplements the proceedings under the U.P. Zamindari Abolition and Land Reforms Act in view of Section 341. The normal rule of interpretation would, therefore, be to apply the amendments in the Civil Procedure Code to proceedings in the U.P. Zamindari Abolition and Land Reforms Act. If any difficulty in applying this rule of interpretation has arisen in respect of second appeals under the U.P. Zamindari Abolition and Land Reforms Act on account of the reference to the grounds specified in Section 100 Civil Procedure code being legislation by incorporation that difficulty stands removed by the definition in Sub Section 30 of Section 3 U.P. Zamindari Abolition and Land Reforms Act. If however an amendment in the Civil Procedure Code is of such a nature that its application to the section, which refers to the Civil Procedure Code would be repugnant to the context it would be inapplicable in view of the exception of contrary context contained in the definition clause.

7. The question whether a particular enactment, which refers to a previous enactment, is legislation by reference or legislation by incorporation is often a difficult one. To remove as far as possible any uncertainty on this count it appears the legislature has introduced Sub Section 30 by amendment in the definition clause Section 3. The definition clause has to be applied unless there is anything repugnant in the context. It is plain that the burden of showing contrary context lies upon him who asserts that the definition is inapplicable. There is nothing in Sub Section 4 of Section 331 on the basis of which an interpretation different from that given in Sub Section 30 of Section 3 be adopted. Taking it that the reference made in Section 331 (4) to Section 100 Civil Procedure Code is by way of legislation by incorporation the reference would be deemed to be to the amended Section 100 Civil Procedure Code in view of the definition clause Section 3 (30) of the U.P. Zamindari Abolition and Land Reforms Act. That definition expresses the legislative intendment to apply the amended provision and carves out an exception to the rule about the effect of legislation by incorporation similar to one of the exceptions carved out by the Supreme Court in Narsimhan's case (supra). The other exception carved out by the Supreme Court, which we have noticed is where both the Acts are supplemental to each other. While it is true that the U.P. Zamindari Abolition and

Land Reforms Act does not supplement the Civil Procedure Code and the two Acts are thus not supplemental to each other but on the subject of suits, appeals and other proceedings the Civil Procedure Code does supplement the U.P. Zamindari Abolition and Land Reforms Act. The definition in Section 3 (30) of U.P. Zamindari Abolition and Land Reforms Act carves out an exception to the general rule of interpretation that in legislation by incorporation an amendment in the Act referred to does not affect the incorporated provision. The M. R.T.P. Act which, was considered by the Supreme Court in Mahindra's case (supra) does not have any provision like Section 3 (30) or Section 341 U.P. Zamindari Abolition and Land Reforms Act nor does the Civil Procedure Code supplement the proceedings under the M.R.T.P. Act. For the reasons given above I am of the view that the amended Section 100 Civil Procedure Code would be applicable to second appeals in the Board of Revenue.

8. Coming now to the facts of the case. A suit was filed by the respondents under Section 229-B of the U.P. Zamindari Abolition and Land Reforms Act, which was decreed by the trial court. The appeal of the defendant was allowed by the Additional Commissioner. The second appeal of the plaintiff was allowed by the Board of Revenue without framing any substantial questions of law.

9. It was submitted by Sri Gajendra Pratap that even though the Board of Revenue may not have framed substantial questions of law but as the order passed by the Board of Revenue is correct on merits this court in exercise of writ jurisdiction can decline to interfere. In support of his contention he relied upon a decision of the Apex Court in A.I.R. 1966 SC 828 Gadde Venkateswara Rao Vs. Government of Andhra Pradesh and others. The proposition cannot be doubted. The Supreme Court however in a series of decisions has set aside judgments of this Court in second appeal on the ground that without substantial questions of law being framed the appeal was allowed. Reference may be made to the recent decision of the apex court in Gian Dass Vs. Gram Panchayat Village Sunner Kalan and others 2006 (101) RD 449. The Board of Revenue has not examined the matter from the point as to whether a substantial question of law was involved in the case or not. That apart the parties are to be heard only on the question framed. As no question was framed the appeal could not have been heard and allowed and the whole exercise was in vain. It is not a feasible course to fill up this omission by framing questions in this court and then hearing the parties. I am of the view that the matter should be sent back to the Board of Revenue

10. In the result the writ petitions are allowed. The order dated 23.9.1991 passed by the Board of Revenue, U.P. at Allahabad is set aside and the case is sent back to the Board of Revenue for fresh decision in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No.58504 of 2006

Smt. Shail Agrawal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.B. Paul
Sri A.P. Paul

Counsel for the Respondents:
Sri G.K. Khanna
S.C.

Constitution of India, Art. 226-Alternative Remedy-read with court fee Act-section 6A, 7 (iv-A), 17 (iii) schedule II-alternative remedy-writ petition challenging order passed by the Trial Court-mode of fixation of court fee under challenge-argument regarding finality of order-held-misconceived-patently erroneous statutory remedy by way of appeal under section 6 A-writ petition-held-not maintainable.

Held: Para 12, 16 & 18

From the aforesaid, it is clear that this Section is confined to such decision on a question relating to the valuation for the purpose of determining the Court fee.

From the aforesaid decisions, it is clear that Section 12 of the Court Fees Act is not applicable in the present case. In the present case, the Civil Judge held that the court fee is payable under Section 7(iv-A) of the Court Fees Act and that Article 17 (iii) of Schedule II of the Court Fees Act has no application. A decision on the question whether the suit falls under Section 7(iv-A) or Article 17(iii) of Schedule II of the Court Fees Ac is not a decision on a question relating to the valuation but on a question relating to the basis or the mode of computation of the court fee. Keeping this in mind, the Supreme Court in Nemi Chand case (supra) held that the finality declared by Section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls.

In view of the aforesaid, the contention of the learned counsel for the petitioner is, that the order of the Civil Judge was one under Section 12 of the Court Fees Act and had become final is patently erroneous.

Case law discussed:
AIR 1934 Alld.-620
2005 (3) AWC-2751
1957 ALJ-53,
AIR 1968 Alld-216

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

1. The plaintiff presented a suit praying that the three sale deeds dated 1.11.2004 and 17.2.2006 be declared null and void and further prayed that the defendants be restrained from transferring the property on the basis of the sale deeds. In paragraph 12 of the plaint, the plaintiff disclosed the valuation of the sale deeds and on that basis, paid a sum of Rs.1300.00 as court fee. The Munsarim submitted a report dated 19.7.2006 stating therein that as per the valuation given by the plaintiff, the total amount of court fee payable as per Section 7 (iv-A) of the Court Fees Act is Rs.62,792.50, whereas the plaintiff has only paid a sum of Rs.1300.00 towards court fee. Consequently, the Munsarim reported that the remaining court fee was required to be paid by the plaintiff.

2. Pursuant to the aforesaid report, the plaintiff filed an objection dated

31.7.2006, which was registered as Misc. Case No.136 of 2006. The plaintiff submitted that the Court fee was not payable as per Section 7 (iv-A) of the Court Fees Act and, in fact, the court fee was payable as per Article 17(iii) of Schedule II of the Court Fees Act, and therefore, the court fee paid by the plaintiff was correct and was in accordance with the provisions of Article 17(iii) of Schedule II of the Court Fees Act. The plaintiff therefore prayed that the report of the Munsarim be set aside.

3. The Civil Judge by an order dated 14.8.2006 rejected the objection raised by the plaintiff and upheld the report of the Munsarim and directed the plaintiff to clear the deficiency of the court fee so that the suit could be registered. Aggrieved, the plaintiff has filed the writ petition under Article 226/227 of the Constitution of India praying for the quashing of the order of the Civil Judge dated 14.8.2006.

4. Heard Sri B.B. Paul, the learned counsel for the petitioner and Sri G.K. Khanna, the learned Standing Counsel.

5. A preliminary objection was raised by the Court with regard to the maintainability of the writ petition in view of Section 6-A of the Court Fees Act as applicable in the State of Uttar Pradesh.

6. The learned counsel for the petitioner submitted that the impugned order was one under Section 12 of the Court Fees Act which had attained finality and that no appeal or revision lay against the said order. Consequently, the writ petition was the only forum for the redressal of the grievance of the petitioner. In support of his submission, the learned counsel for the petitioner has placed reliance upon a decision of Full Bench of this Court in **Messrs. Gupta & Co. Vs. Messrs. Kripa Ram Brothers, AIR 1934 Allahabad 620**, in which it was held that a decision given by a Court in the trial of a suit under Section 12 of the Court Fees Act does not amount to a "case decided" as contemplated under Section 115 of the Code of Civil Procedure, and therefore, no revision lies against the said order.

7. The learned counsel for the petitioner further laid stress on a division bench decision of this Court in the case of **Ram Krishana Dhandhania and another Vs. Civil Judge (Senior Division), Kanpur Nagar and others, 2005 (3) AWC 2751**, wherein the Court held-

"Section 12 of the Act, 1870 deals with the decision of question as to valuation and it provides that such an issue shall be decided by the Court in which the plaint is filed and such decision shall be final between the parties to the suit. Thus, it is evident from the provisions of Section 12 of the Act, 1870 that the decision taken by the Court on such an issue shall be final between the parties but in case the superior Court while exercising the appellate or revisional jurisdiction comes to the conclusion that the issue has wrongly been decided to the detriment of the revenue, it can direct the party to make the deficiency good for the reasons that the object of the Act is not to arm a litigant with a weapon of technicality but to secure the revenue."

8. The learned counsel for the petitioner further placed various

judgments to show that the report of the Munsarim was incorrect, and that the Court fee was only payable under Article 17 (iii) of Schedule II of the Court Fees Act.

In my opinion, the writ petition is not maintainable at this stage.

Paragraph No.35 of the **General Rules Civil** states as under:-

"35. Munsarim's duty in respect of plaints.- A Munsarim of a civil court appointed to receive plaints shall examine each plaint presented to him, and shall report thereon whether the provisions of the Code and the Court-fees Act, have been observed. Whether the claim is within the jurisdiction of the court, constitutes a cause of action, and has been presented within the period prescribed for the institution of such a suit, and whether the plaint is otherwise in proper form including that in a suit whether a notice under Section 80, C.P.C., necessary, such a notice has been given.

The Munsarim shall see that the actual date of the presentation of the plaint is entered upon the impressed stamp and adhesive label, if any, below the date of purchase endorsed on them.

On the back of all plaints the Munsarim shall note-

(a) date of presentation of the plaint,
(b) name of presenter,
(c) classification of suit, and
(d) court-fee paid."

9. From the aforesaid, it is clear that the Munsarim was required to report as to whether the provision of the Court Fees Act had been observed or not and whether proper court fee had been paid or not. In the present case, I find that the Munsarim has submitted a report as per paragraph No.35 of the General Rules Civil, stating therein, that the court fee as per Section 7 (iv-A) of the Court Fees Act was required to be paid and that the plaintiff had only paid a certain amount and had not paid the entire amount of the court fee. The Civil Judge, rejected the objection of the plaintiff, holding that the court fee was required to be paid under Section 7(iv-A) of the Court Fees Act and that Article 17(iii) of the Schedule II of the Court Fees Act had no application.

10. The question now is, whether the order passed by the Civil Judge is an order passed under Section 12 of the Court Fees Act or not?

11. Sections 5 and 12 of the Court Fees Act confers finality on decision of matters effecting the valuation and court fee payable thereon. Section 5 of the Act has no application to the decision of the Civil Judge, and therefore, the said provision is not being considered.

Section 12 of the Court Fees Act reads as under:-

"12. Decision of question as to valuation.-(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly

decided to the detriment of the revenue, it shall require the party by whom such fee has been paid, to pay within such time as may be fixed by it, so much additional fee as would have been payable had the question been rightly decided. If such additional fee is not paid within the time fixed and the defaulter is the appellant, the appeal shall be dismissed, but if the defaulter is the respondent the Court shall inform the Collector who shall recover the deficiency as if it were an arrear of land revenue."

12. From the aforesaid, it is clear that this Section is confined to such decision on a question relating to the valuation for the purpose of determining the Court fee.

13. The Supreme Court in **Nemi Chand and another Vs. The Edward Mills Co. Ltd. and another, AIR 1953 SC 28** held that the finality under Section 12 of the Court Fees Act attaches only to a decision which concerns valuation simpliciter and that no finality attaches when a Court decides a question whether a case falls within one or the other category of the cases mentioned in the different sections and schedule of the Court -fees Act.

14. In **Lala Ram Babu Vs. Lala Ramesh Chandra, 1957 ALJ 53**, this Court held that a decision of the trial court relating to the valuation of the subject matter of the suit for the purpose of determining the amount of court fee payable is final between the parties and cannot be challenged in an appeal under Section 6A of the Court Fees Act.

15. In **Smt. Bibbi and another Vs. Shugan Chand and others, AIR 1968 Allahabad 216**, a Full Bench of this Court held that Section 12 of the Court Fees Act only attaches finality to the question of valuation and not to the category under which the suit falls. The full bench further held that the decision of the Civil Judge on the issue relating to court fee had not become final.

16. From the aforesaid decisions, it is clear that Section 12 of the Court Fees Act is not applicable in the present case. In the present case, the Civil Judge held that the court fee is payable under Section 7(iv-A) of the Court Fees Act and that Article 17 (iii) of Schedule II of the Court Fees Act has no application. A decision on the question whether the suit falls under Section 7(iv-A) or Article 17(iii) of Schedule II of the Court Fees Ac is not a decision on a question relating to the valuation but on a question relating to the basis or the mode of computation of the court fee. Keeping this in mind, the Supreme Court in **Nemi Chand** case (supra) held that the finality declared by Section 12 is limited only to the question of valuation pure and simple and does not relate to the category under which a certain suit falls.

17. In **Ram Krishna Dhindhania's** case (supra) a division bench of this Court also held the finality is, however, with respect to arithmetical calculation and not with respect to classification, i.e., category under which the suit falls.

18. In view of the aforesaid, the contention of the learned counsel for the petitioner is, that the order of the Civil Judge was one under Section 12 of the Court Fees Act and had become final is patently erroneous.

Section 6A of the Court Fees Act as applicable in the State of U.P. reads as under:-

" 6-A. Appeal against order to pay court-fee. (1) Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appeal able under Section 104 of the Code of Civil Procedure.

The party appearing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under Sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed and all interim orders made, including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of appeal together with a copy of the plaint and of the order appealed against shall be sent forthwith by the appellate court to the [Commissioner of Stamps].

(4) If such order is varied or reversed in appeal, the appellate court shall if the deficiency has been made good before the appeal is decided grant to the appellant a certificate, authorising him to receive back from the Collector such amount as is determined by the appellate court to have been paid in excess of the proper court fee.

(5) The court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue."

In my view, the order of the Civil Judge is an order which is appealable under Section 6A of the Act. The question as to whether the court fee payable should be under Section 7 (iv-A) or under Section 17(iii) of Schedule II of the Court Fees Act can be questioned by the plaintiff by filing an appeal under Section 6A of the Court Fees Act.

In view of the aforesaid, the petitioner has a statutory remedy of filing an appeal under Section 6A of the Court Fees Act as applicable in the State of Uttar Pradesh. The writ petition is therefore dismissed on the ground of an alternative remedy. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2006

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

Criminal Misc. Writ Petition No. 9400 of 2005
Connected with
Crl. Misc. Writ Petition Nos.3590 of 2004, 3591 of 2004, 5978 of 2004, 8619 of 2004, 6906of 2005, 11868 of 2005, 11884 of 2005, 11885 of 2005, 11901 of 2005, 11911 of 2005, 12310 of 2005, 12333 of 2005, 12397 of 2005, 12526 of 2005, 12527 of 2005, 12550 of 2005, 12652 of 2005, 12753 of 2005, 12768 of 2005, 12802 of 2005, 12859 of 2005, 12879 of 2005, 157 of 2006, 340 of 2006, 363 of 2006, 1593 of 2006, 1682 of 2006, 1768 of 2006, 1805 of 2006, 2339 of 2006, 2465 of 2006, 2545 of 2006, 2643 of 2006, 2730 of 2006, 3424 of 2006, 3983 of 2006.

Jainendra @ Chhotu Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.K. Mishra and others

Counsel for the Respondents:
Sri Surendra Singh
Sri Neeraj Kant Verma
Sri A.N. Mulla
A.G.A.

Constitution of India, Art. 21, 226-read with Control of Gundas Act, 1970 Section 3 (1)(a)(b)(c), 6-writ petition against show cause notice-held-not maintainable-aggrieved person has right to explain the material before the D.M.-examine the witnesses against the speaking order passed by Magistrate-statutory provision for appeal under section 6 of the Act the impugned notices-held-in conformity of full Bench decision of the Hon'ble Court-need no interference.

Held: Para 17

Experience says that as against the show cause a person has every right to give reply saying that the materials are not sufficient for the purpose of calling. It is within the domain of the District. Magistrate to consider all aspects of the matter and give his opinion. Reasonable opportunity of tendering an explanation is not bare opportunity. The person concerned will have. a right to consult and defend the cause by a counsel of his choice and have an opportunity of examining as well as examining any other witnesses as he wishes to produce in support of his explanation, unless for the reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay. Apart from that, as per Section 6 of the Act any person aggrieved by an order made under Section 3,4or 5 may appeal to the Commissioner within fifteen days from the date of the order. The appellant or his counsel will be entitled to inspect the record which was not disclosed to him at the inquiry, if any, held under Section 3. The Commissioner may either confirm the order, with or without modification, or set it aside, and may, pending disposal of the appeal, stay the operation of the order subject to such terms, if any, as. He thinks fit. Therefore, the Act is well guided unless, of course, factual situation like Ramji Pandey (supra) arose. In fact both the Full Bench and the Supreme Court discouraged formal service of notice under Section 3 of the Act. The notice will be backed by some materials, which can indicate the criminal activities. Only by virtue of such notice the right of individuals will not adversely affect nor the right under Article 21 of the Constitution of -India will be infringed. It will be infringed only when no indications are given in. the notice in respect of Clause (a), (b) and (c) of Section 3 (1) of the Act or it is not referred. If it is indicated, sufficiency as regards general materials are complied with. Now, it is for the persons, who got the notice, to give reply contradicting such reference and proceed with the matter. Therefore, we can, not justify the cause of interference with the show cause notice. This order is passed not only in conformity with the aforesaid Full Bench judgements ratio of this High Court but also on the sufficiency of materials in the notice

Case law discussed:
1981 ACJ-385 (FB), 1972 ALJ-762, 1999 (2) JIC-192 (Alld.), AIR 1991 sC-22, 2002 JIC (2)-469 (Alld.), 2002 JIC (2)-548, AIR 1996 SC-691, J.T. 1995 (8) SC-331, 2006 (5) SCC-228

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

1. All the aforesaid matters are related to necessity and requirement of notice under section 3 of Uttar Pradesh control of Goondas Act, 1970. Since the cause of action of individual action of the individual cases are uniform in nature all the aforesaid matters are taken up together for the purpose of disposal by this solitary judgement having binding effect on all the writ petitions, after making scrutiny of the cases individually.

2. The Uttar Pradesh Control of Goondas Act, 1970 (hereinafter referred to as the 'Act') was promulgated with an intention for the control and suppression Of Goondas with a view to maintenance of the public order.

Section 2-(a) and (b) of the Act, is as follows: -

"(a) "District Magistrate" includes an Additional District Magistrate specially empowered by the State Government in that behalf;

(b) 'Goonda' means a person who-

(i) either by himself or as a member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the Indian Penal Code or Chapter XV, Chapter· XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1987 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;

Explanation.- 'Tout' means a person who-

(a) accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification whatever as a motive or reward for inducing; by corrupt or illegal means any public servant or member of Government, Parliament or of State Legislature, to do or forbear to do anything or to show favour or disfavour to any person or to render or attempt to render any service or disservice to any person, with the Central or State Government, Parliament or State Legislature, any local authority, Corporation, Government Company or public servant; or

(b) procures, in consideration of any remuneration moving from any legal practitioner interested in any legal business, or proposes to any legal practitioner or to any person interested in legal business to procure, in consideration of any remuneration moving from either of them, the employment of legal practitioner in such business; or

(c) for the purposes mentioned in explanation (a) or (b), frequents the precincts of civil, criminal or revenue Courts, revenue or other offices, residential colonies or residences or vicinity of the aforesaid or railway or bus stations, landing stages, lodging places or other places of public resort; or

(vii) is a house-grabber.

Explanation. -'House-grabber' means a person who takes or attempts to take or aids or abets in taking unauthorised possession or having law-fully entered unlawfully remains in possession, of a

building including land, garden, garages or out-houses appurtenant to a building."

Scope and ambit of Section 3 of the Act, which is relevant for the purpose of consideration, as also as follows:-

"**3. Externment, etc. of Goondas**.- Where it appears to the District Magistrate.- .

(a) that any person is a Goonda; and

(b) (i) that his movements or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonable grounds for believing that he is engaged or about to engage, in the district or any part thereof, in the commission of an offence referred to in sub-clause (i) to (iii) of clause (b) of Section 2, or in the abetment of any such offence; and

(c) that witnesses are not willing to come forward to give evidence against him by reason of apprehension on their part as regards the safety of their person or property-

the District Magistrate shall by notice in writing inform him of the general nature of the material allegations against him in respect of clauses (a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witnesses that he may wish to produce in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a), (b) and (c) of subsection (1) exist may by order in writing-

(a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area or the area and such contiguous district or districts or part thereof, as the came may be from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order;

(b) (i) require such person to notify his movements or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order;
(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order;
(iii) direct him otherwise to conduct himself in such manner as may be specified in the order,

until the expiry of such period, not exceeding six months as may be specified in the order."

3. According to the petitioner/s, there should not be any mechanical reasoning in the notice. The Act is not punitive but preventive. Therefore, if the notice is defective, all proceedings taken on the basis of such notice are void ab initio. Since the challenge is thrown in respect of the notice to be issued on the part of the District Magistrate being part and parcel of the State infringing the right of the citizens, writ lies challenging the notice. Whenever certain thing is directed by law to do in certain manner, the same has to be done accordingly. The legal notice under preventive law is to be made with the subjective satisfaction of the cause.

4. In **1981 All. C.J. 385 (Ramji Pandey Vs. State of U.P. and others)** a Full Bench of this High Court considered the point of issuance of notice stating therein **general nature of material allegations**. Factually in that case the District Magistrate, Ballia, issued a notice to the petitioner therein directing him to appear before him at a particular date and time to give his explanation in writing as to why an order should not be passed against him. The petitioner instead of appearing before the District Magistrate filed the writ petition under Article 226 of the Constitution of India challenging validity of the notice. The question arose before such Bench what does the expression **"general nature of material allegations"** denote. The expression "material allegations" has not been defined under the Act. According to the dictionarical meaning, the word "material" means important and essential of significance. The word "allegation" means statement or assertion of facts. Thus, the notice under Section 3 (1) of the Act should contain the essential assertions of facts in relation to the matter set out in Clauses (a), (b) and (c) of Sub-section (1) of Section 3 of the Act. It need not to refer any evidence or other particulars or details. The name of witnesses, and persons who may have made complaint against the person against whom action is proposed to be taken or the time, date and place of the offence committed by the person need not be mentioned in the notice. There is a distinction in between **"general nature of material allegations"** and **"particulars of allegations"**. In the former notice need not give any details of the allegations, instead the requirement of law would be satisfied if the notice contains a general statement of facts, which need not contain any details or particulars.

5. Ultimately it was held by the Full Bench of this Court “In our opinion, it is difficult to uphold the respondents' contention that the list of first information reports of list of cases in which the petitioner was convicted or the list of cases, in which the petitioner was acquitted or the list of pending criminal cases against the petitioner is sufficient to meet the requirement of setting out "the general nature of material allegations. The impugned notice is, therefore, not in accordance with Section 3(1) of the Act as it fails to set out general nature of material allegations against the petitioner.”

6. In the aforesaid referred case, the learned Standing Counsel urged that on a liberal construction of the notice the material allegations, on the basis of which action against the petitioner is proposed to be taken, are discernable, and as such the notice is not rendered illegal and proceedings taken against the petitioners

are valid. It is true that validity of a notice is generally upheld if it substantially conforms with the requirement of law but while considering the validity of a notice issued under Section 3 of the Act the same considerations, can not be applied. As noted earlier, the Act is extraordinary .in nature. Its provisions permit serious inroad on the liberty of a citizen as the provisions permit externment of a citizen without a judicial trial.

7. Ultimately following the earlier ratio of the judgement in **1972 ALJ 762 (Harsh Narain Vs. District Magistrate**) the Full Bench held that executive must strictly comply with the provisions of the Act. Therefore, if a notice issued under Section 3 (1) of the Act is not in accordance with the provisions of the Act and if it fails to comply with the mandatory requirements of setting out "**general natural of material allegations**", further proceedings initiated in pursuance of that notice would also be rendered illegal. It was further held that the impugned notice issued to the petitioner is fatal to the proceedings taken against him as it failed to comply with the mandatory provisions under the aforesaid section of the Act.

8. The point again arose from the Full Bench of three Judges, as aforesaid, to a Full Bench of five Judges as reported in **1999 (2) JIC 192 (AII) (FB) (Bhim Sain Tyagi Vs. State of U.P. through D.M. Mahamaya Nagar).**It was held therein that it may be useful to mention that the right of the petitioners to offer explanation would have to depend upon the material allegations consequently, the reasonably opportunity which is afforded by Sub-section (2) of producing his evidence in support of his explanation, which is guaranteed to the petitioner, should not be exercised if the petitioner do not come to know the **general natural of materials allegations** against them. In the administration of criminal law in our country one comes across two very important terms (i) charge and (ii) statement of accused. In fact these two are fundamental requirements of the principles of natural justice, which have to be followed before an accused is condemned. One would shudder at the idea that an accused shall have stood condemned when the charge would only narrate that there is an F.I.R. against him registered under Section 302 I.P.C.at a police station or that in the statement of the accused only a question is put to him that an F.I.R. has been lodged against him under Section 302 I.P.C. in a police station and that alone held sufficient compliance of law. For action against a proposed Goonda, the provisions contained under Section 3 of the Act, bereft of the technicalities and broader legal necessities in a trial of an accused under the Criminal Procedure Code, combine not only the "charge" and the "statement of the accused" but also requires his "defence evidence". Thus, the proposed Goonda must get the fullest opportunity to defend himself. Therefore, the **general nature of material allegations** must be disclosed to him by the District Magistrate.

9. However, before closing the chapter the Full Bench consisting of five Judges of this High Court held in view of **AIR 1999 SC 22 (Whlrlpool Corporation Vs. Registrar of Trade Mark, Mumbal and others)** ground of alternative remedy does not affect the jurisdiction of the High Court. **Ramji Pandey (supra)** is good law. A show

cause notice fails to indicate **general nature of material allegations** may be challenged and on that ground quashed the notice under Article 226 of the Constitution of India with liberty to the respondents to issue a fresh notice in accordance with law.

10. However, in the aforementioned case in the impugned notice the District Magistrate has set out matters as required by Clause (a), (b) and (c) in the prescribed form. The prescribed form as well as the impugned notice both, seek to maintain a distinction between the material allegation and the matters set out in Clause (a), (b) and (c).

11. We can not have any doubt nor we can raise any dispute with regard to aforesaid two Full Bench judgements of this High Court consisting of three Judges in **Ramji Pandey (supra),** which was also held good by another five Judge Bench in **Bhim Sain Tyagi (supra).** It is to be remembered that if there is no material, the individual petitioner has every right to challenge the notice in the writ jurisdiction of the Court and there is no bar to that extent. But if there is some material, then the notice can not be held to be defective but will be tested on the basis of the factual analysis by the appropriate Magistrate, who called upon to explain and, therefore, in the cases where some materials are available, entertaining writ will be premium to the illegality at the cost of public law and order system. It is to be remembered that protecting the lawful citizens, who are higher in number in the society, is much more important than the accused being lesser in number. It is well known that the alternative remedy is no bar under Article 226 of the Constitution of India. But it is also to be remembered that the High Court in its wisdom controls it on the basis of the individual cases.

12. On the other hand, Mr. Surendra Singh, learned Additional Government Advocate, contended before this Court that in two Division Bench judgements reported in **2002 (2) JIC 469 (All) (Gore Lal Vs. State .of U.P. and others)** and **2002 (2) JIC 548 (All) (Rajey @ Raj Kumar Vs. State of U.P. and others)** this Court held that the above cases are distinguishable in nature in view of the Supreme Court judgement reported in **AIR 1996 SC 691= JT 1995 (8) SC 331 (The executive Engineer, Bihar State Housing Board Vs.Ramesh Kumar Singh and others).** The Division Bench held that a writ petition against a show cause notice should not be ordinarily entertained. It is premature in nature because a show cause notice by itself does not give rise to a cause of action, as no adverse order has yet been passed. In the concluding portion of, the said judgements, it has been held by the Division Bench that "It is well settled that writ jurisdiction is discretionary jurisdiction, and this Court will not ordinarily exercise its jurisdiction against a show cause notice. **It Is possible that after considering the reply of the petitioner the authority may be satisfied with his explanation**." We have gone through **JT 1995 (8) SC 331 (supra),** where the Supreme Court held that normally writ court should not entertain the writ petition against a show cause notice issued by a competent statutory authority. However, exceptions are only available when there is a question of infringement of fundamental right or the issuance of notice is without jurisdiction. The Court ultimately held

that "in the event of adverse decision it will certainly be open to him to assail the same either in appeal or revision, as the case may be, or in the appropriate cases by invoking the jurisdiction of Article 226 of the Constitution of India."

13. So far as the five Judges Bench of the Allahabad High Court in **Bhim Singh Tyagi** (supra) is concerned, it has held that the earlier Allahabad Full Bench judgement of three Judges is good law. A show cause notice, which fails to indicate general nature of material allegations, may be challenged and quashed on that ground under Article 226 of the Constitution of India with liberty to the respondents always to issue fresh notice in accordance with law.

14. Therefore, such judgements are not only reflecting correct analysis of law but it has binding effect on us. But if the facts of the question of general nature of material allegations are indicated or reflected in the notice, such case or cases should not be interfered with by the writ court. It is an admitted position what would be the general nature of material allegations, is not defined under the Act. Dictionarically, it is essential of significance. Therefore, if an indication as regards clause (a), (b) and (c) of sub-section (1) of Section (3) of the Act is given, the same is sufficient for the purpose of denoting **material allegations**. Whenever a person is called without any purpose, then it can be said that there is no material for calling. But when someone is called with some material whatever vague it is, it cannot be said that there is no material. It is a well settled by now that when there is no material, the Court will interfere, but when there is some material, the Court will not interfere. In case of some material, only the authority, who issued the notice calling upon a person to give reply for the purpose of meeting the point of some material, is able to adjudicate the issue, failing which one can invoke the alternative remedy or remedy under writ jurisdiction. In none of the cases, we find that the indications of case crime either now or before have not been indicated. Language of the notice may not be the language like Court, but substantial indication is there. It ought to be because in all the cases the notices were served after the aforesaid Full Bench judgements but not before. **Ramji Pandey (supra)** clearly states that no detail requirement is necessary. Therefore, the indication of mind for the purpose of calling is good enough for the purpose of consideration. In **Whirlpool Corporation (supra)** the Supreme Court did not curtail the power of the High Court in writ jurisdiction but given an indication what would be the cases to be considered by the High Court under Article 226 of the Constitution of India in spite of having alternative remedy, such are as follows:

i) Violation of principle of natural justice;
ii) Infringement of any fundamental right;
iii) Order without jurisdiction;
iv) Vires of the Act, Rules, Regulations, etc are under challenge.

15. In the present case, neither the question of jurisdiction nor the question of vires is challenged. Therefore, no such case is available hereunder. Hence, either it will be case of violation of principle of natural justice or infringement of fundamental right. Again violation of principle of natural justice can not be

available here since in accordance with law the concerned Magistrates have given reasonable opportunity to the petitioners for tendering explanation in connection with the notice. If the reply is given, either it can be accepted or it can be rejected. In case it is accepted, then such petitioners cannot have any grievance. If it is rejected, either he will approach the forum of alternative remedy or to the writ court in the appropriate cases. Hence, the question of violation of principle of natural justice is also not applicable in the case. Therefore, the only other point i.e. infringement of fundamental right by issuing such notice is applicable or not, is to be considered by this Court.

16. In the instant case, at best the question of personal liberty under Article 21 of the Constitution of India might be the question. But when the law is provided to give opportunity to explain, it means legislature wanted to protect the personal liberty of a person even when several criminal cases including heinous crimes are involved with the individuals, who have made writ petitions herein. In **2006 (5) SCC 228 (Lt. Governor, NCT and others Vs. Ved Prakash alias Vedu)** the Supreme Court has categorically held on several points in the case of externment in the similarly placed situation under, a. different Act i.e. Delhi Police Act, 1978. The show cause notice involved therein is quoted hereunder for the purpose of satisfaction what would be materials of show cause notice:

"That your movement and acts are causing and are calculated to cause alarm, danger and harm to person or property. There are reasonable grounds to believe that you engage or likely to engage in the commission of offence punishable under Chapters XVI, XVII, XXII I PC. Is it a fact that you were not involved in a single isolated incident but indulged in, criminal activities since 1982 and continued and dangerous so as to render you being at large in Delhi or in any part thereof is hazardous to the community.

That the witnesses are not willing to come forward to give evidence in public against you by reasons of apprehension on their part as regards the safety of their person or property. There are reasonable grounds to believe that you are likely to engage yourself in the commission of offences like those in para (i) above.

You are likely to be called upon to explain as to why an order for externment out of the limits of the National Capital Territory of Delhi for a period of two years in accordance with the provisions of Section 47 of the Delhi Police Act, 1978 be not passed against you."

17. The show cause notices challenged hereunder issued for the purpose of externment etc. of Goonda under the Uttar Pradesh Control of Goondas Act, 1970 are para materia with such notice. Therefore, that can be a model of notice giving general nature of material allegations. However, the Supreme Court proceeded further on the basis of the reply in connection with the show cause and the order therein. Even from there various other materials can come out to enlighten the issue. The satisfaction of the authority although primarily subjective, should be based on objectivity. **But sufficiency of material as such may not be gone into by the writ court unless it is found that in passing the Impugned order the authority has failed to take into consideration the relevant facts or had**

based its decision on Irrelevant factors not germane therefor. Mere possibility of another view may not be a ground for interference. The High Court and the Supreme Court would undoubtedly jealously guard the fundamental rights of a citizen. While exercising the Jurisdiction rested in them invariably, the courts would make all attempts to uphold the human rights of a proceedee. The fundamental right under Article 21 of the Constitution of India undoubtedly must be safeguarded. But there the statute and the precedents were considered to satisfy the cause when an order was passed in compliance of the notice and reply. However, the Supreme Court further held that the Court must remind itself that the law is not a mere logic but is required to be applied on the basis of its experience. Experience says that as against the show cause a person has every right to give reply saying that the materials are not sufficient for the purpose of calling. It is within the domain of the District. Magistrate to consider all aspects of the matter and give his opinion. Reasonable opportunity of tendering an explanation is not bare opportunity. The person concerned will have. a right to consult and defend the cause by a counsel of his choice and have an opportunity of examining as well as examining any other witnesses as he wishes to produce in support of his explanation, unless for the reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay. Apart from that, as per Section 6 of the Act any person aggrieved by an order made under Section 3,4or 5 may appeal to the Commissioner within fifteen days from the date of the order. The appellant or his counsel will be entitled to inspect the record which was not disclosed to him at the inquiry, if any, held under Section 3. The Commissioner may either confirm the order, with or without modification, or set it aside, and may, pending disposal of the appeal, stay the operation of the order subject to such terms, if any, as. He thinks fit. Therefore, the Act is well guided unless, of course, factual situation like **Ramji Pandey (supra)** arose. In fact both the Full Bench and the Supreme Court discouraged formal service of notice under Section 3 of the Act. The notice will be backed by some materials, which can indicate the criminal activities. Only by virtue of such notice the right of individuals will not adversely affect nor the right under Article 21 of the Constitution of -India will be infringed. It will be infringed only when no indications are given in. the notice in respect of Clause (a), (b) and (c) of Section 3 (1) of the Act or it is not referred. If it is indicated, sufficiency as regards general materials are complied with. Now, it is for the persons, who got the notice, to give reply contradicting such reference and proceed with the matter. Therefore, we can, not justify the cause of interference with the show cause notice. This order is passed not only in conformity with the aforesaid Full Bench judgements ratio of this High Court but also on the sufficiency of materials in the notice.

18. Out of the bunch cases if any writ petition is filed on-the part of the complainant to take cognizance by the District Magistrate, the same can be filed before the District Magistrate itself within the fore-corners of the Act for the purpose of taking steps. There is no necessity of interference of the writ court in this regard.

19. In case any order is passed following the notice and reply and the parties feel aggrieved, they can file an appeal under Section 6 of the Act. Therefore, in that case also, no order can be passed by this Court. If any body wants to get the appeal expedited, he can also make prayer before the appropriate authority to such extent.

20. Hence, in view of the above observations, the writ petition stands dismissed. Interim orders, if any, stand vacated.

However, no order is passed as to costs. Petition dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.11.2006

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAVA, J.

Criminal Misc. Writ Petition No. 13177 of 2006

Sansveer ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri M.K. Srivastava

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

Code of Criminal Procedure-Section 190 (1)(b)-Power of Magistrate after receiving the final report-either drop the proceeding agreeing with conclusion investigation or take cognigence u/s 190 (1)(b) issue process straight way or may order for further investigation or can take congnigence upon original complaint or protect petition.

Held: Para 4

It is settled law that whenever final report is submitted by the police for dropping the proceeding following courses are open to the Magistrate and he may adopt any of the fact as the facts and circumstances of the case, may require:-

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing, he shall give an opportunity of hearing to the complainant;
(II) He may take cognizance under Section 190(1)(b) and issue process straight away to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed;
(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or
(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued."

2001 (43) ACC-1096
2000 (56) ACC-113
2006 (55) ACC-1
2006 Cr.L.J.-2602

(Delivered by Hon'ble Mrs. Poonam Srivastav, J.)

1. Heard Sri Manoj Kumar Srivastava, learned counsel for the petitioner and learned A.G.A. for the State.

2. The petitioner lodged a first information report under Section 324 I.P.C. which was registered at case Crime No. 30 of 2004. Subsequently the case was converted into an offence under Section 307 I.P.C. The injuries of the injured were examined on 22.1.2004 and according to Xray report grievous injury was received by the injured. After completing the investigation, the Investigating Officer submitted final report on the basis of compromise. The petitioner preferred a protest petition. The learned Chief Judicial Magistrate, Ghaziabad vide order dated 4.1.2006 rejected the final report and directed that the protest petition be registered as a complaint case fixing 26.10.2004 for statement of the complainant under Section 200 Cr.P.C. This order was challenged in criminal revision which was dismissed vide order dated 14.9.2006.

3. The grievance of the petitioner is that once the final report was rejected, the Magistrate should have taken cognizance after perusing the case diary under Section 190(1) (b) Cr.P.C. Counsel for the petitioner has placed reliance on a number of decisions. The first decision is ***Pakhando & others Vs. State of U.P. and another 2001 (43) ACC, 1096***. The submission is that since the evidence available in the case diary against the accused was sufficient, the court should have straight away summoned the accused for trial. The procedure adopted by the learned Magistrate treating the protest petition as a complaint is illegal and liable to be quashed. The other decision relied upon is, ***Kamal Saini and others Vs. State of U.P. and another, 2006(56) ACC, 113***. In the said case, the complainant had filed affidavits in support of the protest petition and in all those affidavits, the witnesses had repeated what had been stated in the application under Section 156(3) Cr.P.C. In the circumstances, when there was no new material, the Magistrate should have proceeded and taken cognizance under Section 190(1)(b) Cr.P.C. which was exactly done by the Magistrate in the said case. The Magistrate had taken cognizance under Section 190(1)(b) Cr.P.C. which was challenged in the case of Kamal Saini and others and this Court upheld the order of the Magistrate. A Misc. Application was preferred at the instance of the accused and they had challenged the order of the Magistrate taking cognizance under Section 190(1)(b) Cr.P.C. straight away. This is not the fact of the present case. In fact the present writ petition is at the instance of the complainant with a grievance that the Magistrate proceeded under Section 190(1)(a) Cr.P.C. whereas the contention of the learned counsel for the petitioner is that the Magistrate should have taken cognizance straight away and summoned the accused without calling for the complainant and witnesses to give their statements under Section 200 and 202 Cr.P.C.

4. The next decision relied upon by learned counsel for the petitioner is, **Sukhpal and others Vs. State of U.P. and others, 2006 (55) ACC, 1**. In this case also the Court had concluded that the Magistrate is not bound to accept the recommendation made by the Investigating Officer, that is to say in the event, a final report is submitted by the Investigating Officer, the Magistrate can very well after looking into the case diary summon the accused straight away. He is not bound to agree with the conclusion of the Investigating Officer. The next

decision relied upon by the counsel is, **Anand Swaroop and others Vs. State of U.P. and another, 2006 Cr. L.J. 2602**. This is an order passed in Misc. Recall Application. A perusal of the facts of the said case shows that the Magistrate after hearing the complainant on his protest petition passed an order for treating it as complaint and fixed date for recording statement under Sections 200 and 202 Cr.P.C. Aggrieved with the order, the complainant preferred a criminal revision before the learned Sessions Judge who after hearing the parties, set aside the order of the Magistrate and remanded the matter with direction to the Magistrate to re-examine the final report. After remand, the Magistrate summoned the accused straight away under Section 304B and 201 I.P.C. Aggrieved with the second order of the Magistrate, two criminal revisions were preferred which were decided by a common judgment. An application to recall the earlier order was filed and the recall application was rejected. It is only by way of obiter an observation was made that if there is sufficient material in the case diary, the Magistrate can very well straight away summon the accused and there is no necessity to treat the protest petition as a complaint and record statement under Sections 200 and 202 Cr.P.C. In all these cases relied upon by the learned counsel for the petitioner, it was the order of the Magistrate which was under challenge taking cognizance straight away under Section 190(1)(b) Cr.P.C. after disagreeing with the conclusion of the Investigating Officer. The courts came to a conclusion that no illegality has been committed and the Magistrate was not bound to record the statement of the complainant and witnesses and treat the protest petition as complaint. Thus the assertion of the counsel for the petitioner that there was material and Magistrate should not have treated the protest petition as complaint and there is complete bar, is contrary to what has been held by the courts in the aforesaid citations. The case of **Pakhando (Supra)** is a decision by a Division Bench of this Court. This again only decides the question that the magistrate is not bound to follow the procedure of a complaint case even if he declines to accept the final report after perusing the protest petition. The Magistrate can always proceed to take cognizance under Section 190(1)(b) Cr.P.C. if he is satisfied that the material of the case diary is sufficient to summon the accused. In none of the cases, there is a bar imposed on the Magistrate that he can not take cognizance under Section 190(1)(a) Cr.P.C. The Division Bench had also held that the proviso to sub section (2) of 202 of the Code will apply only to a case where the Magistrate has taken cognizance under Section 190(1)(a) Cr.P.C. and he has opted to hold inquiry under Section 202 Cr.P.C. after examining the complainant and witnesses if any, under Section 200 Cr.P.C. It is thus absolutely clear that it is the option of the Magistrate to choose the procedure. It is settled law that whenever final report is submitted by the police for dropping the proceeding following courses are open to the Magistrate and he may adopt any of the fact as the facts and circumstances of the case, may require:-

(I) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing, he shall give an opportunity of hearing to the complainant;

(II) He may take cognizance under Section 190(1)(b) and issue process straight away to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed;

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued."

5. In the circumstances, on the basis of the various verdict of this Court which has been given following the principle laid down by the Apex Court, I am not in agreement with the submission made by the counsel for the petitioner that the Magistrate had no other option but to have taken cognizance under Section 190 (1)(b) Cr.P.C. after perusing the case diary. A bare perusal of the impugned order which was confirmed in revision, shows that the Magistrate has opted to take cognizance under Section 190 (1)(a) Cr.P.C. and has fixed the date for recording statement under Sections 200 and 202 Cr.P.C. before summoning the accused. The impugned orders does not suffer any legal infirmity whatsoever. No good ground for interference is made out. The writ petition lacks merit and is accordingly dismissed. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2007

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No.49748 of 2006
With
Civil Misc. Writ Petition No. 26323 of 2005

Parents Teachers Association Adarsh Gramya Inter College Chakshya Kiraon, Phoolpur, Allahabad and another
...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha
Sri Satyanshu Ojha

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

U.P. Intermediate Education Act 1921-Chapter-VII Regulation-11-read with Constitution of India Art. 15 (3)-Admission of girl student in boy's school-held-not proper-restrictions provided in Regulation 11 applicable only in girls school where no boys student can be admitted-D.I.O.S. misinterpreted the provision-impugned order can not sustained.

Held: Para 6 & 7

At this stage it may be clarified that so far as the institution where only admission to female students is to be granted, no boy students may be allowed to be admitted inasmuch as Article 15 (3) permits the State Government to make special provisions for women and children.

In such circumstances, Clause11 (t) has to be read down so as to protect is from being struck down as hit by Article 15 of the Constitution of India. It is, therefore, provided that restriction under Clause 11 (t) will apply only in respect of Boys' students being admitted in girls institution. This Court may also record that the District Inspector of Schools while refusing to register the girls students in the petitioner's institution, has not appreciated the proviso to Clause-11 (t), which permits the admission of girls institution in boys institution in special circumstances and no finding in that regard has been recorded.

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

1. Heard leaned counsel for the parties.

The admission of girls students in the Boy's institutions, which are situate in rural areas through out the State of Uttar Pradesh, has been prohibited by the State-respondents with reference to Regulation-11 (t) of Chapter-VII of the Regulations framed under the U.P. Intermediate Education Act, 1921. The relevant clause reads as follows:

"*11(t) Parishad dwara sanstha ko jin abhyarthiyon ke pathan, paathan ke liye manyata pradan ki gayee hai, sanstha meyn ushi prakar ke abhyarthiyon ka pravesh/adhyapan karaya jayega arthat balak ke roop meyn manyata prapt vidyalayon meyn balak tatha balika ke roop meyn manyata prapt vidyalaya meyn balika abhayarthi hi adhyan ke patra hongey."*

2. The restriction so imposed is being challenged on two grounds:

(a) Any provision, which prohibits the girls students being admitted in boys institution is hit by Article 15 of the Constitution of India. Article 15 (3) prohibits the State from discriminating on the ground of sex, therefore, there cannot be any restrictions upon the admission of girls students in boys institution.

(b) Even otherwise, Clause-11 (t) provides that girls students can be admitted in boys' institutions situate in rural areas where there are no girls institutions in the local area. It has further been provided that if in the girls institution situate in local area and if the subjects in which the girl students seeks admission is not being taught, she can be admitted in a boys institution situate in the local area situate nearby. It is therefore, submitted that there is no absolute prohibition in admission of girls students in institution established for boys students.

Learned Standing Counsel on the other hand with reference to Clause-11 (t) supports the ban imposed.

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

Article 15 of the Constitution of India reads as follows:

"*15. **Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth**-(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or party out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

[(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]"

4. Thus, Article 15 prohibits discrimination on the ground of sex, however, Article 15 (3) permits the State Government to make/frame special provisions in favour of female.

5. In view of the aforesaid, thee can be no discrimination against the female candidate only on the ground of sex, including the admissions in institutions.

6. At this stage it may be clarified that so far as the institution where only admission to female students is to be granted, no boy students may be allowed to be admitted inasmuch as Article 15 (3) permits the State Government to make special provisions for women and children.

7. In such circumstances, Clause011 (t) has to be read down so as to protect is from being struck down as hit by Article 15 of the Constitution of India. It is, therefore, provided that restriction under Clause 11 (t) will apply only in respect of Boys' students being admitted in girls institution. This Court may also record that the District Inspector of Schools while refusing to register the girls students in the petitioner's institution, has not appreciated the proviso to Clause-11 (t), which permits the admission of girls institution in boys institution in special circumstances and no finding in that regard has been recorded.

8. On behalf of the petitioner it has been stated that the condition mentioned in Clause-11 (t) stands satisfied in their favour, to which no reply could be submitted. The order passed by the District Inspector of Schools refusing to issue registration forms in favour of petitioners' institution is hereby quashed.

9. Let the District Inspector of Schools take necessary steps, preferably within one month for ensuring that the students of petitioners' institution are registered in accordance with Regulation-3 of Chapter-XII of the regulations framed under the U.P. Intermediate Education Act.

10. It is further provided that the late fee which the petitioners' institution has been required to deposit must also be refunded to the institutions within one month.

The present writ petition is allowed subject to the observations made herein above. Petition allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2006

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal No. 281 of 1992

U.P. Avas Evam Vikash Parishad
...Opposite Party/Appellant
Versus
Smt. Pushpa Devi & others ...Respondents

Connected with
1.First Appeal No. 280 of 1992
2.First Appeal No. 282 of 1992
3.First Appeal No. 298 of 1992

Counsel for the Appellant:
Sri P.K. Singhal
Sri Shree Kant

Counsel for the Respondents:
Sri K.S. Kushwaha
Smt. Sunita Agrawal
Sri V.K. Sharma

Land Acquisition Act-Section 18-Right to sue mean right to hold / possess the property-Transfer of land already acquired-but before the award-whether such transfree has right to press reference for enhancement of compensation-held-'yes' as per provisions of Art. 300-A of the constitution-right to property is constitutional right-Transfree shall stand in the shoes of transferer with right to claim for enhancement of compensation.

Held: Para 17 & 18

From the above discussion it is clear that right to receive compensation is not a mere right to sue but is an actionable claim which can be transferred, as held by the Supreme Court in the case of Khorshed Shapoor (supra).

Besides above right to property has been recognized as a constitutional right by Article 300-A of the Constitution of India inserted by the Constitution (44th Amendment) Act, 1978 w.e.f. 20th of June, 1979 wherein it has been provided for that no person shall be deprived of his property saved by the authority of law. This article also supports the view, as canvassed by the claimant respondents who are transferee from the original land owner. Such transferee shall stand in the shoes of the transferer to receive compensation with a right to file a reference application for enhancement of the compensation if the compensation awarded by the Land Acquisition Officer is not as per correct market value prevalent on the date of the relevant notifications.

Case law discussed:
2004 (3) AWC-2195
AIR 1980 SC-775
1999 ALJ-153
(1905) 1 K.B.-260
AIR 1932 Cal.-719
1999 ALJ-153
AIR 1980 SC-775
1962 (1) SCR-676
AIR 1989 SC-1652
AIR 1958 SC-328
AIR 1992 SC-1604

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

1. The above four first appeals were heard together and are being disposed of by a common judgment. The learned counsel for the parties jointly agreed that a common question of law is involved in these appeals and they can be disposed of on the said common question. In order to appreciate the controversy involved in these four cases the facts of first appeal no.281 of 1992 are being taken into account as the arguments were advanced by the learned counsel for the parties in this appeal only and they submitted that the said arguments cover the remaining

appeals also. The brief facts of the case are as follows:-

2. It arises out of L.A. Case No.121 of 1987 decided on 13th of November, 1991 along with other land acquisition cases filed by Amar Singh and two cases by Smt. Usha Singh being L.A. Case Nos. 115 of 1987, 120 of 1987 and 122 of 1987 respectively.

3. A parcel of land measuring 130.35 acres of village Mathura Bangar was acquired by the State Government for the development of residential colony of U.P. State Avas Evam Vikas Parshad, Lucknow which included 35.01 acres of land of village Mathura Bangar involved in these appeals. The compensation offered by the Special Land Acquisition Officer was enhanced by the Reference Court, namely, District Judge Mathura by the judgment under appeal. Although in the memo of appeal the enhancement of the compensation by the Reference Court has been challenged but during the course of the argument enhancement of the compensation was not pressed by Shri Shri Kant, Advocate, the learned counsel for the appellant. It is, therefore, not necessary to notice in detail the facts concerning the market value of the land involved in these appeals on the date of relevant notification issued under Section 28 of U.P. Avas Evam Vikash Parishad Act equivalent to Section 4 of the Land Acquisition Act.

4. As many as sixteen grounds have been raised in the memo of appeal but the learned counsel for the appellant did not advance any argument with reference thereto, rather he did not press any of the grounds raised in the memo of the appeal. However, he has raised a new ground/argument in these appeals that the reference application was not maintainable by the claimant respondents as they have purchased a mere right to sue from the original claimants before the award by the Special Land Acquisition Officer, as submitted by Shri Shri Kant, the learned counsel for the appellant. The said argument was built up on the basis of a document paper No.4 C, which is a copy of the report submitted by the Special Land Acquisition Officer (Dwitiya) U.P. Avas Evam Vikash Parishad, Kamla Nagar, Agra, under Section 19 of the Land Acquisition Act. At the tail end of the said report under the column No.10 headed as Special Particulars (Vishesh Vivaran) it has been mentioned that the original Bhoomidhars of the acquired plots after obtaining the permission from Settlement Officer Consolidation have sold 1/4th share in favour of the person who has sought the reference for a sum of Rs.17, 000/-, by means of sale deed dated 16th of November, 1985 Right to receive compensation along with other rights has been sold for a sum of Rs.17, 000/- in favour of the person who has sought reference. The contention of the learned counsel for the appellant is that the said sale by the original land owners is not permissible in law in as much as a mere right to sue has been transferred and such transfer is impermissible under Section 6 (e) of the Transfer of Property Act. Strong reliance particularly on paragraph 18 of the ***Agra Development Authority Vs. State of U. P. and others 2004 (3) AWC 2195*** by the learned counsel for the appellants.

5. The case was initially heard on 22nd of September, 2003 and the following order was passed:-

"Shri Sri Kant, the learned counsel for the appellant at the very outset submitted that he is pressing the appeal on one point namely that the claimant respondents were not entitled to make any reference application before the Reference Court. Elaborating it, it was submitted that the claimant respondents purchased only a mere right to sue and not an actionable claim. Page 44 of the paper book was referred in support of his submission which is a copy of the report wherein under column 10 it is mentioned that the claimant respondents purchased 1/4th share from Ram Lal in the disputed property by means of the sale deed dated 16th of November, 1995 for a sum of Rs.17, 000/- only while under the award a sum of Rs.87, 828/- has been awarded. Evidently the said point was not raised either by the Reference Court or in the memo of the appeal. Smt. Sunita Agrawal, the learned counsel for the respondents submitted that she has been taken by surprise and needs time to examine the case from the said angle.

As jointly prayed list on 3rd of October, 2006."

6. It was taken up on 3rd of October 2006 on which date the arguments were concluded.

7. In contra, the learned counsel for the respondents submitted that the aforesaid argument besides being meritless, cannot be permitted to be raised in the present appeal for the first time at the time of its hearing. In other words, the said objection was not raised either before the Special Land Acquisition Officer or before the Reference Court and therefore, should not be permitted to be at this fag end of the litigation. On merits reliance has been placed upon the following three cases:-

(I)Mrs. Khorshed Shapoor Vs. Assistant Controller of Estate AIR 1980 S.C. 775.

(ii) U.P. Avas Evam Vikash Parishad Vs. Smt. Kanak and others 1999 ALJ 153.

(iii) Dawson Vs. Great Northern and City Rail. Co. (1905) 1 K.B. 260 = (1904 -7) All England law Reports Reprint.

8. I have given careful consideration to the aforesaid submissions of the learned counsel for the parties. At the very outset it may be noted that the appellants are disputing the legality and validity of the sale deed executed by the original land owner in their favour. The copy of the said sale deed which is a primary document has not been produced by the parties either before this Court or before the Reference Court, as admitted by the learned counsel for the appellants. In absence of original or certified copy of the sale deed, the argument that only a mere right to sue was transferred under the said sale deed cannot be accepted or entertained. However, the learned counsel for the appellant submitted that since the point raised by him goes to the very root of the matter and the sale deed is the basis of the respondents' claim, its nonfiling before the Reference Court or before this Court is inconsequential. It is difficult to accept the said argument. Without looking the document in question namely sale deed it is difficult to draw inference that merely a right to sue was transferred in favour of the claimant respondents, who are transferee from the original land owner.

9. The report of the Special Land Acquisition Officer submitted under Section 19 of the Land Acquisition Act cannot be read in evidence with reference to the nature of the right transferred under the sale deed in favour of the claimant respondents. The sale deed being the primary evidence should have been produced by the party who is interested to challenge its legality or validity.

10. Apart from the above, the problem can be looked from the another angle also. The U.P. Avas Evam Vikash Parishad, the present appellant, had the opportunity not to accept the sale deed in question at the initial stage of the litigation. The present appellant having accepted the said sale deed as genuine and a legal document transferring the rights, title and interest of the original land holder in favour of the claimant respondent, the appellant cannot be permitted to turn around and urge that such transaction is void and is liable to be ignored on the basis of report of its one of the officers. From the said report it is clear beyond doubt that a sum of Rs.87, 828/- has been paid to the transferee namely claimant respondents in pursuance of the award, on the basis of the sale deed in question dated 16th of November 1985. A party cannot be permitted to take contradictory and different stand qua a document at different stages of litigation.

11. Even otherwise I do not find any merit in the submission of the learned counsel that what was transferred was mere a right to sue, for the reasons more than one. No doubt the Division Bench judgment relied upon by the appellant in the case of ***Agra Development Authority Vs. State of U.P. (supra)*** supports the contention of the appellant, but on deeper probing the facts are distinguishable. In the said case, the compensation awarded by the Special Land Acquisition Officer under the Land Acquisition Act was duly paid to the owner who subsequently transferred their right after filing the reference application in favour of the respondents therein. Moreover as is apparent from paragraph 23 of the report a specific issue was framed to the effect "whether the transferees of the original claimants, are entitled to the compensation in place of the original claimant? If so to what extent?" Meaning thereby in the aforesaid ruling, the acquiring authority namely Agra Development Authority was disputing the transfer by the original claimants from its very inception on the ground that the and claimants have transferred their rights to sue only, after receiving the amount awarded by the Special Land Acquisition Officer. But in the case in hand, the facts are distinct. The transfer in question was made even before the award of sum by the Special Land Acquisition Officer. As demonstrated above, no such issue challenging the entitlement of the transferee (claimant respondents) was raised before the Reference Court. No such ground has been raised in the memo of the appeal.

12. The Division Bench has placed reliance upon a judgment of the Calcutta High Court in ***Manmatha Nath Dutt Vs. Matilal Mitra, AIR 1932 Cal 719*** and quoted a passage from it. A bare perusal of the passage quoted from the judgment of the Calcutta High Court it is clear that assignment in that case was by a person who was out of the possession of the immovable property and was to the effect " that assignee would have right to sue without conveying any interest in the

property, the assignee would not be entitled to maintain any suit for the recovery of the property."

13. The above quoted portion of the judgment of the Calcutta High Court makes the controversy involved in the present case distinguishably. Further reliance has been placed on another judgment of the Calcutta High Court and of this Court wherein it has been held that a claim for unliquidated damages for breach of contract is not an actionable claim within the Section 3 of the Transfer of Property Act, so also an action for damages in tort is not assignable. Ultimately in paragraph - 18 of the report, which has been strongly relied upon it has been held as follows:-

"*18. Thus, the above decisions show that a distinction has been drawn between a mere right to sue and an actionable claim. To give an example, if A files a suit against B claiming certain property or certain money then if A executes a deed in favour of C transferring all his right in respect of the litigation before the suit is decided such a conveyance would be invalid being hit by Section 6 (e) of the Transfer of Property Act. However, if the suit of A against B is decreed, and after the decree, but before its execution. A transfers all his rights under the decree to C this is conveyance would not be hit by Section 6 (e) vide AIR 1935 Cal 751 : AIR 1955 Mad 165 etc.*

14. In the aforesaid judgment, as pointed out by Smt. Sunita Agrawal, the learned counsel for the respondents, the earlier Division Bench judgment of this Court in the case of ***U.P. Avas Evam Vikas Parishad Vs. Smt. Kanak and others 1999 ALJ 153 (supra)*** which in its turn has relied upon a judgment of the Apex Court in the case of ***Khorshed Shapoor Vs. Assistant Collector, Estate Duty, AIR 1980 SC 775*** have not been noted or considered. It appears that the aforesaid two judgments which were otherwise binding on the Division bench were not brought to the notice of the Division Bench who has delivered the judgment in the case of Agra Development Authority (supra).

15. The Apex Court in the case of ***Khorshed Shapoor Vs. Assistant Collector, Estate Duty (supra),*** in para 10 has observed with reference to the provisions of the Estate Duty Act that,

".....but the right to receive compensation at market value on the dates of the relevant notifications unquestionably accrued to the deceased which was property and it would be such property that would pass on the death of the deceased. That such right is property is well settled and if necessary reference may be made to a decision of this Court in Lakshmi Kant Jha v. Commissioner of Wealth Tax, Bihar and Orissa, (1973) 90 ITR 97, a case under the Wealth Tax Act, 1957 where it has been clearly held that the right to receive compensation in respect of the Zamindari estate which was acquired by the Government under the Bihar Land Reforms Act, 1950, even though the date of payment was deferred, was property and constituted an asset for the purpose of that taxing statute. In other words, since the lands where lost to the estate of the deceased before the relevant date, namely, the date of death, it would be the right to receive compensation under the Land Acquisition Act that will have to be evaluated under the Estate Duty Act. Counsel for the appellant did

not dispute this position but he contended that no sooner the Collector (the Special Deputy Collector herein) made his awards determining the amounts of compensation payable to the claimants under Section 11 of the Land Acquisition Act, the right to receive compensation must be regarded as having merged in the awards, the determination having been made by a statutory public official and what the claimants would be left with thereafter was merely a right to agitate the correctness of such determination and this right to claim further compensation being merely a right to litigate was no asset or property and further that such right would become asset or property only after the Civil Court finally adjudicated upon such claim. The High Court, while negativing this contention, has held that the "right to receive extra compensation" was not a separate or different right independent of "the right to receive compensation".

It has observed thus:

"The right to receive compensation for the lands acquired by the Government, at their market value at the date of the acquisition is one and indivisible right. There is no right to 'receive compensation' and a separate right to receive 'extra compensation'. The only right is to receive the compensation for the lands acquired by the Government, which is the fair market value on the date of acquisition."

It has repelled the argument that there are two separate rights-One a right to receive compensation and other a right to receive extra or further compensation and held that under the Land Acquisition Act, the claimant has only one right, which is to receive compensation for the land at their market value on the date of relevant notification and it is this right which is quantified by the Collector under Section 11 and by the Civil Court under Section 26 of the Land Acquisition Act. The award made by the Collector under Section 11 is nothing more than an offer of the compensation made by the Government to the claimants whose property is acquired. It has relied upon an earlier judgment of the Privy Council in ***Ezra Vs. Secretary of State for India (1905) ILR 32 Cal 605*** which has been followed by the Apex Court subsequently in number of cases such as ***Raja Harish Chandra Vs. Deputy Land Requisition Officer, (1962) 1 SCR 676*** and recently in the case of ***Chiman Lal Hargovinddass Vs. Special Land Acquisition Officer A.I.R. 1989 SC 1652*** it is apt to quote the following observation of the Apex Court from the aforesaid decision of the ***Khorshed Shapoor (supra)***:-

".....The claimant can litigate the correctness of the award because his right to compensation is not fully redeemed but remains alive which he prosecutes in Civil Court. That is why when a claimant dies in a pending reference his heirs are brought on record and are permitted to prosecute the reference....."

16. A Division Bench of this Court in ***U.P. Avas Evam Vikash Parishad Vs. Kanak (supra)*** has considered the controversy involved in hand in depth and has made a survey of all decisions directly touching the point as also the relevant provisions of the Land Acquisition Act. It has repelled the contention of the acquiring body that such transfer is a mere right to sue. Its conclusion is

recorded in para 31 of the report which is reproduced below:-

"*In view of the discussions made above we hold that the sale deeds whereby the respondent-claimants once have acquired property rights in the land acquired and the right to receive compensation, did not envisage transfer of mere right to sue, transfers of property in the acquired land are not of champertous nature, hit by the provisions of S. 6 of the Transfer of Property Act and S.23 of the Indian Contract Act.*"

17. From the above discussion it is clear that right to receive compensation is not a mere right to sue but is an actionable claim which can be transferred, as held by the Supreme Court in the case of **Khorshed Shapoor (supra).**

18. Besides above right to property has been recognized as a constitutional right by Article 300-A of the Constitution of India inserted by the Constitution (44th Amendment) Act, 1978 w.e.f. 20th of June, 1979 wherein it has been provided for that no person shall be deprived of his property saved by the authority of law. This article also supports the view, as canvassed by the claimant respondents who are transferee from the original land owner. Such transferee shall stand in the shoes of the transferer to receive compensation with a right to file a reference application for enhancement of the compensation if the compensation awarded by the Land Acquisition Officer is not as per correct market value prevalent on the date of the relevant notifications.

19. The Apex Court in ***Bombay Dyeing and Manufacturing Co. Ltd. Vs. State of Bombay and Others AIR 1958 S.C. 328*** has held while interpreting word "property" with reference to Article 19 (1) of the Constitution that it has been used in a wider connotation and includes money. The citizens have a right to hold money subject to law only.

20. In a slightly different context the Apex Court in ***Jagdish Das Singh Vs. Natthu Singh AIR 1992 S.C. 1604*** has considered the Section 21 of the Specific Relief Act with reference to a situation when the subject matter of suit for specific performance of the contract to sell has been acquired by the State Government under the Land Acquisition Act. It has been held that under the Indian Law of Contract, for no fault of the plaintiff contract for performance becomes impossible; in this situation Section 21 enables award of compensation in lieu and substitution of specific performance. This decision to some extent also supports the contention of the respondents that right to receive compensation is not a mere right to sue but is right to hold property. The effect of the acquisition of the subject matter of the suit is that instead of getting immovable property, the plaintiff will get compensation in lieu and substitution of specific performance. In other words, the plaintiff gets the compensation in terms of money which itself is a property.

No other point was pressed by the learned counsel for the appellant.

21. In view of the above discussion, the aforesaid contention raised by the appellants has no force and is liable to be rejected. There is no merit in the appeal. All the appeals are dismissed with costs.

Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.10.2006

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

Civil Misc. Writ Petition No.1853 of 2006

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

Counsel for the Petitioner:
Sri A.N. Rai

Counsel for the Respondents:
Sri C.B. Yadav
Sri G.P. Yadav
S.C.

U.P. Plice Officers of the Sub-ordinate Ranks (Punishment and Appeal) Rules 1991-Rule 8 (2)-dismissal from service-petitioner alone found guilty for non reporting election duty habitual of misbehaving with other police man and public in drunken state-while dispense with departmental enquiry-No reason recorded dismissal order-held highly unjustified-not commensurate with alleged charges-order quashed.

Held: 8 & 12

In view of clause (b) of sub-rule (2) of the Rule 8 of the Rules clearly shows that the authority is empowered to dismiss or remove a person without initiating proper enquiry and disciplinary proceedings, as contemplated by the Rules provided he is satisfied that for some reason it is not reasonably practicable to hold such enquiry but the reasons have to be recorded in writing by the authority concerned. In the present case, there is not even a whisper of any reason or ground as to why it was not reasonably practicable to hold such enquiry.

Thus I am of the view that disciplinary authority while exercising its special power to dispense with departmental enquiry proceeding at the time of dismissing the service of the petitioner has failed to strictly comply with the provisions as provided under Rule 8 (2) b of the Rules and failed to record the reasonable ground, which is highly unjustified and the impugned order dated 17.8.2005 (Annexure No.5 to the writ petition) passed by respondent no.5 is liable to be struck down, consequently the impugned order dated 9th October, 2005 passed by the respondent no.4 and the order dated 12th December, 2005 passed by the respondent no.3 (Annexures No. 7 and 9 to the writ petition respectively) are also liable to be quashed.

Case law discussed:
2005 (1) ESC (HC)-505
1990 (20) SLR-488 (P of H)
1998 (1) UPLBEC-638
1994 (3) UPLBEC-638

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

1. Sri R.N. Rai, learned counsel for the petitioner and learned standing counsel on behalf of the respondents are present. Counter and rejoinder affidavits have been exchanged. On the joint request of learned counsel for the parties, this writ petition is being decided finally at the admission stage in terms of the Rules of the Court.

2. This writ petition has been filed by the petitioner for quashing orders dated 17th August, 2005, passed by respondent no.5, 9th October, 2005 passed by respondent no.4 and 12th December, 2005 passed by respondent no.3 (Annexures No. 5, 7 and 9 to the writ petition respectively) and further for a direction to the respondents to allow the petitioner to work on the post of Constable in Civil

Police and pay him salary month to month in accordance with law.

3. The facts of the case of the petitioner in brief are that he was posted as constable in Civil Police of Uttar Pradesh and during the course of service he was posted as constable 94 C.P. at police station Khekhara District Baghpat and before passing the impugned termination order he was working at Police Chauki Bazar, Khekhara, Baghpat. On 15.8.2005, the petitioner was relieved by the Station Officer to proceed to village Sunhaira vide G.D.No.15 at 22.30 hours for the purpose of getting arm's license deposited due to the Panchayat Election of 2005. While he was away from duty, Sub-Inspector Jai Dev Malik made an inspection of the police Chauki Bazar Khekhara and made an endorsement in the G.D. No.38 at 23.30 hours to the effect that he was not present at the Police Station and submitted his report. The petitioner after having knowledge of the aforesaid complaint reported at the Police Station Khekhara and made an entry to that effect in G.D. No. 40 at 23.45 hours on 15.8.2005. It is alleged in the writ petition that the said Sub Inspector without making necessary enquiry about rawangi of the petitioner to village Sunhaira vide G.D. No. 15 at 22.30 hour reported the matter to the Superintendent of Police, Baghpat on 16.8.2005 (Annexure No.4 to the writ petition) that the petitioner was habitual of drinking alcohol and misbehaved in drunken state with the public and other employees of the department in the night of 15.8.2005. A search of the petitioner was made, on the instructions of the Superintendent of Police and it was found that he alone was found absent from duty whereas other remaining employees had gone on election duty and such act committed by the petitioner amounted to serious negligence and utmost dereliction of duty. In the report a request was made that the petitioner may be transferred to some other distant place. On the said report an endorsement was made by the Superintendent of Police on 16.8.2005 to the effect which reads as under:

"H.C./ put up to termination order under 8 (2) b."

4. The Superintendent of Police, Baghpat exercising its power under Rule 8 (2) b of the Uttar Pradesh Police Officers of the Sub Ordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as the Rules) vide order dated 17.8.2005 terminated the services of the petitioner with immediate effect on the ground of misbehavior and uncivilized action with the public and other employees of the department due to which the image of the Police department was tarnished and such misbehavior and dereliction of duty naturally had a bad affect on the other Police Officials, therefore, he was satisfied that the petitioner was fully unfit to continue on his post in the disciplined Police Force.

5. Being aggrieved by the aforesaid impugned order dated 17.8.2005 the petitioner filed an appeal before the Deputy Inspector General of Police-respondent no.4 under Rule 23 of the Rules against the order dated 17.8.2005 (Annexure No.5 to the writ petition) on the ground that neither any opportunity of hearing was afforded to him nor any disciplinary proceedings in accordance with law was drawn against the petitioner at all before passing the impugned termination/dismissal order dated

17.8.2005 (Annexure No.5 to the writ petition).

6. The said appeal was dismissed by the respondent no.4. Feeling aggrieved, the petitioner filed a revision against the said order before the Inspector General of Police, Meerut Region, Meerut-respondent no.3 under Rule 23 of the Rules which too was rejected vide impugned order dated 12.12.2005 (Annexure No.9 to the writ petition.)

Being aggrieved by the aforesaid orders the petitioner has filed the present writ petition.

7. I have heard learned counsel for the petitioner and learned standing counsel at length and perused the record. Rule 8 (2) b of the Rules relying upon which the respondent No.5 relied while dismissing the services of the petitioner reads as under:

"8. Dismissal and removal - (1) No Police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.
(2) No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and disciplinary proceedings as contemplated by these rules:
Provided that this rule shall not apply-
(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or
(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or
(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry."

8. In view of clause (b) of sub-rule (2) of the Rule 8 of the Rules clearly shows that the authority is empowered to dismiss or remove a person without initiating proper enquiry and disciplinary proceedings, as contemplated by the Rules provided he is satisfied that for some reason it is not reasonably practicable to hold such enquiry but the reasons have to be recorded in writing by the authority concerned. In the present case, there is not even a whisper of any reason or ground as to why it was not reasonably practicable to hold such enquiry.

9. Learned standing counsel appearing for the State-respondents has submitted that there was no need for the authority to endorse such reason for dispensing with an enquiry as the allegations which was made against the petitioner itself was sufficient for terminating the services of such police personal. In this respect he has relied upon a judgment of this Court rendered in Niranjan Singh and another Vs. State of U.P. and others, (2005) (1) E.S.C. (All.) 505) which in my view is not applicable to the facts and circumstances of the present case.

10. From perusal of the record I find that the impugned order dated 17.8.2005 (Annexure No.5 to the writ petition) was passed by the Superintendent of Police, Baghpat respondent no.5 against the petitioner on the allegations which are

general in nature and particularly on the basis of allegations made in the report dated 15.8.2005 (Annexure No.3 to the writ petition). In the said report no specific name of a person from the public has been mentioned nor any complaint has been referred to have been received from them. More so, as per the report of the Sub Inspector of the concerned Police Station dated 16.8.2005, there was no other police employee present at the Police Station, as all of them had gone out on the election duty, whereas in the impugned order, the allegation made against the petitioner is that he misbehaved with the other police officials in drunken state. From perusal of the record, I also found that the penalty imposed against the petitioner removing him from service does not commensurate with the alleged charges and could not be reasonably imposed as in the like circumstances, in the case of Ram Kishan Vs. State of Haryana, (1990 (20) S.L.R. 488 (P & H) Panjab & Haryana, High Court held as under:

"Punishment of dismissal on a police constable on guard duty on charges of consuming liquor and chasing colleague constable on sentry duty with intention to bodily harm him and abusing the head constable, in charge guard was held disproportionate and case remanded to disciplinary authority to reconsider the quantum of penalty. In the case of Dharma Pal Vs. State of Haryana 1989 (5) SLR 569 (P&H), it has been held that the dismissal from service of the constable for having consumed liquor on duty is wholly arbitrary and hence liable to be quashed"

11. Further, it is not clear from the impugned orders passed in the instant case against the petitioner that the petitioner was provided any opportunity of hearing before terminating him from service. In such circumstances, the petitioner was also deprived of the basic principle of natural justice by not affording reasonable opportunity of hearing for defending himself. This Court has on two occasions earlier dealt with Rule 8(2) b of the Rules. In Brijendra Singh Yadav Vs. State of UP (1998 (1) UPLBEC 638) and in Deep Narain Vs. Deputy Inspector General of Police (1994 (3) UPLBEC 1717). In Brijendra Singh Yadav (Supra), this Court held as under:

"it is well settled that the satisfaction of the authority concerned for dispensing the enquiry on the ground that it was not reasonable practicable to hold the enquiry, is open to judicial review. Before an order dispensing an enquiry can be sustained, two conditions must be satisfied (1) that there existed a situation which rendered holding of any enquiry not reasonably practicable an (2) that the disciplinary authority had recorded in writing its reasons in support its conclusion. In addition to that it must also be shown that the authority concerned has not exercised the statutory power maliciously and is not motivated by personal animosity.

It was further observed:

".....It was incumbent upon the respondents to disclose to the court the material which existed at the date of passing the impugned order in supportof the subjective satisfaction recorded by the respondent no.3 in the impugned order especially when serious allegation of mala fide were made against him as well as Sri Ranvir Singh Chauhan. It is well

settled that the decision to dispense with departmental enquiry can not be rested solely on the ipse dexit to the concerned authority.....Non holding a regular enquiry in the back ground of the allegations of malafide, was highly unjustified and the ground record for subjective satisfaction for non holding of enquiry that no witness was prepared to give evidence against the petitioner, was nothing but a lame excuse and appears to be a concoction.

In Deep Narain (Supra) it was held by this Court as under:

".....the disciplinary authority has power to dispense with the enquiry but that decision can only be taken in case it is satisfied that it is not reasonably practicable to hold such enquiry. The reasons are to be recorded in writing in support of the satisfaction. The disciplinary authority has no right to dispense with the departmental enquiry against the government servant is week and likely to fail. The discretion which has been given to the disciplinary authority to dispense with the departmental enquiry can not rest solely on the whims of the concerned authority....."

12. Thus I am of the view that disciplinary authority while exercising its special power to dispense with departmental enquiry proceeding at the time of dismissing the service of the petitioner has failed to strictly comply with the provisions as provided under Rule 8 (2) b of the Rules and failed to record the reasonable ground, which is highly unjustified and the impugned order dated 17.8.2005 (Annexure No.5 to the writ petition) passed by respondent no.5 is liable to be struck down, consequently the impugned order dated 9th October, 2005 passed by the respondent no.4 and the order dated 12th December, 2005 passed by the respondent no.3 (Annexures No. 7 and 9 to the writ petition respectively) are also liable to be quashed.

13. Under above said facts and circumstances of the case, settled law and the observations made hereinabove, the writ petition is allowed and the impugned orders dated 17.8.2005 (Annexure No.5 to the writ petition), the appellate order dated 9th October, 2005 (Annexure No.7 to the writ petition) and the revisional order dated 12th December, 2005 (Annexure No.9 to the writ petition) are hereby quashed. The petitioner shall be allowed to continue to work on the post of Constable in Civil Police and will be paid salary month to month, in accordance with law. However, the concerned authority would be at liberty to proceed with the disciplinary proceedings, if so it thinks proper against the petitioner in accordance with law.

No order is passed as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2006

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

Civil Misc. Writ Petition No. 5089 of 1988

Gaon Sabha ...Petitioner
Versus
Additional District Judge and eighteen others ...Respondents

Counsel for the Petitioner:
Sri M.M.D. Agrawal
Sri V.K. Singh, S.C.
Sri Santosh Shukla

Counsel for the Respondents:
Sri Yogesh Kumar Saxena
Sri Anil Kumar Sharma
Sri A.K. Tewari
Sri M.C. Chaturvedi, Addl. C.S.C.
S.C.

Code of Civil Procedure-Order 21 rule-22-objection against confirmation of auction sale-beyond statutory period-can be entertained if based on fraud or ignorance of sale proceeding-1 Bigha land sold for Rs. One-held-very shocking-auction sale can not survive.

Held: Para 11

It is correct that mere inadequacy of consideration is no ground to set-aside the auction sale. However, if the consideration for which property has been sold is shocking to the conscious of the court then it is good ground by itself to set-aside the same. Even in the year 1968 for one rupee even one square yard of land could not be purchased. However through the impugned auction one bigha of land (equivalent to 917 square yard) was sold for only Rs.1/-.

Case law discussed:
AIR 1997 SC-3
AIR 1979 Alld.-106
AIR 2006 SC-1458
1981 ALJ-684

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

1. In this writ petition Hon'ble R.B. Misra J passed several orders (on the order sheet) from 10.8.2001 till 23.11.2004 in respect of service upon respondents. District Magistrate and other officials were also directed to effect service and file affidavit of compliance, which was accordingly done. District Magistrate and Sub-Divisional Magistrate were also directed to be made parties in the writ petition. However at the time of arguments on 2.8.2006 no one appeared on behalf of the respondents except respondent No. 14 Ram Swaroop one of the auction purchasers on whose behalf Sri A.K.Sharma learned counsel has argued the case. Sri M.M.D Agarwal learned counsel appeared on behalf of the petitioner and learned standing counsel represented the State authorities. On 2.8.2006 all the substitution applications were allowed after hearing learned counsel for the parties and judgment was reserved (order on the order sheet).

2. This writ petition discloses a shocking state of affairs. Agricultural land belonging to the State and under the management of the Gaon Sabha admeasuring about 80 acres has been sold in auction only for Rs.400/- for realization of some costs payable by Gaon Sabha petitioner to the respondents.

3. Respondents 3, 4 and 5 Ram Narain, Sadan Sahkari Samiti and Manphool obtained a decree of costs amounting to Rs.410.20/- against Gaon Sabha Makrandpur, district Etawah in O.S No. 170 of 1964. For realization of the costs, Execution case No. 95 of 1968 was filed praying therein that for realization of the aforesaid costs Plot No. 2/ admeasuring 32.15 acres and Plot No. 14/1 admeasuring 48.08 acres belonging to Gaon Sabha concerned be attached and sold.

4. The other contesting respondents of this writ petition purchased the land in dispute in auction on 28.11.1969. Gaon Sabha filed objections under section 47

C.P.C against the said auction on 11/12 February 1970. The objections under section 47 C.P.C numbered as Misc. Case No. 19 of 1970 were allowed by Munsif , Etawah, Court No. 5 through order dated 15.5.1981. The learned Munsif held that price of Rs.1/- per bigha was shocking (80 acres come to about 400 Kuchcha bighas). Trial court further held that execution application was filed after one year of the decree hence by virtue of Order 21 Rule 22 C.P.C it was necessary to issue notice to the judgment debtor which was not done (Before the amendment of C.P.C in the year 1976 notice was necessary to be issued if execution was filed after one year from the date of decree. Through Act No. 104 of 1976, the said period of one year has been substituted by two years). Against the said order Civil Revision No. 69 of 1981 was filed by Ram Babu and Brij Bhushan Lal only (respondents 1A and 2). The other auction purchasers respondents were impleaded as proforma opposite parties. A.D.J / Special Judge (E.C. Act), Etawah through judgment and order dated 25.7.1987, allowed the revision, set-aside the order of the trial court dated 15.5.1981 and rejected the objections filed by Gaon Sabha through its Pradhan under section 47 C.P.C hence this writ petition by Gaon Sabha.

5. The first ground taken by the learned A.D.J for allowing the revision was that "from perusal of the objections filed under section 47 C.P.C it is apparent that the objection was filed by the Pradhan on behalf of the Gaon Sabha in his personal capacity and not in the capacity of representative of Gaon Sabha and the resolution to this effect was neither passed nor copy thereof was enclosed with the objections hence the institution of the objection was illegal and it must have been summarily rejected". Learned A.D.J also referred to paragraphs 128 to 132 of Gaon Samaj Manual.

6. After holding that objections were filed by the Pradhan on behalf of Gaon Sabha objections should have been held to be maintainable. Gaon Sabha is always represented by Pradhan. It is not understandable that what the learned A.D.J meant by first saying that objections were filed by the Pradhan on behalf of Gaon Sabha and then saying that objections were filed by the Pradhan in his personal capacity. This observation is self-contradictory. In any case even if there was some technical flaw in filing the objections its benefit could not be given to the respondents to usurp the property of the Gaon Sabha. The court is required to be more concerned about the substance than mere technicalities. The Supreme Court in ***United Bank of India Vs. Naresh Kumar AIR 1997 SC 3*** has held that suit filed by the Bank shall not fail due to absence of signature of proper officer in plaint. Same principle will apply in the instant case also; even if it is held that there was some defect in the representation of Gaon Sabha as mentioned in the application under section 47 C.P.C. However I do not find any substantial defect in the description of Gaon Sabha in the application under section 47 C.P.C. Gaon Sabha could sue through Pradhan and it in fact filed objections through Pradhan.

7. The other reason given by the learned A.D.J Sri Narendra Singh was that execution had been struck off in full satisfaction on 5.1.1970 hence objection under section 47 C.P.C was not maintainable. This ground is also not tenable. Objections under section 47

C.P.C are quite maintainable even after satisfaction of the decree. Moreover Gaon Sabha had contended and it was accepted by the trial court that it had no knowledge of execution proceedings and objections were filed as soon as Gaon Sabha came to know about the said proceedings.

8. The third ground taken by the learned A.D.J is that opportunity of producing evidence should have been provided to the decree holder and auction purchasers. In this regard it is important to note that no prayer for adducing evidence was made by the decree holder and auction purchasers.

9. The next ground taken by the revisional court is that as auction purchasers had been delivered possession of the property hence sale could not be set-aside. In this regard, reliance was placed upon an authority of this court reported in ***Abdul Ghani Versus Mahendra Kumar and others AIR 1979 Alld. 106***, wherein it was held that if a stranger has purchased the property in auction then after reversal of the decree auction can not be set-aside. The said principle is not at all applicable to the facts of the instant case. In the instant case, no prayer was made for setting aside the decree in execution of which property in dispute was sold. In the instant case, objections against execution were filed under section 47 C.P.C, which were quite maintainable.

10. I am constrained to observe that judgment and order passed by the Additional District Judge is utterly illegal. Each and every point taken by him is against the settled principles of law. Learned A.D.J did not say a single word regarding the points on which sale was set-aside by the trial court. Revision was allowed on flimsy and imaginary bars against filing of objections under section 47 C.P.C. The least, which can be said is that learned A.D.J was predetermined to allow the revision, dismiss the objections of Gaon Sabha and confirm the auction sale.

11. It is correct that mere inadequacy of consideration is no ground to set-aside the auction sale. However, if the consideration for which property has been sold is shocking to the conscious of the court then it is good ground by itself to set-aside the same. Even in the year 1968 for one rupee even one square yard of land could not be purchased. However through the impugned auction one bigha of land (equivalent to 917 square yard) was sold for only Rs.1/-.

12. As rightly observed by the trial court the auction sale was also labile to be set-aside for want of compliance of mandatory provisions of Order 21 Rule 22 C.P.C. The sale was also liable to be set-aside for non compliance of provisions of Order 21 Rule 64 C.P.C which are quoted below:

"Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale,or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

13. The attachment was in respect of two separate plots hence it was essential to sale only one of the two plots by virtue of Order 21 Rule 64 C.P.C. In fact the amount of Rs.400/- could be fetched by

selling only one bigha of land. In the year 1968 average value of agricultural land in U.P was about Rs.5000/- per Kuchcha bigha. The Supreme Court in a recent authority reported in ***Bala Krishanan Vs. M.Konar AIR 2006 SC 1458*** has held that only so much portion of the property must be sold which is sufficient to satisfy the decree and it is not just a discretion but obligation on court. Sale held without examining this aspect is illegal (para 10). In the said case, objections filed after ten years of confirmation of sale were directed by the High Court to be treated objections under section 47 C.P.C. Supreme Court approved the veiw of the High Court. In the said case also five acres of land had been sold for Rs.4000/-, which was termed as paltry sum by the Supreme Court. It has been held by the full benches of Rajasthan and Patna High Courts in Phool Chand and another Vs. Badri Prasad AIR 1953 Raj. 51 (FB) and Baleshwar Chaubey Versus R.R.P Singh and others AIR 1947 Patna 461 that objections against sale under section 47 C.P.C can be filed even after confirmation of sale if applicant shows that owing to fraud or for other reason he was ignorant of the sale proceedings preliminary to sale. Similarly it has been held by this court in ***Firm Harvilas Rai, Deokinandan, Ranikhet and another VS. Lucknow Resin Factory and others, 1981 ALJ 464*** that if the sale is void ab initio then objections regarding illegality may be made even after sale is confirmed.

14. Accordingly I am of the view that the order passed by the revisional court is patently erroneous in law and without jurisdiction.

15. Writ petition is therefore allowed. Judgment and order passed by the revisional court dated 25.7.1987 is set-aside. Judgment and order passed by the trial court dated 15.5.1981 setting aside the auction sale is confirmed.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 27432 of 2004

Kantu ...Petitioner/Defendant
Versus
Musaram & others ...Respondent/ Plaintiff

Counsel for the Petitioner:
Sri J.P.S. Chauhan

Counsel for the Respondents:
Sri Shashi Kant Shukla

Code of Civil Procedure-as amended by Act No. 22 of 2002-Amendment in Plaint-after 7 years when issues framed and Trail Commenced-no reasons disclosed for not taking this plea as earliest-when suit instituted-once trail commenced it should not be delayed-amendment-held-not justified.

Held: Para 8

In the present case, it has been specifically argued by the petitioner and not disputed by the respondent that the trial of the suit had commenced at the time of filing of the amendment application and as such the proviso to Rule 17 would be attracted and in the absence of the plaintiff-respondent having been able to show that in spite of due diligence, he could not have raised the issue involved in the amendment before the commencement of the trial, allowing of the amendment application would not be justified in law.

Case law discussed:
2006 ACJ 989 distinguished.

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

1. Plaintiff-respondent no. 1-Musaram filed a Civil Suit No. 499 of 1996 against the petitioner (who is his real brother) with a prayer for grant of permanent injunction against the petitioner (defendant) from interfering in the possession of the plaintiff (respondent no. 1). The written statement of the petitioner-defendant was filed, issues were framed and evidence of the plaintiff was closed and a date was fixed for evidence of the defendant and the witnesses of the defendant were to be cross-examined and it was at this stage that on 28.8.2003 the plaintiff-respondent no. 1 filed an application under Order VI Rule 17 of the Code of Civil Procedure seeking amendment of adding the relief for partition of the property in question and also for a declaration of his 3/4th share in the property in dispute. The said application of the defendant-respondent no. 1 was allowed by the trial court on 20.9.2003. Challenging the said orders, the petitioner filed Civil Revision No. 52 of 2003 before the District Judge, Saharanpur which has been dismissed on 12.5.2004. Aggrieved by the aforesaid orders, the petitioner has filed this writ petition.

2. I have heard Sri J.P.S. Chauhan, learned counsel appearing for the petitioner as well as Sri Shashi Kant Shukla, learned counsel appearing for the respondents. Pleadings have been exchanged and with the consent of the learned counsel for the parties, this writ petition is being disposed of at this stage.

3. It is not disputed between the parties that the trial of the suit had commenced at the time when the application for amendment had been filed. The courts below have allowed the amendment application primarily on the ground that *"the courts should be extremely liberal in granting the prayer for amendment"* and as such when the amendment is being sought only in the prayer of the plaint, the same would not change the fundamental character of the suit and thus the same should be allowed and was accordingly allowed by the courts below:

4. 'The submission of the learned counsel for the petitioner is that it was only after certain material facts were disclosed in the written statement and the evidence filed by the petitioner, that the respondent no. 1 moved such application for amendment, and in case if such amendment is allowed, it could cause grave hardship to the petitioner. It has further been submitted that the said amendment application has been filed after seven years of the filing of the suit and also after coming into force of Act No. 22 of 2002, whereby Rule 17 of Order VI of the Code of Civil Procedure has been amended, with effect from 1.7.2002.

5. The proviso to the amendment Rule 17 clearly states that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The word used in the said proviso is "*shall*" and not "*may*" and as such it was obligatory for the court below to first come to the

conclusion that in spite of due diligence, the plaintiff could not have filed the amendment application before the commencement of the trial. A perusal of the application seeking amendment goes to show that there is no reason whatsoever disclosed by the plaintiff for not having added such a prayer at the time of filing of the suit or having got the same amended prior to the commencement of the trial. The purpose of the said proviso is that the trial of the suits should not be delayed and once the trial commences, it should be concluded expeditiously, unless for some specific and valid reason the amendment application is to be entertained.

6. The submission of the learned counsel for the petitioner has force that the situation with regard to the property remained the same at the time of filing of the suit and when the amendment application was filed, and in case if the respondent had so desired, he could have made the prayers sought by means of the amendment, at the time of filing the suit itself, and by adding it subsequently after 7 years of the filing of the suit, and after the issues had been framed and evidence was going on, the interest of the petitioner-defendant shall be prejudiced.

7. Learned counsel for the respondent has relied upon a decision of the Apex Court rendered in the case of Raiesh Kumar Aggarwal Vs. K.K. Modi 2006 All.C.J. 989 wherein it has been held that an amendment which does not change the basic structure of the suit, should be permitted, specially when the party can file an independent suit for the same relief. The facts of the said case were different as the proviso clause of Rule 17 of Order VI C.P.C. was not attracted in the said case.

8. In the present case, it has been specifically argued by the petitioner and not disputed by the respondent that the trial of the suit had commenced at the time of filing of the amendment application and as such the proviso to Rule 17 would be attracted and in the absence of the plaintiff-respondent having been able to show that in spite of due diligence, he could not have raised the issue involved in the amendment before the commencement of the trial, allowing of the amendment application would not be justified in law.

9. As such the orders impugned in this writ petition are liable to be set aside.

10. This writ petition succeeds and is allowed. The orders dated 12.5.2004 passed by the Additional District Judge, Court No. 5, Saharanpur and dated 20.9.2003 passed by the Civil Judge (Junior Division), Hawali, Saharanpur are quashed. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Application No. 206 of 2006

Triyugi Nath ...Defendant/Applicant
Versus.
Additional District Judge, and another
...Plaintiff/ Opp.Parties

Counsel for the Applicant:
Sri Ashish Srivastava

Counsel for the Opposite Parties:
Sri B.B. Paul
Sri A.P. Paul
S.C.

Code of Civil Procedure-Order 8 rule-I- Written statement not filed within 90 days-Trail court proceeded ex-parte-even when the counsel for defendant sought adjournment of his case-once the court allowed the defendant to contest the case-15 days delay in filing w.s.-can not come in the way-held-written statement can be filed even after expiry statuary period for reasonable cause.

Held: Para 12

Therefore, in the opinion of the Court, a liberal approach should have been adopted by the Court below in permitting the defendant to file the written statement. Admittedly, the delay in filing the written statement was only 15 days. Since the trial court had allowed the defendant to contest the matter on merit, the Court ought to have allowed the defendant to file the written statement. The trail court committed an error in rejecting the application of the defendant seeking permission to file the written statement.

Case law discussed:
J.T. 2005 (4) SC-10
2005 (4) SCC-480
2005 (6) SCC-705
AIR 2006 SC-396

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

1. A suit for eviction and for arrears of damages was filed. The summons was served upon the defendant on 12.7.2004. The written statement was to be filed by 12.10.2004, i.e., within 90 days from the date of the service of the summons. The defendant did not file the written statement within the said period. On 21.10.2004, an adjournment application was moved by the defendant praying for an adjournment on the ground that his counsel was suffering from a viral fever. The Court by an order dated 28.10.2004 rejected the application of the defendant and directed that the case to proceed exparte, since the defendant had not filed a written statement. An application for recall of this order was filed by the defendant alleging that the written statement was ready, but could not be filed, as his counsel was unwell, and therefore, prayed that the order be recalled and the defendant be permitted to file the written statement. The Court below, after hearing the parties, allowed the recall application and recalled its order dated 21.10.2004 and permitted the defendant to appear and contest the matter, but debarred the defendant from filing his written statement. A second application was filed by the defendant again praying that the defendant should be permitted to file the written statement, as there was only a small delay and that there was no intention on his part to delay the proceedings. This application was rejected by an order dated 13.7.2006 on the ground that no written statement could be permitted to be filed after the expiry of 90 days. Consequently, the writ petition.

2. Heard Sri Ashish Srivastava, the learned counsel for the petitioner and Sri B.B. Paul, the learned counsel for the respondent.

3. The learned counsel for the respondent submitted that the order dated 4.2.2005 had become final and that no review application nor a revision was filed against the said order, and therefore, the said order could not be set aside in the present proceedings under Article 227 of the Constitution of India. The learned counsel for the respondents submitted that

the petitioner had an alternative remedy against the order dated 13.7.2006 by filing a revision under Section 115 of the Code of Civil Procedure.

4. The learned counsel for the respondent further submitted that in view of the provision of Order 8 Rule 1of the C.P.C., no written statement could be filed after 90 days, inasmuch as, the said provision is mandatory in nature and that time could not be extended beyond 90 days for the purpose of filing the written statement.

5. In the opinion of the Court, the submission made by the learned counsel for the respondents is bereft of merit.

6. In the opinion of the Court, this is a fit case where the Court should exercise its power under Article 227 of the Constitution, rather than delegating the petitioner to a remedy of filing a revision. Substantial justice is required to be done rather than take a technical approach in the matter. The Supreme Court in the case of **State of Nagaland Vs. Lipok AO and others, JT 2005(4) SC 10** held "*When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."*

7. The said principle of law as enunciated by the Supreme Court is squarely applicable in the present case.

8. Order 8, Rule 1 of the Code of Civil Procedure as amended by the Act No.22 of 2002 w.e.f. 1.7.2002 reads as under:-

"**1. Written Statement.-**The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."

9. The aforesaid provision has been interpreted by the Supreme Court in various judgments. In **Kailash vs. Nanhku and others, 2005 (4) SCC 480**, the Supreme Court held that the nature of the provision contained in Order 8 Rule 1 is procedural and is not a part of the substantial law unless compelled by express and specific language of the statute. The provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The Supreme Court held-

"Considering the object and purpose behind enacting Rule 1 of Order 8 in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired."

10. In **Rani Kusum (Smt.) Vs. Kanchan Devi (Smt) and others,**

reported in 2005 (6) SCC 705, the Supreme Court held as under:-

"Order 8Rule 1 of the amendment casts an obligation on the defendant to file the written statement written within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order 8 Rule 1 is procedural. It is not a part of the substantive law.

It is also to be noted that thought the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words " shall not be later that ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The Courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be director though worded in the negative form."

11. In **Shaikh Salim Haji Abdul Khayumsab vs. Kumar and others, AIR 2006 SC 396**, the Supreme Court again held that even though the provision of Order 8, Rule 1 C.P.C. is couched in a negative language, the said provision is directory in nature and that the Court has the inherent power to extend the time in filing the written statement for reasons to be recorded.

12. In the present case, the Court proceeded exparte inspite of an adjournment application being filed by the defendant. The said order to proceed exparte was recalled because the Court found that the counsel for the defendant was ill. It has come on record that the written statement was ready, but could not be filed on account of the fact that the defendant's counsel had fallen ill. Therefore, in the opinion of the Court, a liberal approach should have been adopted by the Court below in permitting the defendant to file the written statement. Admittedly, the delay in filing the written statement was only 15 days. Since the trial court had allowed the defendant to contest the matter on merit, the Court ought to have allowed the defendant to file the written statement. The trail court committed an error in rejecting the application of the defendant seeking permission to file the written statement.

13. For the reasons stated aforesaid, the writ petition is allowed. The orders dated 4.2.2005 and 13.7.2006 are set aside. The written statement filed by the petitioner-defendant shall be taken on record subject to the payment of cost of Rs.2,000.00, which shall be deposited by the petitioner within three weeks from the date of the production of a certified copy of the order. The said amount shall be withdrawn by the plaintiff.

14. It is further directed that the suit shall be decided by the trial court within a period of six months. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.22514of 1997

Lokman Singh ...Petitloner
Versus.
Deputy General Manager, Western Zone, U.P.8.R.T.C. Meerut & others ...Respondents

Counsel for the Petitioner:
Sri Brijesh Sahai
Sri Satyanshu Ojha
Sri R.K. Ojha
Sri V.P. Singh
Smt. Krishna Singh
Sri Suman Kumar Yadav
Sri Akhilesh Misra

Counsel for the Respondents:
Sri Sameer Sharma
Sri Sheshshadri Dwivedi
S.C.

Constitution of India, Art. 226-Alternative Remedy-termination order challenged-pending for long period of 10 years-after exchange of counter-Rejoinder affidavit-held alternative remedy No bar.

Held: Para 4

No doubt, the petitioner has·a remedy of raising a dispute under the U.P. Industrial Disputes·Act. However, since the petition was entertained in the year 1997 and counter and rejoinder affidavits have been exchanged, it would not be proper for the Court to relegate the petitioner to an alternative remedy under the Industrial Disputes Act at this stage, and that too, after a period of almost 10 years. Consequently, the preliminary objection made by the learned counsel for the respondents is rejected.

(B) Constitution of India, Art. 226-Dismissal-No finding recoverded by disciplinary authority-about the charges found established-No show cause notice given-about dis agreement with the finding recorded by the enquiry officer-dismissal order-held not sustainable.

Held: Para 11 & 12

A perusal of the show cause notice indicates that no reasons had been given by the disciplinary authority while disagreeing with thefindings of the enquiry officer. The show cause notice only quotes the charges levelled against the petitioner which, by itself, did not amount to a disagreement with the findings given by the enquiry officer, nor would it amount to a disclosure of the reasons of the disciplinary authority.

Further, the, order of dismissal does not indicate that the disciplinary authority had found that the charges against the petitioner stood proved. Consequently, in the absence of any findings that the charges stood proved against the petitioner, the Court is of the opinion that the order of dismissal against the sole charge that was found proved by the enquiry officer, by itself, cou1d not be a ground for dismissal of the petitioner.
2005 (7) SCC-597
1999 (83) FLR-534

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

1. A checking squad of the U.P. State Roadways Transport Corporation stopped Bus No. UGE 507 on 18.12.1993 and upon checking, found, that out of 95 passengers, 48 passengers were travelling without, tickets. On the basis of the checking report, the petitioner was suspended on 14.12.1993 and a charge sheet dated 11.1.1994 was issued. The

charges against the petitioner was that 47 persons were travelling without tickets and that the petitioner had manhandled the checking staff and had also incited the passengers, who in turn, misbehaved with the checking staff and that the petitioner indulged in indiscipline and violated the Rules and Regulations of the Corporation. The petitioner denied the allegations and submitted that he was in, the process of issuing the tickets when the bus was stopped by the checking staff and, at that stage, he had already issued several tickets. He further submitted that he did not misbehave with the checking staff nor had incited the passengers and, in fact, was instrumental in assuaging the tempers of the passengers. The disciplinary authority found that the reply of the petitioner was not satisfactory, and decided to hold an oral enquiry and appointed an enquiry officer to conduct an enquiry. The enquiry officer conducted the enquiry and submitted a report and found that the petitioner had not done his duty in accordance with the Rules and Regulations and therefore found him guilty of this charge. The enquiry officer found that the petitioner was issuing the tickes at the time when the bus was stopped by·the checking squad and that there was some misunderstanding between him,the passengers and the checking staff. The enqmryofficer consequently exonerated the petitioner from the remaining charges. The disciplinary authority disagreed with the enquiry report and issued a show cause notice dated 12.8.1994 to the petitioner to show cause why his services should not be dismissed. The petitioner submitted a detailed reply. The disciplinary authority after considering the matter, passed an order· of dismissal dated 26.9.94. The petitioner filed a departmental appeal which was dismissed. Consequently, the writ petition praying for the quashing of the impugned orders.

2. Heard Sri Satyanshu Ojha, the learned counsel holding the brief of Sri R.K. Ojha, the learned counsel for the petitioner and Sri Sheshshadri Dwivedi, the learned counsel holding the brief of Sri Sameer Sharma, the learned counsel for the respondents.

3. A preliminary objection was raised .by the learned counsel for the respondents, namely, that the petitioner had a remedy of filing a reference under, the U.P. Industrial Disputes Act for adjudicating upon the legality and validity of the order of the dismissal, and therefore, submitted that the writ petition should be dismissed on the ground of alternative remedy.

4. No doubt, the petitioner has·a remedy of raising a dispute under the U.P. Industrial Disputes·Act. However, since the petition was entertained in the year 1997 and counter and rejoinder affidavits have been exchanged, it would not be proper for the Court to relegate the petitioner to an alternative remedy under the Industrial Disputes Act at this stage, and that too, after a period of almost 10 years. Consequently, the preliminary objection made by the learned counsel for the respondents is rejected.

5. The learned counsel for the petitioner submitted that the petitioner was exonerated·of the charges levelled against· him by· the enquiry officer except for one charge, which by itself, was not that grievous, warranting an order of dismissal. Further, the disciplinary authority, while disagreeing with the enquiry report did not specify any reason

for disagreeing with the enquiry report, nor such reasons were communicated by the disciplinary authority while issuing the show cause notice to the petitioner. Consequently, the show cause notice issued by the disciplinary authority was exfacie illegal. The learned counsel for the petitioner further submitted that even in the order of dismissal, no reason had been given by the disciplinary authority for disagreeing with the enquiry report nor the disciplinary authority found that the petitioner was guilty of the charges levelled against him. Consequently, in the absence of any finding that the petitioner was guilty of the charges, the order of the disciplinary authority dismissing the petitioner from the services·of the respondents was wholly illegal and was liable to be set aside.

6. On the other hand, the learned counsel for the respondents submitted that the disciplinary authority had full power to disagree with the findings recorded by the enquiry officer and that he had recorded the reasons for such disagreement while issuing the show cause notice. The learned counsel further submitted that assuming that the disciplinary authority did not give cogent reasons in the show cause notice, the reasons so given were only tentative in nature which, in any case, was supplied by the disciplinary authority in the order of dismjssal. The learned counsel for the respondents, therefore submitted, that there was no error in the order of the dismissal and that the same was liable to be confirmed and that the Court should not interfere in the decision of the authority or substitute its decision with the decision of the authority.

7. In support of his submission, the leraned counsel placed reliance upon the decision of the. Supreme Court in **V. Ramana vs. A.P.SRTC and others, 2005 (7) SCC 338**, wherein the Supreme Court held:

"11. The common thread running through in all these decisions is that the court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court, in·the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case the court would not go into the correctness of the choice made by the administrator open to him and the court should not substitute its decision for that of the administrator. The scope of judicial ·review is limited to the deficiency in decision making process and not the decision.

12. To put it differently unless the punishment imposed·by the disciplinary authority or the Appellate Authority shocks the conscience of the court/Tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof.·In a normal course if the punishment imposed is shockingly disproportionate it would be appropriate to direct the disciplinary authority or the Appellate Authority to reconsider the penalty imposed."

8. In the opinion of the Court, the aforesaid principle, as enunciated by the Supreme Court is not applicable in the present case, inasmuch as, the decision of

the disciplinary authority is vitiated on account of the fact that the order of dismissal is disproportionate to the charge found proved against the petitioner and also on account of thefact that the disciplinary authority while disagreeing with the fmdings recorded by the enquiry officer had neither given any reasons nor had found that the charges levelled against the petitioner stood proved.

9. In **National Fertilizers Ltd. and others Vs. P.K. Khanna, 2005 (7) SCC 597**,·the Supreme Court held that it was necessary for the disciplinary authority to record its reasons for such disagreement as well as give its own findings on such charges, if it disagreed with the findings of the enquiry officer.

10. In **Yoginath D. Bagde vs. State of Maharasntra and another, 1999 (83) FLR 534**, the Supreme Court held that when the disciplinary authority disagreed with the fmdings of the enquiry officer, he was required to record his ownfmdings that the charges were established and that the delinquent officer was liable to be punished. The Supreme Court held-

"it is open to the Disciplinary Authority either to agree with the findings recorded by the Inquiring Authority or disagree with those findings. If it does not agree with the findings of the Inquiring Authority, it may record its own fmdings. Where the Inquiring Authority has found the delinquent officer guilty of the charges framed against him and the Disciplinary Authority agrees with those findings, there would arise no difficulty. So also, if the Inquiring Authority has held the charges proved, but the Disciplinary Authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties havearisen in all those cases in which the Inquiring Authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the Disciplinary Authority disagreed with, those findings and recorded its own findings that the charges were established and the delinquent officer was liable to, be punished."

11. The learned counsel for the respondents submitted that the disciplinary authority while disagreeing with the findings of the enquiry officer tentatively recorded its reasonings in the show cause notice and after giving full opportunity to the petitioner, the disciplinary authority, after considering the reply of the petitioner, recorded its reasons for disagreeing with the findings of the Enquiry Officer and thereafter, passed the order of dismissal. The submission of the learned counsel for the respondents is bereft of merit. A perusal of the show cause notice indicates that no reasons had been given by the disciplinary authority while disagreeing with thefindings of the enquiry officer. The show cause notice only quotes the charges levelled against the petitioner which, by itself, did not amount to a disagreement with the findings given by the enquiry officer, nor would it amount to a disclosure of the reasons of the disciplinary authority.

12. Further, the, order of dismissal does not indicate that the disciplinary authority had found that the charges against the petitioner stood proved. Consequently, in the absence of any findings that the charges stood proved

against the petitioner, the Court is of the opinion that the order of dismissal against the sole charge that was found proved by the enquiry officer, by itself, cou1d not be a ground for dismissal of the petitioner.

13. For the reasons stated aforesaid, the order of termination as well as the appellate order cannot be sustained and are quashed. The writ petition is allowed. The respondents are directed to reinstate the petitioner within one month from the date of the production of a certified copy of this order before the authority concerned. Since, no relief for back wages has been claimed, this Court is therefore not inclined to grant any relief of back wages. Even otherwise, in the opinion of the Court, since the petitioner had not worked during the interim period, no wages can be granted on the basis of the principle of 'No work no Pay'.

14. Since, only one charge levelled against the petitioner had been proved, consequently, the petitioner would not be entitled to receive the balance pay during the suspension period other than the subsistence allowance. The period of suspension from the date of the dismissal till the date of reinstatement would however be counted towards his length of service. In the circumstances of the case, parties will bear their own cost.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 10844 of 2004

Sunil Kumar Giri ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Giri

Counsel for the Respondents:
Sri A.K. Rai
Sri B.N. Singh (Sr. S.C.)

Central Civil Services (Temporary Service) Rules 1965-Rule-5 (a)-a termination during training period passed on the basis of assessment of performance-the material assisting the authorities come to this conclusion-the petitioner found misbehaving with lady constable under intoxication- held-termination simplicitor and not punitive-warrants no interference by writ court.

Held: Para 18

In the present case, however, merely for the reason that a show-cause notice was issued to the petitioner or a preliminary enquiry was conducted, I am not inclined to hold that the order of termination, impugned in the writ petition is punitive in nature, since, the aforesaid material is only to aid and assist the authorities to form an opinion as to whether the petitioner should be continued in service or not. They possess power to terminate him simplicitor and have exercised the same under the Rules. Therefore, in my view, it cannot be said that the order impugned is stigmatic or founded on alleged misconduct and, therefore, vitiated in law.

Case law discussed:

AIR 1999 SC-983
2002 (1) SCC-743
2003 (3) SCC-263
AIR 2002 SC-23
2003 (96) FLR-1002
2005 (106) FLR-1214
J.T. 2005 (7) SC-512
J.T. 1991 (1) SC-108
AIR 2005 SC-344
2000 92) UPLBEC-1961

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

1. Heard Sri Prakash Giri, learned counsel for the petitioner and Sri A.K. Rai appearing for respondents.

2. The writ petition is directed against the order dated 13th December, 2003 passed by Commandant 145 Battalion Central Reserve Police Force, Nagpur, Maharastra terminating the service of the petitioner in exercise of power under Rule 5(1) of Central Civil Services (Temporary Service) Rules, 1965 (hereinafter referred to as "1965 Rules'). It is stated that the petitioner was appointed on the post of constable on 19.4.03 and during the course of training, a show cause notice was issued on 14.11.2003 and thereafter without any further notice, by means of impugned order, he has been terminated w.e.f. 13th December, 2003.

3. The respondents have filed counter affidavit wherein it is stated that during the period of training, the performance of the petitioner was not found satisfactory and therefore he was terminated in accordance with rules.

4. Heard learned counsel for the petitioner and perused the record.

5. From the pleadings of the parties and submissions advanced, the admitted facts as brought on record are that after holding a selection for the post of Constable in Central Reserve Police Force (hereinafter referred to as "CRPF' in short), a letter offering appointment on the post of Constable was issued to the petitioner requiring him to report on 3.4.2005 at CRPF Old Air Port, Pandila, Phaphamau, Allahabad, in case, he accepts the terms and conditions contained in the aforesaid letter, copy whereof is placed on record as Annexure-3 to the writ petition. The petitioner was offered temporary appointment and as per condition no. 13 contained in the aforesaid letter, his service could have been terminated in accordance with Central Civil Services (Temporary Service) Rules, 1965. The petitioner was to be treated on probation for a period of two years likely to be extended by the competent authority, and, on satisfactory completion of probation, he was liable to be made permanent. The petitioner reported and thereafter enlisted in CRPF on 6.4.2003 at GC-Nagpur as temporary Constable/G.D. in the pay-scale of Rs. 3030-4590. The letter of appointment was issued on 19.4.2003 by Additional D.I.G., CRPF, Nagpur. Clause 6 of the condition of appointment letter provides that the petitioner was to undergo a basic training at any training center of CRPF and in case, he is not found suitable at any stage, he was liable to be discharged. It appears while undergoing training, the respondents received some information of indiscipline on the part of the petitioner for which a preliminary enquiry was conducted wherein it was reported that the petitioner was in the habit of consuming Alcohol in Recruit Line. Consequently. A show-cause notice was issued on

14.11.2003. Since, the petitioner was temporary in service, respondents subsequently exercising power under Rule 5 of 1965 Rules terminated him.

6. The contention of the learned counsel for the petitioner is that the allegation of indiscipline and consumption of liquor are the foundation on account whereof the impugned order of termination has been passed without holding any enquiry and affording opportunity to him. Therefore, the same is vitiated in law. He further contended that the respondents in the counter affidavit have repeatedly pleaded that the petitioner was reported to be guilty of indiscipline in the preliminary enquiry being in habit of consuming liquor and procuring the same after illegally scaling down campus premises, which was not in the interest of the service expected from a person who has just begun, i.e., during training. It is contended that in view of the pleadings in the counter affidavit, the foundation of the order of termination is evidently the alleged misconduct and therefore, termination is not a simplicitor but amounts to dismissal and is vitiated in law, since no departmental enquiry has been conducted against the petitioner.

7. In order to appreciate the aforesaid contention, the only question which has to be considered by this Court is whether the termination order dated 13.10.2003 can be said to be a dismissal in the garb of termination simplicitor founded on an alleged misconduct or not. For appreciation of this question, it would be appropriate to consider the termination order itself, which is reproduced as under:-

"OFFICE ORDER

In continuation to this office notice even number dated 14.11.2003.

Notice for termination of service was issued to No. 031456586 RT Sunil Kumar Giri of this Unit under Rule 5(1) of Central Civil Service (Temporary Service) Rules 1965 on 14.11.2003. Accordingly his service hereby terminated with effect from the afternoon of 13.12.2003, i.e., expiry of one month period and also struck off strength from this Unit with effect from the same date 13.12.2003 (AN).

Sd.
A.M.Muhammed
Commandant-145"

8. A bare perusal shows it an order of termination simpliciter. It is also apparent from averments in Para 19 of the writ petition that show-cause-notice was issued to the petitioner with respect to his work and performance during training which was not found to be satisfactory Thus, it is evident that the petitioner has been terminated after assessment of his performance during training. Neither any stigma has been caused by making such aspersion in the order of termination nor attending circumstance preceding impugned order of termination leads to such conclusion. The petitioner has been terminated exercising power under Rule 5(1) of 1965 Rules. It would be appropriate to reproduce the relevant Rule as under:

"Rule 5(1)(a):-The service of a Government Servant who is not Quasi permanent service shall be liable to be terminated at any time by a notice in writing given either by the government servant to the appointing authority or by

the appointing Authority to the Government Servant.

(b) :-The period of such notice shall be one month; provided that the services of any such Government servant may be terminated forth with and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances for the period of the notice at the same rate at which he is drawing them immediately before the termination of his service, or as the case may be for the period by which such notice falls short of one month."

9. It is not disputed that so long as the petitioner was not confirmed, he could have been terminated under 1965 Rules. When the order of termination is couched in plain words without casting any aspersion upon the employee, it cannot be made or read to be a termination by way of punishment by looking to any background. The golden rule in normal case is to consider the order of termination itself to find out its nature. From the bare perusal of the impugned order, it cannot be said to be stigmatic or founded on any alleged misconduct. Merely if a preliminary enquiry was conducted to assess the work and performance of the employee, it cannot be said that the termination is founded on alleged misconduct. The question as to when an order is termination simplicitor or by way of punishment founded on alleged misconduct has been considered by the Apex Court in **Dipti Prakash Banerjee Vs. Satyendra Nath Bose, AIR 1999 SC 983** and in para 21 of the judgment the distinction has been explained as under :

"If findings were arrived at in an enquiry as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as "founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, at the same time, he did not want to continue the employee against whom there were complaints, it would only be a case of motive and the order would not be bad. Similar is the position if the employer did not want to enquire into the truth of the allegations because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegations would be a motive and not the foundation and the simple order of termination would be valid. *From a long line of decisions it appears to us that whether an order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor or on motive on the ground of unsuitability to continue in service."(para 9)*

(emphasis added)

"When the factual scenario of the present case is considered in the background of legal principles set out above, the inevitable conclusion is that the High Court was not justified in interfering with the order of termination."(para 10)

10. Similar situation arises in the case of **State of Punjab Vs. Balbir Singh, 2002(1) SCC 743**. The order of

discharge mention the words "unlikely to prove an efficient police officer." Further before passing the aforesaid order of discharge it appears that Shri Balbir Singh, who was found to have consumed liquor and misbehaved with a lady constable was medically examined and thereafter discharge order was passed. The appeal, which was filed before the Deputy Inspector General of Police, was rejected and while rejecting the appeal, he referred to the aforesaid facts and stated that the discharge order was correct. Shri Balbir Singh challenged the order of discharge on the basis of the averments contained therein as well as in the order of the Deputy Inspector General of Police. The Hon'ble Apex Court upholding the aforesaid order of discharge held as under;-

"In the present case, order of termination cannot be held to be punitive in nature. The misconduct on behalf of the respondent was not the inducing factor for the termination of the respondent. The preliminary enquiry was not done with the object of finding out any misconduct on the part of the respondent, it was done only with a view to determine the suitability of the respondent within the meaning of Punjab Police Rule 12.21. The termination was not founded on the misconduct but the misbehaviour with a lady constable and consumption of liquor in office were considered to determine the suitability of the respondent for the job, in the loight of the standards of discipline expected from police personnel."(para 17)

11. **In Mathew P. Thomas vs. Kerala State Civil Supply Corporation Ltd. and others, (2003) 3 SCC 263 after following Dipti Prakash Banerjee(supra) and Pavanendra Narayan Verma Vs. Sanjay Gandhi Post Graduate Institute of Medical Sciences and another, AIR 2002 SC 23**, the Hon'ble Apex Court has observed as under:-

"From a long line of decisions it appears to us that whether on order of termination is simplicitor or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either is thin or overlapping. It may be difficult either to categorize or classify strictly orders of termination simplicitor falling in one or the other category, based on misconduct as foundation for passing the order of termination simplicitor or on motive on the ground of unsuitability to continue in service. If the form and language of the so called order of termination simplicitor of a probationer clearly indicate that it is punitive in nature or/and it is stigmatic there may not be any need to go into the details of the background and surrounding circumstances in testing whether the order of termination is simplicitor or punitive. In cases where the services of a probationer are terminated by an order of termination simplicitor and the language and form of it do not show that either it is punitive or stigmatic on the face of it but in some cases there may be a background and attending circumstances to show that misconduct was the real basis and design to terminate the services of a probationer. In other words, the façade of the termination order may be simplicitor, but the real face behind it is to get rid of the services of a probationer on the basis of misconduct. In such cases it becomes necessary to travel beyond the order of termination simplicitor to find out what in

reality is the background and what weighed with the employer to terminate the services of a probationer. In that process it also becomes necessary to find out whether efforts were made to find out the suitability of the person to continue in service as he is in reality removed from service on the foundation of his misconduct."(Para 11)

12. Even otherwise in some case when the order of termination contains the words "unsatisfactory work and conduct" or factum pertaining to suspension etc. the question was raised as to whether such order is stigmatic in nature or not. In **Dipti Prakash Banerjee** (Supra), the order of termination mentions the word "unsatisfactory work and conduct'. After review of entire case-law, the Apex Court did not find the aforesaid order to be stigmatic and held as under:

"At the outset, we may state that in several cases and in particular in State of Orrisa Vs. Ram Narain Dass it has been held that the use of the word "unsatisfactory work and conduct' in the termination order will not amount to a stigma"

13. Similarly, in **Pavanendra Narayan Verma (Supra)**, it was mentioned that "the work and conduct was not found satisfactory'. Following the **Dipti Prakash Banerjee (Supra)**, the Apex Court in **Pavanendra Narayan Verma** held as under :

"Returning now to the facts of the case before us. The language used in the order of termination is that the appellant's "work and conduct has not been found to be satisfactory". These words are almost exactly those, which have been quoted in Dipti Prakash Banerjee's case as clearly falling within the class of non stigmatic orders of termination. It is, therefore, safe to conclude that the impugned order is not ex facie stigmatic" (para 31)

14. In **Dhananjay vs. Chief Executive Officer, Zila Parishad, Jaina, 2003 (96)FLR 1002** mention of the word 'suspension' in the order of termination was not held to be stigmatic or punitive. In **State of U.P. and others versus Ram Bachan Tripathi, 2005(106)FLR 1214** the Hon'ble Apex Court considering as to when the order of termination can be said to be stigmatic held as under:-

"We shall first examine the plea relating to the stigma. Usually a stigma is understood to be something that is detraction from the character or reputation of a person. It is blemish, imputation, a mark or label indicating a deviation from a norm."(Para 6)

"Mere description of a background fact cannot be called as stigma. In the termination order it was merely stated that the show cause notices were issued and there was no response. This can by no stretch of imagination be treated as a stigma as observed by the Tribunal and the High Court."(Para 7)

15. In **Rajasthan State Road Transport Corporation & others vs. Zakir Hussain, JT 2005 (7) SC 512** the Hon'ble Apex Court following its earlier judgment in the case of **State of Uttar Pradesh & another vs. Kaushal Kishore Shukla, JT 1991 (1) SC 108** has held as under:-

"In State of Uttar Pradesh & another vs. Kaushal Kishroe Shukla this Court has observed in Para 6 as under:-

"The High Court held that the termination of respondent's services on the basis of adverse entry in the character roll was not in good faith and the punishment imposed on him was disproportionate. It is unfortunate that the High Court has not recorded any reasons for this conclusion. The respondent had earned an adverse entry and complaints were made against him with regard to the unauthorized audit of the boys fund in an educational institution, in respect of which a preliminary inquiry was held and thereupon, the competent authority was satisfied that the respondent was not suitable for the service. The adverse entry as well as the preliminary inquiry report with regard to the complaint of unauthorized audit constituted adequate material to enable the competent authority to form the requisite opinion regarding the respondent's suitability for service. Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service. If on ***the perusal of the character roll entries or on the basis of preliminary inquiry on the allegations made against on employee, the competent authority is satisfied that the employee is not suitable for the whereupon the services of the temporary employee are terminated, no exception can be taken to such an order of termination."*** *(Para 20)*

(emphasis added)

16. In Registrar, High Court of Gujarat and another vs. C.G. Sharma, AIR 2005 Supreme Court 344 the Hon'ble Apex Court has held as under:-

"We are also satisfied, after perusing the Confidential Reports and other relevant vigilance filed etc. that the respondent is not entitled to continue as a judicial Officer. The order of termination is termination simplicitor and not punitive in nature and, therefore, no opportunity needs to be given to the respondent herein. Since the overall performance of there was found to be unsatisfactory by the High Court during the period of probation. It was decided by the High Court that the services of the respondent during the period of probation of the respondent be terminated because of his unsuitability for the post. In this view of the matter, order of termination simplicitor cannot be said to be violative of Articles 14, 16 and 311 of the Constitution of India. The law on the point is crystallized that the petitioner remains probationer unless he has been confirmed on the basis of the work evaluation. Under the relevant Rules under which the respondent was appointed as a Civil Judge, there is no provision for automatic or deemed confirmation and/or deemed appointment on the regular establishment or post, and in that view of the matter, the contentions of the respondent that the respondent services were deemed to have been continued on the expiry of the probation period, are misconceived."

17. Learned counsel for the petitioner, however, has placed reliance on the Apex Court Judgment in **Chandra Prakash Shahi Vs. State of U.P. & others, 2000(2) UPLBEC 1961 (SC).** However, in my view, the aforesaid judgment does not help at all. It has been held therein that the Court can lift veil of an innocuously worded order to look at the real facet of the order and to find out

whether it is innocent as worded or not. The mere fact that negligence or misconduct may have been the factors for inducing the government to terminate service of a temporary employee does not mean that it is founded on misconduct. Para-11 of the judgment, which highlights this aspect is reproduced as under:-

"Now, it is well-settled that the temporary Government servants or probationers are as much entitled to the protection of to the protection of Article 311(2)of the Constitution as the permanent employees despite the fact that temporary Government at any time by giving them a month's notice without assigning any reason either in terms of the contract of service or under the relevant statutory rules regulating the terms and conditions of such service. The Courts can, therefore, lift the veil of an innocuously worded order to look at the real fact of the order and to find out whether it is as innocent as worded (See: Parshotam Lal Dhingra V. Union of India, AIR 1958 SC 36 ; 1958 SCR 828). It was explained in this decision that sufficiency, negligence or misconduct may have been the factors for inducing the Government to terminate the services of a temporary employee under the terms under the terms of the contract or under the statutory Service Rules. Regulating the terms and conditions of service which, to put it differently, may have been the motive for terminating the services but the motive by itself does not make3 the order punitive unless the order was "founded" on those factors or other disqualifications."

18. In the present case, however, merely for the reason that a show-cause notice was issued to the petitioner or a preliminary enquiry was conducted, I am not inclined to hold that the order of termination, impugned in the writ petition is punitive in nature, since, the aforesaid material is only to aid and assist the authorities to form an opinion as to whether the petitioner should be continued in service or not. They possess power to terminate him simplicitor and have exercised the same under the Rules. Therefore, in my view, it cannot be said that the order impugned is stigmatic or founded on alleged misconduct and, therefore, vitiated in law.

19. The next question as to whether the reasons, if any, mentioned in the counter affidavit may be taken as constituting foundation rendering an order of termination as dismissal or removal or termination by way of punishment. It is also no more res-integra, since this aspect has been considered by Apex Court in **Pavnanendra Narayan Verma (Supra)** and in para 34 and 35 of the judgment, it has been held as under:-

"That an affidavit cannot be relied on to improve or supplement on order has been held by a Constitution Bench in Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi.....When a statutory functionary makes an order based n certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise....."(para 34)

"Equally an order which is otherwise valid cannot be invalidated by reason of any statement in any affidavit seeking to justify the order. This is also what was held in State of Uttar Pradesh v. Kaushal Kumar Shukla (supra):

"The allegations made against the respondent contained in the counter affidavit by way of a defence filed on behalf of the appellants also do not change the nature and character of the order of termination."(para35)

In view of law as laid down and discussed above, neither from the averments contained in the counter affidavit nor from the order of termination or show-cause notice, it can be said that the impugned termination is stigmatic in nature instead of termination simplicitor.

In the result, the writ petition lacks merit and is, accordingly, dismissed without any order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2007

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 21403 of 2006

Barati Lal and others ...Petitioners
Versus
Natthu ...Respondent

Counsel for the Petitioners:
Sri R.R. Shivahare
Sri A.K. Tewari

Counsel for the Respondent:
Sri P.R. Maurya

Code of Civil Procedure-Order 22 Rule-2-Abatement of Suit-Appellant died on 23.6.94 substitution application moved on 1.2.99-without application to condone the delay-without prayer for rejecting abatement if any-satisfactory explanation not given-substitution application-held-can not be allowed.

Held: Para 18 & 21

In the entire perspective, it does appear that the delay was deliberate in spite of the fact that the respondents were having knowledge regarding the death on 22.2.2003, which is apparent on the basis of the statement of the respondents. But no application prior to 25.4.2003 has been filed. No explanation has been given by the respondents that why in spite of the knowledge regarding the death of two defendants on 22.2.2003 application was not filed within a reasonable period. There is no explanation in the application filed by the respondents. In various cases Apex Court has held that for the purposes of benefit under Section 5, the sufficient cause means the sufficient reason has to be explained for not approaching the Court within time and day to day delay has to be explained in the application. If that has not been explained the same is fatal. No doubt the law of limitation may effect a particular party, but it has to be applied with all its rigour when the statute so prescribed and the courts have got no power to extend the period of limitation on equitable grounds.

In view of the aforesaid fact and in view of the Apex Court judgements, as there is no reasonable explanation in the application for substitution and there is no day-to-day delay explained, therefore, in my opinion, allowing the application by the trial court is liable to be set aside.

Case law discussed:
1997 (8) J.T.-189
J.T. 2000 (4) S.C.-408
2002 (93) RD-56
2001 (45 ALR-192
1995 SCC (1)-242

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

1. The present writ petition has been filed for quashing the order dated 13.9.2005 (Annexure 4 to the writ

petition) passed by the Additional District Judge, Court No.4 Hamirpur and order dated 19.1.2005 passed by the Civil Judge (Junior Division), Hamirpur.

2. The facts arising out of the present writ petition are that the respondent No.1 filed an Original Suit No.10 of 1997 against the petitioners' predecessors Shivraj and Prabhu Dayal for cancellation of sale deed dated 12.1.1989. During the pendency of the said suit, the defendant No.1 Shivraj died on 18.7.2002 and the other defendant Prabhu Dayal also died on 27.5.2001. The plaintiff respondent and his counsel was having the said information about the date of death but no application for substitution was moved within time. An application was moved on 21.4.2003 describing the same under Order 22 Rule 2 and under Order 6 Rule 17 of the Civil Procedure Code.

3. An objection was filed on behalf of the petitioners that the application under Order 22 Rule 2 and under Order 6 Rule 17 of Civil Procedure Code is not maintainable and no amendment application can be given to substitute Shivkali W/o Shivraj on the date of filing the said application Shivkali W/o Shivraj has already died. No date regarding the date of death of the persons to whom application of substitution has been made has not been given. Both the parties are living in the said village in a very short distance, therefore, it cannot be presumed that they had no knowledge regarding the death of Shivraj who died on 18.7.2002 and Prabhudayal died on 27.5.2001. It has further been stated that as the application has been filed after 150 days and no prayer in the application for setting aside the abetment has been made or any application has been filed, therefore, the application for substitution cannot be considered but the trial Court without taking into consideration the aforesaid fact, has allowed the said application vide its order dated 19.1.2004. The petitioners aggrieved by the aforesaid order, has filed a revision and the revision too has been dismissed by order dated 13.9.2005. A copy of the same has been filed as Annexure 4 to the writ petition.

4. It has been submitted on behalf of the petitioners that as the parties are living in the same village and their houses are nearby in the village, as such, it cannot be believed that they were not having any knowledge regarding the death. It has also been stated that as no date has been mentioned regarding the date of death of the persons to be substituted, as such, the application was not maintainable. It has also clearly been averred that the plaintiffs-respondents have participated in the funeral and their substitution application has not been filed within time and without making an application for setting aside the abatement and even Section 5 application has not been filed, therefore, the application for substitution cannot be allowed.

5. A finding to this effect that respondents came to know regarding the death of the defendants on 21.8.2003 is not turn out from any relevant evidence that how they came to know on that date regarding date of death. In view of the aforesaid fact, the petitioners submit that the impugned order is liable to be set aside.

6. Reliance has been placed upon two judgements of the Apex Court reported in Judgement Today 1997(8) 189

P.K.Ramachandran Vs. State of Kerala and another and reliance has been placed upon Para 6 of the judgement. The same is being reproduced below:-

"Law of limitation may harshly effect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. The discretion exercised by the high Court was, thus, neither proper nor judicious. The order condoning the delay cannot be sustained. This appeal, therefore, succeeds and the impugned order is set aside. Consequently, the application for condonation of delay filed in the High Court would stand rejected and the Miscellaneous First Appeal shall stand dismissed as barred by time. No costs."

7. In support of the aforesaid contention it has been submitted that the Court has not recorded any satisfaction that the explanation for the delay was either reasonable or satisfactory, which is essential prerequisite to condonation of delay.

8. Another judgement relied upon by the counsel for the petitioners is Judgement Today 2000(4) Supreme Court 408 ***Lal Chand Vs. Sh.Paras Ram (D) by Lrs.& others***.

9. In the aforesaid case the appellant was died on 23.6.1994 and an application was moved on 1.2.1999 on behalf of the respondents for dismissing the appeal as abated. It was thereafter that an application was filed on behalf of the appellant for substitution and for setting aside the abatement. The Apex Court held that the fact which was stated in the affidavit in paras 3 and 4 has held that the explanation was not satisfactory and as such, rejected the application for substitution.

10. It has further been submitted that on 28.2.2003 an information was given by the counsel for the defendant regarding the death of two persons namely Shivraj and Prabhu Dayal, then first time they have came to know that they have died and as such, immediately an application was filed on 21.4.2003. Petitioners further submits that assuming without admitting if the plaintiffs-respondents were having knowledge regarding death of the two defendants on 28.2.2003 but the application for substitution was filed on 25.4.2003 about two months thereafter but no explanation of the said application for substitution has been given that in spite of the knowledge on 28.2.2003 why the application is being filed after two months.

In view of the aforesaid fact, the petitioners submit that the order passed by both the Courts are liable to be set aside.

11. A counter affidavit has been filed on behalf of the respondents and it has been submitted that immediately after coming to know the respondents filed an application for substitution on 21.4.2003 explaining the delay before the Trial Court and the same was allowed. It has also been submitted that Nattu is residing in the same village but his resident was situated ½ kilometres distance from the house of the petitioners and he has never participated in the funeral and the substitution application which has been filed a prayer has been made for condonation of delay. Further submission has been made that the Court has

jurisdiction to substitute the name of the heirs of deceased on the information of the parties to decide the case on merit not on the technical ground to reject the substitution application, due to the aforesaid reason the substitution application has been allowed. There is no illegality in the order passed by the Court below and the writ petition is liable to be dismissed.

12. The counsel for the respondents has placed reliance upon a judgement of the Apex Court reported in 2002 (93) R.D. 56 ***Ram Nath Sao Vs. Gobardhan Sao and others*** and has placed reliance upon para 12 of the said judgement. The same is being reproduced below:-

"A court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide Shakuntala Devi Jain V. Kuntal Kumari and State of W.B. V. Administrator, Howrah Municipality."

13. The another judgement relied upon by the learned counsel for the respondents is the Apex Court judgement reported in 2001 (45) ALR 192 ***M.S.Grewal and and another Vs.Deep Chand Sood and others*** and has placed reliance upon para 27 of the said judgement. The same is being reproduced below:-

"27. Currently judicial attitude has taken a shift from the old Draconian concept and the traditional jurisprudential system-affectation of the people has been taken note of rather seriously and the judicial concern thus stands on a footing to provide expeditious relief to an individual when needed rather than taking recourse to the old conservative doctrine of civil courts obligation to award damages. As a matter of fact the decision in D.K.Basu has not only dealt with the issue in a manner apposite to the social need of the country but the learned Judge with his usual felicity of expression firmly established the learned Judge with his usual felicity of expression firmly established the current trend of 'justice oriented approach'. Law courts will lose its efficacy if it cannot possibly respond to the need of the society- technicalities there might be many but the justice oriented approach ought not to be thwarted on the basis of such technicality since technicality cannot and ought not to out-weigh the course of justice."

14. Further reliance has been placed by the counsel for the respondents in ***Nooruddin Vs. Dr.K.L.Anand*** reported in (1995) 1 Supreme Court Cases 242 and in ***Ramniklal N.Bhutta and another Vs. State of Maharashtra and others*** reported in AIR 1997 Supreme Court 1236. In support of the aforesaid contention, the learned counsel for the respondents submits that "Equally the judicial process should never become an instrument of oppression or abuse or a means in the process of court to subvert justice". The power under Article 226 is discretionary. It will be exercised only in furtherance of interest of justice and not merely on making out of a legal point. The interests of justice and the public interest coalesce. The further reliance has been placed by the learned counsel for the

respondents of a judgement of this Court in Writ Petition No.43189 of 1993 ***Shiv Narain Singh Vs. Board of Revenue U.P. Allahabad and others***. It has been stated that there can be from lapse on the part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him.

15. The further submission has been made by the respondents that as a cost of Rs.50/- in allowing the substitution application has been passed and the cost has been deposited by the respondents and both the Court below has taken into consideration the aforesaid fact, therefore, the writ petition is liable to be dismissed.

I have heard learned counsel for the petitioners and counsel for the respondents and have perused the record.

16. From the record, it is clear that the plaintiffs-respondents came to know regarding the death of the plaintiff defendant on 28.2.2003 but admittedly an application has been filed on 25.4.2003 after a lapse of about 53 days. There is no explanation to the said application that why the application is being made in spite of the fact that they were having knowledge on 28.2.2003. Under the law the period of limitation for filing the substitution application is 90+60 days. After 150 days, the abatement is automatic in case no application is filed. From the perusal of the application filed before the trial Court, no separate application for setting aside the abatement has been made. Only this has been averred that the benefit of Section 5 be given in case there is any delay and if there is an abatement, the abatement be set aside. It is well settled in law that for the purposes of condoning the delay if an application under Section 5 is filed the day-to-day delay is to be explained. There is nothing on record or any averment has been made in the application that the day-to-day delay has been explained even the period from the date of knowledge if it is presumed that the respondents came to know regarding the death on 28.2.2003 but no explanation for filing the application for substitution on 21.4.2003 has been given from 28.2.2003 to 21.4.2003. From the averment made in the objection as well as in the counter affidavit, it is clear that both the parties are residents of the same village in a distance of half kilometre, therefore, the story set up by the respondents that in spite of the fact that Shivraj died on 18.7.2002 and Prabhu Dayal died on 27.5.2001, they were not having any knowledge cannot be believed.

17. As regards, the contention raised on behalf of the respondents that the liberal view should be taken and sufficient cause under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice. It has also been submitted that the length of delay is no matter; acceptability of the explanation is the only criterion. Sometimes, delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. It was further expounded by the Supreme Court that there can be some lapse on the part of the litigant concerned and that alone is not enough to turn down his plea and to shut the door against him unless the explanation smacks of malafides if it has been put forth as part of a dilatory strategy. The Apex Court in one of the

case has rightly observed that a Court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause and the words "sufficient cause" under section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice.

18. In the entire perspective, it does appear that the delay was deliberate in spite of the fact that the respondents were having knowledge regarding the death on 22.2.2003, which is apparent on the basis of the statement of the respondents. But no application prior to 25.4.2003 has been filed. No explanation has been given by the respondents that why in spite of the knowledge regarding the death of two defendants on 22.2.2003 application was not filed within a reasonable period. There is no explanation in the application filed by the respondents. In various cases Apex Court has held that for the purposes of benefit under Section 5, the sufficient cause means the sufficient reason has to be explained for not approaching the Court within time and day to day delay has to be explained in the application. If that has not been explained the same is fatal. No doubt the law of limitation may effect a particular party, but it has to be applied with all its rigour when the statute so prescribed and the courts have got no power to extend the period of limitation on equitable grounds.

19. This is also a case in which admittedly Shivraj died on 18.7.2002 and Prabhudayal died on 27.5.2001 and the distance of residence of both the plaintiff and defendants are hardly half kilometres in the same village. But no application was filed within time. Even after coming to know regarding the date of death, no application has been filed and no explanation has been made in the application for substitution that why the application is being filed after 53 days from the date of knowledge. From the perusal of the application it is also apparent that no separate application under Section 5 and an application for setting aside abatement has been filed. Only in one line it has been stated that if there is any delay that may be condoned and if any abatement is there, the abatement be set aside.

20. In my view the aforesaid explanation is not for the purposes of getting benefit of Section 5 of Limitation Act. The meaning of sufficient cause is that sufficient reason has to be explained in the application and affidavit for taking the benefit of Section 5 of the Act. If that has not been done a party is not entitled for any benefit.

21. In view of the aforesaid fact and in view of the Apex Court judgements, as there is no reasonable explanation in the application for substitution and there is no day-to-day delay explained, therefore, in my opinion, allowing the application by the trial court is liable to be set aside.

22. In view of the aforesaid fact, the writ petition is allowed and the orders dated 13.9.2005 (Annexure 4 to the writ petition) and 19.1.2005 (Annexure 3 to the writ petition) are hereby quashed.

There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2006

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

Civil Misc. Writ Petition No. 43672 of 2006

Amit Anand Singh ...Petitioner
Versus
The Vice Chancellor, Banaras Hindu University Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Ajay Shanker

Counsel for the Respondents:
Sri V.B. Singh
Sri Hem Pratap Singh
Sri Panak Naqvi

Constitution of India, Art. 226-Principle of Natural Justice-recording reasons-petitioner while appearing B.A. Part III examination of Geography subject-geometry box on its oversize offending material, recovered-after receiving report from invigilator-without issuing show cause notice without charge sheet without offering any opportunity-without recording any reason-punishment order can not sustain-statutory committee being quasi-judicial authority held-bound to give reasons.

Held: Para 16

It would thus be eloquent that the statutory committee, which was dealing with the matter of unfair means allegedly employed by the petitioner in attempting questions, being quasi-judicial authority was to act judicially and was bound to give reasons, the duty to give reasons being an incident of the judicial process and to decide the matter on the facts of the case, on the material before them and by applying legal norms to factual situations. There is no order at all on record, not to speak of a reasoned order-evidencing the fact that requisite material was taken into reckoning by the Committee. As no reasons are given in the decision of the Unfair-means Committee, which is a creation of statute, the order impugned herein is liable to be quashed. It thus leaves no manner of doubt that the petitioner was not given any opportunity and there is also non-application of mind. Since no reasons have been given, the impugned order suffers from error apparent on the face of the record and is liable to be quashed.

Case law discussed:
1973 (2) SCC-936
1979 (2) SCC-368
1979 (4) SCC-594
1979 (4) SCC-537
AIR 1979

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

1. Impugned herein is the office memorandum/order dated 10.4.2006 issued by the Examination Controller, Banaras Hindu University, Varanasi by which it was intimated to the petitioner that his entire examination in which the petitioner has already appeared or which he is likely to appear in future during the current examination has been cancelled.

2. The facts forming background to the case are that on 5.4.2006, while the petitioner was writing answer to the question paper (Geography of B.A. Part III), a geometry box was recovered from his possession by the flying squad alleging further that on its obverse-side, the offending copying material was found written. It is averred in the writ petition that the petitioner was not afforded any opportunity either by way of hearing or by requiring him to explain his stand and further that the entire proceeding was carried out in a post-haste manner and ultimately, by means of impugned order,

he was intimated that his entire examination which he has appeared and which he is likely to appear in future has been cancelled upon consideration of the decision taken by Unfair Means Committee of the University. It is in this backdrop that the present writ petition has been preferred by the petitioner.

The petition was argued on 11.8.2006 on which date the learned counsel for the University was enjoined to file counter affidavit and also to produce the entire material relating to unfair means on the date fixed. The entire original record relating to proceeding of Unfair Means Committee has been annexed to the counter affidavit filed on behalf of the University.

3. The learned counsel for the petitioner began his submission arguing that the petitioner was not afforded any opportunity of hearing and the entire proceeding was carried out in a rushed hole and corner manner against the provisions of the statute. The learned counsel denied having employed any unfair means in answering the question paper and also repudiated the claim that the geometry box belonged to me. Per contra, learned counsel for the University contended that the invigilator had recovered the geometry box from the possession of the petitioner on which copying material was found written and further that the material found written on the box related to question no.3 of the paper being answered by the petitioner. The learned counsel also drew attention of the Court to the fact the answer script was immediately withdrawn from the petitioner and he was supplied "B' answer-sheet and requisite form was also filled up by the invigilator forming part of the flying squad and also the invigilator on duty in the prescribed column. He further contended that the petitioner was afforded sufficient opportunity of submitting written explanation in accordance with the provisions of the statute and further that he admitted in his own hand-writing that he had written the material on the box by mistake which is not related to the subject. He also drew attention to the report of the examiner which vouchsafed the fact that material had bearing on the subject matter of the question paper being answered by the petitioner on the date.

4. An exhaustive counter affidavit has been filed annexing therewith the entire papers relating to the proceeding in the matter of use of unfair means by the petitioner have been annexed. Annexure no.1 is the form for reporting case of unfair practice. From a close scrutiny, it would appear that the incident relating to unfair means occurred on 5.4.2006 at 9 a.m. In the column requiring mention of details of specific complaint, the expression-dated 5.4.2006 is "***The candidate has written on the geometry box and enclosed signed by me.***" From a further scrutiny of the form it would also appear that the same day it was forwarded for necessary action by the two Invigilators. In the self-same form, it is written in the hand-writing of the petitioner that "***Me Galti Se Box Par Likha Tha Vo Vishai Se Sambandhit Nahin Hai.***" This statement of the petitioner is shown to have been written in the presence of the invigilator and it also bears the signature of the two invigilators. In part C of the Form, there is a note appended by the superintendent of Examinations to the effect "***Forwarded for necessary actio****n*". This note also

bears the date 5.4.2006. Annexure C.A. II is the Certificate of Scrutiny bearing signature of the examiner and it would appear that the examiner has certified the same day i.e. **5.4.2006** that the resource material is related to the concerned examination and that the examinee had actually made use of the resource material in his answer book in question number no.3. It would further appear from its perusal that the Unfair Means Committee held the meeting on the same day i.e. 5.4.2006 in which decision was taken to cancel the entire examination. In the same annexure is contained the proceeding of unfair means committee in which it is shown that eight members had participated. The proceeding of unfair means committee is excerpted below.

"The candidate was given due opportunity to explain his version through Scheduled-I Part-B (Unfair means form), which was duly considered by the Committee.

The committee also considered the reports/charges made against the examinees as detailed. Further committee also scrutinized the relevant papers on record and the concerned answer books. The recommendations made by the Committee are serialized in the Annexure-1."

Though in all eight members are shown to have participated in the meeting, the proceeding bears only three signatures.

5. Before analytically examining the matter, it would be appropriate to acquaint myself with the relevant Rules contained in the Statute of the University which are quoted below.

"1.13.2. No candidate shall bring with him into the examination room/hall any book, notes or, other materials capable of being used by him in connection with the examination, nor shall he communicate to or receive from any other candidate any information in the examination room/hall.
1.13.3. No candidate shall assist or received assistance from any other candidate at in examination or adopt any unfair means to further his/her interest in connection with an examination.
1.13.4. No person shall adopt any unfair practice to further or adversely affect the interests of an examinee or indulge in acts which interfere with the property conduct of examinations.
1.13.6. The superintendent of the examinations shall give him/her an opportunity to submit a written explanation on the prescribed form.....

x x x x

8.13.8 In the event of detection of use of unfair means by a large number of examinees or in the event of refusal by examinee to give statement, the invigilator/superintendent shall submit a confidential report to that effect to the controller of examinations and the University shall take suitable disciplinary against the examinee on the basis of confidential report. In such cases the names of the Invigilator/superintendent making the report shall be kept confidential.

8.13.9. The written explanations submitted by an examinee alleged to have violated the provision of clauses 2,3 and 4 a confidential report under the provisions of clause 8 shall be placed before the Vice Chancellor for suitable disciplinary action.

8.13.10. If the allegations against an examinee is found correct he/she will be liable to disciplinary action.

6. A close perusal of the above rules would reveal that in the event of allegations against an examinee of using unfair-means are found to have been proved, he will be liable to disciplinary action. In clause 8.13.9 it is postulated that the written explanation submitted by an examinee alleged to have violated the provision of clauses 2,3 and 4 a confidential report under the provision of clause 8 shall be placed before the Vice Chancellor for suitable disciplinary action.

7. From a perusal of the various annexures annexed to the counter affidavit, it would transpire that the entire proceeding was taken to completion within a span of one day ending up in the decision of cancellation of examination. The question now arises whether proceeding was violative of principles of natural justice and whether the petitioner was given opportunity to explain his stand especially regard being had to the fact that any action consequent upon the proceeding would be fraught with grave consequence putting the future of the petitioner at stake who is at the threshold of his career.

8. It brooks no dispute that the Unfair Means Committee constituted by the University being creation of the Statute, is a statutory body and it is bound to abide by what constitutes "opportunity" of hearing. It would appear from the record that immediately after the geometry box containing written material on its back had been recovered, it is clear from the record that the petitioner's explanation was had on the prescribed form which is to the effect that he had mistakenly written on the geometry box attended with further explanation that the writing on the geometry box did not relate to the subject matter of the question paper. The examiner's report is also contained in the printed form in question and answer manner. In the certificate of scrutiny the examiner has right-marked all the three queries showing that the resource material related to question no.3. Although the proceeding annexed as annexure 2 to the counter affidavit did show that the committee considered the reports/charges made against the examinees and further scrutinized the relevant papers on record and the concerned answer books and also the recommendations made by the Committee, there is nothing on record to manifest that any such material alleged to have been considered by the committee was at all taken into reckoning. It is also manifested from the record that no charge sheet was issued nor any show cause notice was issued to petitioner after receipt of the report from invigilator and further no explanation was had from the petitioner. It therefore, transpires that the impugned order was passed without considering whatever explanation was obtained at the time of the examination.

9. Now I proceed to examine whether the entire matter relating to unfair means has been considered in accordance with the mandate of the statute and that the petitioner has been afforded reasonable opportunity of hearing in the matter to vindicate his stand.

10. The court can certainly examine whether the decision making process was reasonable, rationale and not arbitrary on

the facts and circumstances. This Court now proceeds to examine whether the Committee was a statutory body exercising quasi judicial function and whether the alleged decision rendered by it in the matter was reasonable, rationale and informed with reasons observing in compliance the principles of natural justice.

11. The Committee dealing with unfair means matter of a student is a statutory committee having imprimatur of the Act and the statute of Banaras Hindu University and by this reckoning it is a body performing quasi-judicial functions. Every authority exercising quasi-judicial functions is bound to give reasons in support of the order he makes. The essence of the settled position is that examining the question on principle why every quasi-judicial order must be a speaking order. The necessity of giving reasons flows as a necessary corollary form the rule of law, which constitutes one of the basic principles of the Constitutional set up. They must decide solely on the facts of the particular case, solely on the material before them and apart from any extraneous considerations by applying pre-existing legal norms to factual situations. It was further observed that now the necessity of giving reasons is an important safeguard to ensure observance of the duty to act judicially. It introduces clarity, checks the introduction of extraneous or irrelevant considerations and excludes or at any rate, minimizes arbitrariness in the decision making process.

12. The provisions afore-quoted clearly envisage that the Committee shall reckon with the report about the candidate having been found in possession of unauthorized material, the reply of the candidate to the notice, the report of examiner concerned regarding the transcription or non-transcription of the unauthorized material of which the candidate was allegedly found in possession. At page 18 of Annexure C.A.2, the recommendation of the Committee signed by Chairman and member is contained. There is no discussion and all that the Committee has done is to right-mark query no.2 the substance of which "**entire examination be cancelled**". Likewise Annexure 4 is the paper stated to be recommendation of the Committee forwarded to the Vice Chancellor and at the end of this paper, what is couched is "examined and approved". It does not appear from the materials on record whether any reply of the petitioner was had and whether it has been taken into reckoning. Furthermore, there is no order canceling the result passed by the Vice Chancellor.

13. In **Union of India v. Mohan Lal Capoor (1973) 2 SCC 936**, the Apex Court in a Bench of two Judges held in paragraph 28 that the reasons are the links between the materials on which certain conclusions are based to the actual conclusions. They disclose how mind is applied to the subject matter for a decision, whether it is purely administrative or quasi judicial. They would reveal nexus between the facts considered and the conclusions reached. This view was reiterated in **Gurdial Singh Fijji v. State of Punjab (1979) 2 SCC 368. In S.N. Mukherjee v. Union of India (1990) 4 SCC 594**, the Constitution Bench of the Apex Court surveyed the entire case law and held in para 40 that except in cases where the requirement has been dispensed with

expressly or by necessary implication, an administrative authority exercising judicial or quasi judicial functions is required to record the reasons for its decision. In para 36 of the said decision, it was further held that recording of reasons excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said principle would apply equally to all decisions and its applications cannot confined to decisions which are subject to appeal, revision or judicial review. It is not required that the reasons should be as elaborate as in the decision of a court of law. In **Mazharul Islam Hashmi v. State of U.P. & Anr (1979) 4 SCC 537**, the Apex Court pointed out that "Every person must know what he is to meet and he must have opportunity of meeting that case. The legislature, however, can exclude operation of these principles expressly or implicitly. But in the absence of any such exclusion, the principle of natural justice will have to be proved." In **Ghazanfar Rashid v. Secretary Board of High School and Intermediate Education, U.P. AIR 1979 All 209**, a Full Bench of this Court dealing with the proof of the charge of use of unfair means at the examination, held that it was the duty of the Examination committee to maintain purity of examination and if examinee is found to have used unfair means at the examination, it is the duty of the Examination Committee to take action against the erring examinees to maintain the educational standard. It was further observed that direct evidence is available in some cases but in a large number of cases direct evidence is not available. In that situation the Examination committee has of necessity to rely on circumstantial evidence which may include the answer given by the examinee, the report of the Superintendent of the center, the invigilator and the report of the experts and other attending circumstances. The Examination Committee, if it relies upon such evidence to come to the conclusion that the examinee has used unfair means in answering questions then it is not open to the High Court to interfere with the decision merely because the High Court may take a different view on reassessment of those circumstances. ***While it is open to the High Court to interfere with the order of the quasi judicial authority, if it is not supported by any evidence or if the order is passed in contravention of the statutory provisions of the law or in violation of the principles of natural justice***, the court has no jurisdiction to quash the order merely on the ground that the evidence available on record is insufficient or inadequate or on the ground that different view could possibly taken on the evidence available on the record. The above decision has been cited with approval in the following decision. In **Maharashtra State Board of Secondary and Higher Secondary Education v. K.S.Gandhi and others (1991) 2 SCC 716**, the Apex Court held as under:

"The reasons are harbinger between the mind of the maker of the order to the controversy in question and the decision or conclusions arrived at. They also exclude the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an inbuilt support to the conclusion/decision reached. When an order affects the right of a citizen or a person, irrespective of the fact whether it is a quasi judicial or administrative order, and unless the rule expressly or by necessary implication excludes recording of reasons, it is

germane and precise relevant reasons as apart of fair procedure. In an administrative decision, its order/decision itself may not contain reasons. It may not be the requirement of the rules, but at the least, the record should disclose reasons. It may not be like a judgment. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. ..."(Emphasis supplied).

14. In **Ghanshyam Das Gupta's case (1962) Supp 2 SCR 36**, the examination results of three candidates were cancelled and the Apex Court held that they should have received an opportunity of explaining their conduct. It was also said that even if the enquiry involved a large number of persons, the Committee should frame proper regulations for the conduct of such inquiries but not deny the opportunity.

15. In **R.P. Bhatt v. Union of India (1986) 2 SCC 651**, the Apex Court while interpreting Rule 27 (2) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 held that the word "consider' in Rule 27 (2) of the Rules implied **"due application of mind'**. It was further held that the appellate authority discharging quasi-judicial functions in accordance with natural justice must give reasons for its decision. In **Ram Chander v. Union of India (1986) 3 SCC, 103**, the Apex Court held that ***the duty to give reasons is an incident of the judicial process.*** In **Divisional Personnel officer, Southern Railway v. T.R. Chellappan, (1976) 3 SCC**, the essence of what has been held by the Apex court was that the terms "consider' postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person. In **Barium Chemicals Ltd v. A.J. Rana, (1972) SC 591**, the Apex Court reckoned into consideration the dictionary meaning of the word "consider' which according to Shorter Oxford Dictionary means "to review attentively, to survey, examine, inspection, to look attentively, to contemplate mentally, to think over, mediate on, give heed to, take note of, to think deliberately, bethink oneself to, reflect. Again the Court consulted Words and Phrases-Permanent Edition Vol. 9-A according to which the word "consider' means to think with care. It is also mentioned that to "consider' is to fix the mind upon with a view to careful examination; to ponder; study; mediate upon, think or reflect with care.

16. It would thus be eloquent that the statutory committee, which was dealing with the matter of unfair means allegedly employed by the petitioner in attempting questions, being quasi-judicial authority was to act judicially and was bound to give reasons, the duty to give reasons being an incident of the judicial process and to decide the matter on the facts of the case, on the material before them and by applying legal norms to factual situations. There is no order at all on record, not to speak of a reasoned order-evidencing the fact that requisite material was taken into reckoning by the Committee. As no reasons are given in the decision of the Unfair-means Committee, which is a creation of statute, the order impugned herein is liable to be quashed. It thus leaves no manner of doubt that the

petitioner was not given any opportunity and there is also non-application of mind. Since no reasons have been given, the impugned order suffers from error apparent on the face of the record and is liable to be quashed.

17. As a result of foregoing discussion, the writ petition succeeds and is allowed and the impugned order dated 10.4.2006 is quashed. The Opposite party is directed to declare result after evaluation of answer-sheets.

18. In the facts and circumstances of the case, there would be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2006

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

Civil Misc. Writ Petition No.39727 of 2006

Dr. Ramanand ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Suneet Kumar

Counsel for the Respondents:
Sri Ramanand Pandey
Sri Abhishek Kumar
Sri R.S. Sengar
S.C.

Constitution of India, Art. 226-Transfer Order-Challenged as-without jurisdiction-petitioner a class-II officer-Chief Medical Officer on the letter of such minister having no concerned with medical Department-No. G.O. or circular produced empowering C.M.O. to pass transfer order of a class-II officers-held-order of Transfer without jurisdiction can not be-sustained.

Held: Para 5

We are of the opinion that since no Government Order available to the concerned C.M.O. at the relevant point of time, it appears that passing of the order of transfer was without jurisdiction, therefore, such order cannot be sustained. Hence the impugned order stands quashed.

Case law discussed:
2003 (11) SCC-740
2005 (3) SCC-153
2002 (1) UPLBEC-369
2004 (III) UPLBEC-2225

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

Amitava Lala, J.- 1. The petitioner has challenged the order of transfer dated 6th July, 2006 taking two grounds i.e. (i) mala fide (ii) without jurisdiction. The petitioner contended specifically taking two points, first that Chief Medical Officer (hereinafter called as C.M.O.) had no jurisdiction on 6th July, 2006 to transfer him from one place to another within the district. We find from the annexure-5 of the rejoinder affidavit that C.M.O. is entrusted with such power only from 31st July, 2006. State has contended by filing counter affidavit that such power of the C.M.O. was preexisting from 22nd April, 1987. We have gone through the same and found that it will be applicable only in respect of Class-C and Class-D officers. So far as the clause-5 order impugned in vernacular is concerned, although the Government Order will be applicable in general, but for the later part of such Government Order it implies that there is a confusion whether the Level I and Level II officers can be transferred or not. Petitioner contended that he is a

Level II officer, therefore, he cannot be transferred. According to us, had the power existed there would no have any necessity of issuance of Government Order. In further in paragraph 3 of the Government Order dated 31st July, 2006 it is categorical that from now onwards such order will be effective meaning thereby such power is prospective. Therefore, the impugned order, which was passed earlier prior to the date of giving effect of such Government Order, cannot be made by the C.M.O. The second point, which has been taken by the petitioner, is in respect of mala fide exercise of power on the basis of a letter of a Minister dated 6th July, 2006 itself. The Minister is not the concerned Minister of the department. In the second paragraph of the letter being annexure-2 to the writ petition he specifically directed the authority to transfer the petitioner from the place at the earliest. Therefore, it was a clear directive of a Minister who according to the learned counsel appearing for the petitioner is not concerned about the affairs of the department. We have gone through two recent judgments delivered by the Supreme Court one of such reported in **(2003) 11 SCC 740 (Sarvesh Kumar Awasthi v. U.P. Jal Nigam and others)** where under it was held that transfer of an officer is required to be effective on the basis of set norms or guidelines. The power of transferring an officer cannot be wielded arbitrarily, mala fide or an exercise against efficient and independent officer or at the instance of politicians whose work is not done by the officer concerned. For better administration the officers concerned must have freedom from fear of being harassed by repeated transfers or transfers ordered at the instance of someone who has nothing to do with the business of administration. In **(2005) 3 SCC 153 (Suresh Chandra Sharma v. Chairman U.P.SEB and others)** it was held that interference in transfers and posting with political patronage has totally destroyed the autonomous nature of the authority therein i.e. the Electricity Board. Therefore, the same was discouraged by the Supreme Court.

2. Learned Standing Counsel contended before the Court by citing **(2002) 1 UPLBEC 369 (Narendra Kumar Rai v. State of U.P. and others)** where under Division Bench of this Court held that there is no presumption that the authority passing the transfer orders has not applied his independent mind. It is quite likely that the authority was not aware of the situation and after the full and correct facts were brought to his notice he decides to take appropriate action on objective consideration. This Court is, therefore, clearly of the opinion that without there being anything more, the mere fact that a transfer order has been passed soon after a complaint has been sent by a MLA or MP or a political person to the minister or superior officers of the concerned department, it cannot be branded as having been passed without application of mind or on the dictate of a political person.

3. In fact the Division Bench of this Court wanted to make a line in between not to transfer anybody on the basis of letter of MLA, MP or political persons or to take steps with mala fide intention.

4. Further in **(2004) 3 UPLBEC 2225 (State of U.P. and others v. Gobardhan Lal)** Supreme Court again held that this Court often reiterated that the order of transfer made even in

transgression of administrative guidelines cannot also be interfered with, as they do not confer any legally enforceable rights, unless it is shown to be vitiated by mala fides or is made in violation of any statutory provision.

5. We are of the opinion that since no Government Order available to the concerned C.M.O. at the relevant point of time, it appears that passing of the order of transfer was without jurisdiction, therefore, such order cannot be sustained. Hence the impugned order stands quashed.

6. The writ petition is allowed.

7. However, no order is passed as to costs.

But passing of this order will not debar the authority concerned to pass such order afresh in accordance with law.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 40677 of 2004

Smt. Kusum Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

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

Counsel for the Respondents:
Sri Abhinav Upadhyay
S.C.

Constitution of India, Art. 226-Service Law-Right of appointment-Shiksha Mitra-life of appointment-one year-provision for renewal is subsequent year governed by the G.O.-petitioner stood top most candidate in merit list-denial on the ground-her mother-in-law is village Pradhan-being president of selection committee falls under prohibited relationship under G.O. dated 1.7.2000-even under Rule 105 (5) of U.P. Panchayat Raj Rules 1947-mother-in-law not specified-contention about denied of her claim by efflux of time-infractuous-not available-pendency of writ petition-shall not vanish the right her appointment and to right for consideration of renewal of terms.

Held: Para 12

Since the petitioner has been denied appointment on the post of Shiksha Mitra, she also stand denuded of her right to be considered for renewal of the term as per para 5 of the aforesaid Government Order. The pendency of this case before this Court shall not vanish the right of petitioner to get appointment on the post of Shiksha Mitra and also to loose right to be considered for renewal of the term. The scheme laid down in the aforesaid Government Orders makes it clear that once a person is selected as Shiksha Mitra, and has performed satisfactory, he is not be terminated or substituted by another person. In these circumstances, it cannot be said that the writ petition is rendered infructuous by efflux of time.

Case law discussed:
2005 (2) E.S.C.-1199 relied on.

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

1. Heard Sri R.K. Pandey, learned counsel for the petitioner and Sri Abhinav Upadhyay, learned Standing Counsel for the respondents.

2. The petitioner has sought a mandamus commanding the respondents to appoint him on the post of Shiksha Mitra in Primary School Ameliya, Gram Panchayat Chandapur, Block Koraon, District Allahabad.

3. The brief facts giving rise to this petition are that pursuant to the various Government orders laying down guidelines regarding appointment on the post of Shiksha Mistra in Primary Schools, a selection was held in the year 2004 wherein the petitioner was placed on the top of the select list for appointment to the post of Shiksha Mitra in Primary School Ameliya, Gram Panchayat Chandapur, Block Koraon, District Allahabad as is apparent from the proceedings of the Selection Committee (Annexure-2 to the writ petition). However, she has been denied appointment on the post of Shiksha Mitra on the ground that her mother-in-law is Gram Pradhan of Village Chandapur and therefore, being closely related to the Gram Pradhan, she is disqualified for appointment under the Government Order dated 1.7.2000.

4. Learned counsel for the petitioner vehemently contended that the relationships which are prohibited have been specifically mentioned in the aforesaid Government order which does not include "mother-in-law" and therefore, the petitioner could not have been disqualified for appointment to the post of Shiksha Mitra.

5. The short question required consideration in this case is whether the petitioner was disqualified for appointment to the post of Shiksha Mitra on the ground that her mother-in-law was Gram Pradhan and whether the said relationship is prohibited under Government order dated 1.7.2000.

6. The Government order provides that the near relatives of Pradhan and Secretary of Shiksha Samiti shall not be appointed as Shiksha Mitra. The Gram Pradhan is the Sabhapati of the Selection Committee. The near relatives have further been specified which are father, grand-father, father-in-law, son, grand-son, brother-in-law (Damad), brother, sister, husband, wife, daughter and mother. The relevant extract of the aforesaid Government order is reproduced as under:-

"शिक्षा समिति के सभापति व सचिव के निकट सम्बन्धी का चयन शिक्षा मित्र के रूप में नहीं किया जायेगा। सम्बन्धियों का तात्पर्य पिता, दादा, स्वसुर घ्पपित्र एवं मात्र सम्बन्धीघ्प पुत्र, पौत्र, दामाद, भाई, बहन, पति, पत्नी, पुत्री तथा मां से है।"

7. Learned Standing Counsel however, vehemently contended that the various relatives in the aforesaid Government order are illustrative and not exhaustive since the basic purpose is to exclude the near relatives of the persons who play an important role in the Selection Committee. He submits if a father-in-law is prohibited, it is not understandable as to why mother-in-law will not be prohibited. However, this issue is no more res integra since a Division Bench of this Court in **Gyan Pratap Singh Vs. State of U.P. and others 2005(2) Education Service Cases, 1199** has already considered a similar issue. While interpreting provision contained in Sub-rule (5) of Rule 165 of the U.P. Panchayat Raj Rules, 1947 (hereinafter referred to as 1947 Rules) it was held that relationships identified in the explanation are exhaustive and not illustrative.

8. Sub-rule 4 of Rule 165 of 1947 Rules prohibits appointment of Panchayat members relation to any post. The explanation of Sub-rule 5 of Rule 165 provides as under:-

***"Explanation**-The word "relation' in the proviso means father, grand-father, father-in-law, maternal or paternal uncle, son, grandson, son-in-law, brother, nephew, first cousin, brother-in-law, sister's husband, wife, wife's brother, son of nephew."*

9. A Division Bench of this Court after reading the aforesaid explanation took a view that explanation is not illustrative but exhaustive and the word relation is restricted to it meaning assigned and specified in the aforesaid provision. It has also held that it is not for the Court to find out different degrees or items of prohibition to exchange the aforesaid relationship though it has not mentioned in the Rule. The English translation of the provision in the Government Order would be as follows:-

"Relative means father, grandfather, father-in-law (maternal or paternal), son, grandson, son-in-law, brother, sister, husband, wife, daughter and mother."

10. The language of the Government order providing the meaning of relation is pari materia with the explanation to Rule 165(5) of 1947 Rules and therefore, though at first flush the contention of the learned Standing Counsel appears to be attractive but I feel bound by the view taken by the Division Bench in **Gyan Pratap Singh** (Supra) and hold that the petitioner could not have been disqualified only on the ground that her mother-in-law was Gram Pradhan of the Panchayat.

11. The learned Standing Counsel however vehemently contended that the matter pertains to the year 2004 and since the period of appointment of Shiksha Mitra is only one year, therefore, some other person must have been appointed and this petition has rendered infructuous by efflux of time.

12. In my view the submission is to be noted for rejection outright. A perusal of the Government Order dated 1.7.2000 would show that though a Shiksha Mitra is to be appointed for an academic Session but has a right of renewal in the next Session subject to his satisfactory work and performance in the preceding academic Session. Thus though initial appointment of a Shiksha Mitra is only for one academic year but under the Government Order he has a right to be considered for renewal of the term in the next academic Session provided his work, performance and conduct in the preceding Session has been satisfactory. Since the petitioner has been denied appointment on the post of Shiksha Mitra, she also stand denuded of her right to be considered for renewal of the term as per para 5 of the aforesaid Government Order. The pendency of this case before this Court shall not vanish the right of petitioner to get appointment on the post of Shiksha Mitra and also to loose right to be considered for renewal of the term. The scheme laid down in the aforesaid Government Orders makes it clear that once a person is selected as Shiksha Mitra, and has performed satisfactory, he is not be terminated or substituted by another person. In these circumstances, it

cannot be said that the writ petition is rendered infructuous by efflux of time.

13. In the result, the writ petition succeeds and is allowed. A mandamus is issued to the respondents to consider petitioner for appointment to the post of Shiksha Mitra and not to disqualify her only on the ground that her mother-in-law is the Gram Pradhan of the concerned Gram Panchayat, if she fulfills all other eligibility qualification etc., and pass an appropriate order regarding her appointment expeditiously preferably within a period of 2 months from the date of production of a certified copy of this order. Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2006

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No.17935 of 2006

Raghuvir ...Applicant
Versus
State of U.P. ...Respondent

Counsel for the Applicant:
Sri D.N. Wali

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section-439-Bail-day light murder in Police station-in heart of city-F.I.R. lodged promptly-role of firing assigned to the applicant-incident witnessed by so many persons-held-not entitled for grant of Bail.

Held: Para 6

Considering the seriousness of the allegations made against the applicant and other co-accused persons and they have committed the murder of the deceased in police custody in broad day light in the heart of the city and the F.I.R. has been promptly lodged, the role of firing is assigned to the applicant also and the deceased had received injuries, the incident had been witnessed by so many persons and considering the submissions made by both the sides and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore the prayer for bail is refused.

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

1. This application has been filed by the applicant Raghuvir with a prayer that he may be released on bail in Case Crime No.233 of 2006, under Sections 312,149,148,147 and 506 I.P.C., P.S. Kotwali Nagar, District Etah.

2. The prosecution story, in brief, is that the F.I.R. of this case has been lodged by the Constable Digvijay Singh on 17.4.2006 at 6.15 P.M. in respect of the incident which had occurred on 17.4.2006 at 5.30 P.M. The distance of the Police Station was about 1 kl.mt. from the alleged place of occurrence. It is alleged that the accused Bablu alias Dhirendra involved in Case Crime No.73 of 2006 under Section 60 of the Excise Act and the deceased Raj Kumar involved in Case Crimes No.74 of 2006 and 75 of 2006 were arrested and they were taken by the first informant and constable 97 Rajveer Singh and H.G. Hari Singh for getting the remand in the court of learned A.C.J.M., Kasganj but the court was closed. Thereafter accused persons were brought to Etah by Roadways Bus and they proceeded by sitting, in two Rickshaws to

the court of Etah for producing the accused in the court, the mother and other family members were also in their company. When they reached near the State Bank, the co-accused Sunil Yadav, co-accused Prempal, co-accused Balbir Singh, the applicant Raghuvir Singh and two unknown miscreants, who were following the Rickshaw by motor-cycle, came forward and stopped the Rickshaw of deceased Raj Kumar and discharged the shots at him by their rifle and country made pistols. Consequently after sustaining the injuries, the deceased Raj Kumar died on the spot at about 5.30 P.M. The deceased Raj Kumar was_ having enmity due to litigation with the accused persons and leaving the dead body of the deceased Raj Kumar and taking the co-accused Bablu alias Dhirendra, the first informant went to the Police Station and lodged the F.I.R. According to the post-mortem examination report, the deceased received six antemortem injuries in which three injuries are of fire arm wound of entries and three injuries are exit wounds. Injury no.1 was fire arm wound of entry on the chest, it was having no blackening, tattooing or charring, injury no.3 was fire arm wound of entry on left axilla, it was having no blackening, tattooing or Charring, injury no.5 was fire arm wound of entry mandible, it was having. Blackening around the wound. All the fire arm; injuries were of different dimensions.

3. Heard Sri D.N. Wali, learned counsel for the applicant and 1earned A.G.A. for tile State of U. P.

4. It is contended by the learned counsel for the applicant:

(i) That an unusual story has been given by the prosecution by showing that the first of all deceased Raj Kumar and the Bablu alias Dhirendra were going to get their remand from the civil court, Etab but the court was closed. Thereafter they were brought to Etah by Roadways Bus and from the Roadways Bus they were taken to the civil court, Etah on the Rickshaws and firing was done by the applicant and other co-accused but only deceased had received injuries and no ether person received any injury. This is highly improbable that if in one Rickshaw three persons are sitting and in indiscriminate firing only one person has sustained injuries. The alleged occurrence has taken place in some other manner or the deceased was murdered by the Police itself but to save the skin from the criminal liability, the present story has been concocted;

(ii) That the statements of the witnesses have been cielaye4 recorded by the I.O. which are delayed statements, no reliance can be placed on such delayed statements;

(iii) That the F.I.R. of this case is ante-timed. According to the wireless message dated 17.4.2006, no one was named as accused;

(iv) That an application has been moved by the applicant in the court of learned C.J..M., Etah on 27.4.2006 that he may be put up for identification by the Police witnesses and the witnesses of the locality but the same has been rejected. The deceased Raj Kumar was a criminal, he was having multi-cornered enmity.

(v) That in Case Crime No.940 of 2002, under Section 302/34 I.P.C., Rahul and Anoop were named as accused by Rajveer Singh. In that case the name of the deceased also come into light, during

investigation the name of accused Rahul and Anoop's father constable Vijay Singh and Shyam Singh, who were posted in district Etah, were pressurising the family of the deceased;

(vi) That there is no independent witness to support the prosecution story and the applicant is innocent, he has not committed the alleged offence, he is in jail since 21.4.2006, therefore he may be released on bail.

5. In reply of the above contentions, it is submitted by the learned A.G.A. that it is very serious offence in which the deceased was arrested by the police and he was taken to the court for getting the remand but he has been murdered by the applicant and other co-accused, the F.I.R. has been promptly lodged without any delay and the role of firing is assigned to the applicant also and deceased had received gun shot wound of entries and the alleged occurrence has been witnessed by so many persons. The applicant has been named in the F.1. R., he was taken by the first informant for getting the remand, therefore his identification was not disputed. The application of the applicant seeking his identification has been rightly rejected by the learned C.J.M., Etah and the alleged occurrence has taken place in a broad day light inside the city, it is grave in nature. In case the deceased had been murdered in the police custody and the applicant is released on bail, he shall tamper with the evidence, therefore he is entitled to be released on bail

6. Considering the seriousness of the allegations made against the applicant and other co-accused persons and they have committed the murder of the deceased in police custody in broad day light in the heart of the city and the F.I.R. has been promptly lodged, the role of firing is assigned to the applicant also and the deceased had received injuries, the incident had been witnessed by so many persons and considering the submissions made by both the sides and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. Therefore the prayer for bail is refused.

7. Accordingly, this application is dismissed. Application Rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.09.2006

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 7056 of 2005

Deepak Kumar and another ...Applicants
Versus
State of D.P. & another...Opposite Party

Counsel for the Applicants:
Sri Manu Yadav
Sri I.M. Khan

Counsel for the Opposite Parties:
Sri Nitin Gupta
A.G.A.

Code of Criminal Procedure Section 482-read with General Clauses Act-S.-27-Quashing of summoning order-offence under Section 138 of Negotiable Instrument Act-Notice send through courier service-held-No authenticity-No offence made out-summoning order liable to Quashed.

Held: Para 10

Consequent1y, the contention of the learned counsel for the applicant that the service should be presumed in the present case cannot be accepted as it does not hold good on the pn2vision of the statute itself and has to be rejected. Resultantly, the submission of the counsel for the applicant that in the present case no offence is made out holds good and deserves to be accepted and I hold so.

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

1. A couple, Deepak Kumar and Smt. Nirmala, have invoked the jurisdiction of this court under section 482 Cr.P.C.(herein in . after referred to as the Code) and have preferred this criminal Misc. Application No. 7056 of 2005, with the prayer to quash the summoning order dated 16.9.04, by which the learned Special Judicial Magistrate (C.B.I.) Ghaziabad has summoned them for committing offence under section 138 of the Negotiable Instrument Act, (herein after referred to as the Act) in complaint case no. 7136 of 2004, Rajbir Singh Vs. Deepak Kumar & others. The ancillary prayer is for stay of the proceeding of the aforesaid complaint case *pendent Lite*.

2. The encapsulated facts of the case, as is perceptible from the complaint (Annexure no. 4), filed by complainant Rajbir Singh respondent no.2 are that the complainant is an employee of Air Force and Kishan Lal, father of the applicant no. 1 Deepak Kumar, was his neighbour and was serving as a civil defence personnel. Applicant no.2 Smt. Nirmala is the wife of Deepak Kumar. Being neighbour and persons connected with defense a close friendship and intimacy developed between the applicants and the complainant. As a result of the said intimacy between the two, 'the applicants took a loan of Rupees 1 lac from the complainant Rajbir Singh, respondent no.2 on 12.4.04 with a promise to repay it within six months. A receipt cum agreement annexure no. 1, was executed on a stamp paper to this effect on 12.4.04 itself. A cheque, dated 10.7.04, being cheque no. 087411 from Account No.116, of Punjab and Sindh Bank, Sector 19 NOIDA, was also issued by the applicants as a guarantee on the said loan, on the condition that if, the loan amount was not paid within the stipulated period of time then the complainant was free to realise the loan amount by presenting the said cheque in the bank for encashment. As the applicants failed to repay the loan amount within the stipulated period the complainant, left with no other option to realize his money, deposited the said cheque for encashment on 13.7.2004 in his Syndicate Bank, Air Force Station, Hindon, Ghaziabad branch. Syndicate Bank returned the said cheque, bounced and dishonoured to the complainant, alongwith a memo dated 15.7.04, which were received to him on 16.7.04. The memo indicated that the cheque had bounced because of "funds insufficient". The complainant, thereafter, made several requests to the applicant accused for payment of his loan amount but it was all in vain. Consequently, the complainant gave a legal notice, on 26.7.04 under Section 138 of N.I. Act (annexure no. 2) to the applicants accused through his counsel Sri Jai Singh Bhadoria, Advocate. It was sent through courier service DTDC vide annexure no.3. Inspite of service of notice, since, the applicants did not pay the demanded amount of cheque, the complainant, respondent no.2 filed a complaint in the court of Special C.J.M. (C.B.I.) Ghaziabad on 30.8.04 being complaint case number 7136 of 2004

under section 138 of the N.I. Act against the applicants accused; Along with the complaint he filed photocopies of the agreement, original copy of the cheque issued by applicants,' copy of notice and four courier receipts. The trial court took cognizance of the offence, recorded the statement of the complainant under section 200 Cr.P.C. on 13.8.04, (annexure no. 5) and thereafter, vide order-16.9.04 summoned the accused applicants for offence under Section 138 of the N.I. Act vide annexure no.6. Aggrieved by their summoning order the present Criminal Miscellaneous Application has been filed by the accused applicants with the prayer to quash the same. Complainant respondent no. 2 has filed a counter affidavit in this application.

3. I have heard Sri Manu Yadav, advocate, learned counsel for the applicants, Sri Nitin Gupta, learned counsel for the complainant respondent no.2 and the learned A.G.A. in opposition at a great length and have gone through the record of the case. As agreed between the contesting parties this application is being finally heard and is being disposed off at the admission stage itself by this order.

4. Learned counsel for the applicant submitted that no offence is made out against the applicants as it is. not mentioned in the complaint and in statement under section 200 Cr.P.C. as to on what date the notice/notices alleged to have been sent through DTDC courier service was served on the applicants. He further contended that it is not clear from the complaint as to whether a joint notice or a single notice was sent under Section 138 of the N.I. Act by the complainant to the two applicants and who had received the said notice/notices. Therefore, he submitted that no offence is made out against the applicants as it is not known as to on what date, the offence is made out in absence of the date of service of notice on the applicants. He also submitted that once the notice has been sent by a private courier there can not be any presumption under section 114 of Evidence Act read with section 27 of The General Clauses Act of service of notice on the applicants. He further contended that, the complaint was pre mature and, therefore also, no offence is· made out against the applicants. He further contended that the present complaint has been filed with malicious intention only for the purpose of harassment.

5. Learned counsel for the respondent no.2 along with learned AGA, contrarily, contended that the notice were served on the applicants and the complaint is not pre mature as fifteen days had lapsed before the complaint was filed in the court. They further argued that if, the notice is sent by courier service then the service on the applicants must be presumed as the notice had not been received back by the complaint. They further argued that since the contentions raised at the bar by the applicants are factual and relates with the merit of the case therefore the prosecution must be allowed to proceed and it can not be nip into the bud at this stage.

6. Cogitating over the rival submissions canvassed at the bar and for a proper appreciation of the same, the ingredients for making out an offence under Section 138 of N.I. Act is to be brought forth. Section 138 of N.I. Act provides:-

"138. Dishonour of cheque for insufficiency, etc., of funds in the account- *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 he 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 purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.

7. Thus, for making out an offence under section 138 of the Act following ingredients are essential. In seriatim, they are registered here as: *(i) that a person must have an operative account in any bank (ii) 'he owns some debt or liability to any other person whether juristic/legal, or not (iii) a cheque is issued in the name of that person, to whom the debt or liability is owned by the account holder, from his such operative account in the bank, for the satisfaction of, whole or part payment, for the said debt or liability. (Such person who issues the cheque is called "drawer" of the cheque and the person in whose name the cheque is issued is called the "drawee" of the cheque.) (iv) the said cheque is presented by the person in whose name it is issued (drawee)or the holder of the cheque, in the bank for it's encashment with the period of it's validity or within six months of the date of it's issuance noted on the cheque (v) the bank had returned the said cheque unpaid or dishonoured or uncashed because of 'insufficiency of funds', with what ever terminology used by the bank for the said dishonour because of insufficiency of funds in the account from which the cheque had been issued by the drawer (vi) the person in whose name the cheque was issued (drawee) or holder in due course of the said cheque gives a notice, in writing, to the person who has issued the cheque (drawer)with a period of thirty days, from the date of receipt of the notice of dishonoured/ unpaid cheque from the bank, demanding the payment of the amount of cheque, with or without other prayers for damages or interest thereon (vii) the notice of demand is served on the*

person who had issued the cheque (drawer) (viii) the drawer does not make the payment to the payee or drawee within fifteen days of the receipt of the said notice on him and the amount of cheque remains unpaid (ix) the complaint is laid in court within one month, after expiry of period of fifteen days from the date of service of notice on the drawer/payer (emphasis supplied). These requirements listed above are sine qua non for making out an offence under section 138 of the Act. In the event of absence of any of the above mentioned, necessary requirements, the offence under section 138 of the N.!. Act is not made out. *Thus, for making out an offence under 138 N.I. Act, four dates are very relevant to be mentioned in the complaint or at least they should be clear from the papers filed along with the filing of the complaint itself. These dates are (i) date mentioned on the cheque (ii) date of it's deposit in the bank for encashment (For knowing it's period of validity), the date on which the notice/memo advice from the bank was received by the drawee/payee or holder of the cheque regarding it's bouncing because of insufficiency of funds by using any phraseology for the same (for determining the period of notice, which is one month, from such a date), the date of notice given bv the drawee/ payee to the drawer/payer of the cheque (to determine fifteenth day so as to bring "cause of action " to life, in case the cheque money is not paid during this period), the date on which the said notice is received or served to the drawer/payer of the cheuue (to determine the date on which the offence is made out, in case the cheque money is not paid with fifteen days of the service of the notice) and lastly, the date of filing of the complaint (for determining the jurisdiction of the court to entertain the complaint within the prescribed period of limitation and complaint not being time barred). If, these dates are not perceptible from the complaint or papers accompanying it then the Magistrate has no jurisdiction to entertain the complaint for offence under Section 138 N.I. Act (emphasis supplied.)*

8. Now the case of the complainant is to be judged in view of rival contentions raised at the bar and pleadings made herein in the application and counter affidavit on the above ingredients for making out offence under Section 138 N.I. Act.

9. Pondering over the rival contentions, I find that there is substance III the submissions raised by the counsel for the applicant. As a fact, neither in the complaint, nor in statement under section 200 Cr.P.C. nor in the counter affidavit any date of service on notice demanding re-payment of cheque money from the applicants is mentioned. No document was also appended along with the complaint so as to indicate the said date. Even during the course of argument, the counsel for the respondent complainant could not point out the date of- service of such notice. Thus, in the total absence of date of service of notice demanding payment of the cheque amount, no offence is made out against the applicants. Moreover, it cannot be said that any such notice was ever served on the applicants and consequently fifteen days period for making the payment of the cheque money can not be counted and unless that is done no offence is made out against the applicants. The contention of respondent complainant that the service is to be presumed also can not be accepted because section 27 of General Clauses

does not takes into it's purview service by private courier. For a proper under standing of this submission Section 27 of The General Clauses Act is quoted below:-

"Meaning of Service by post- *where any (Central Act) or Regulation made after the commencement of this Act authorizes or requires any document to be served by P 0.'-, t, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing. pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. "*

10. Thus, the wordings of Section 27 of The General Clauses Act clearly indicates that this section deals only with service by 'Post' and that too "registered service" when such a service is contemplated by the Act itself. Attour, no other mode of service is embraced in section 27. The condition precedent for the applicability of this section are firstly, *that the service must he provided by the Act itself and secondly, that such "service shall he deemed to be affected by properly addressing, pre-paying and posting by registered post "(Emphasis mine).* Unless the twin conditions are satisfied, section 27 of The General Clauses Act will not apply. In the present case the second condition is not satisfied and therefore the service of notice on the applicants cannot be presumed. *Since the legislature has kept service by private courier out side the purview of the section 27 of The General Clauses Act, therefore the courts can not implant such presumption of service into that section and rightly so because private courier services are privately run business without any authenticity of service, (emphasis mine).* Consequent1y, the contention of the learned counsel for the applicant that the service should be presumed in the present case cannot be accepted as it does not hold good on the pn2vision of the statute itself and has to be rejected. Resultantly, the submission of the counsel for the applicant that in the present case no offence is made out holds good and deserves to be accepted and I hold so.

Summing up from the discussions made above, since, no offence under Section 138 of N.I. Act is made out against the applicants, in absence of date of service of notice of demand on them their summoning order dated 16.9.04 passed by the Special Judicial Magistrate, CBI, Ghaziabad, in complaint case number 7136 of 2004 Rajbir Singh versus Deepak Kumar and another, under section 138 of Negotiable Instrument Act, cannot be allowed to stand and has to be quashed and I order so.

Resultantly, this Criminal Miscellaneous Application is allowed. The impugned summoning order dated 16.9.04 passed in complaint case no. 7136 of 2004 Rajbir Singh versus Deepak Kumar and another, under section 138 of Negotiable Instrument Act 1881, by Special Judicial Magistrate, CB I, Ghaziabad against the applicants is quashed.

Let a copy of this order be sent to the trial court for it's intimation and further action as it's intimation and further action as it’s end. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Writ Petition No.2140 of 2004

Ramveer Singh and others ...Petitioners
Versus.
Gail India Ltd. and others ...Respondents

Connected with:
1. Writ Petition No.28608 of 2003
2. Writ Petition No.3601 of 2004

Counsel for the Petitioners:
Sri Ashok Khare
Sri V.D. Chauhan
Sri H.N. Singh

Counsel for the Respondents:
Sri Navin Sinha
Sri Siddharth Singh
S.C.

Constitution of India, Art. 226-Regularisation-appointment on 'Junior Foreman Trainee' post-under Govt. policy-for two years on consolidated stipend of Rs.4300 plus canteen subsidy of Rs.400/-further extended for one year-allowed to continue as trainee for long time amount unfair labour-practices no denied of working as regular employee-court can assume and direct for creation of post and regularization-till regular absorption minimum scale of pay to be given.

Held: Para 10 & 12

The Supreme Court in State of Haryana v. Piyara Singh, (1992) 4 SCC-118 held that the State should act as a model employer and should not exploit its employees nor take advantage of the helplessness and miseries of such persons, who are working for a long time. In the present case, the petitioners have been allowed to continue as trainees for a long time and is therefore indicative of the fact that the respondents are adopting unfair labour practice for the simple reason that the respondents are taking regular work from the petitioners on a consolidated amount and are not treating them as regular workers. The fact that regular work is being taken from the petitioners have not been denied by the respondents. That fact that the respondents are permitting the petitioners to work in the establishment is also indicative of the fact that there is a need for regular work. Therefore, even assuming that there are no vacancy in the regular cadre, nonetheles, there is a requirement for a regular post and accordingly, the Court could direct the respondents to create a post and regularise the services of the petitioners.

In view of the aforesaid, it is clear that the petitioners are working continuously from the date of their initial appointments as trainees. The action of the respondents in permitting the petitioners to work for considerable length of time gave them a flicker of hope for being absorbed in the services of the respondents. Clause 12 of the terms and conditions of the offer of appointment indicates that the management has a policy for the absorption of trainees in the regular cadre.

Case law discussed:
2006 (4) SCC-1 relied on.
1992 (4) SCC-118 relied on.

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

1. The land of the petitioners was acquired under the Land Acquisition Act for the Gas Authority of India Limited (GAIL) to set up a project known as " Uttar Pradesh Petrochemicals Complex". A lot of hue and cry was raised by the land owners against the acquisition

proceedings and eventually, a tripartite agreement dated 29.6.1998 was executed between the land oustees, the district authorities, and the Management of Gas Authority of India Limited. The agreement contained a stipulation that one member of a family would be given an employment. This condition of employment was incorporated as per the prevailing policy of the State Government. Based on the aforesaid, the petitioners were offered an appointment as " Junior Fireman Trainee" in the project. The terms and conditions of the appointment was that the training would be for a period of two years and if the performance was found unsatisfactory, in that case, the period of training would be extended by six months. The trainees would be paid a consolidated stipend of Rs.4300.00 plus canteen subsidy @ Rs.400/- per month and that it was not obligatory on the part of the management to offer an appointment after the completion of the training period. The offer of appointment further stipulated that the management would retain the discretion to consider the trainees for a suitable absorption as per the terms and conditions of the absorption as laid down by the management, and if absorbed, the trainee would be placed in the minimum pay scale and that the training period would not be counted towards the service period. For facility, clause 12 of the terms and conditions of the offer of the appointment is detailed herein below:-

"It shall not be obligatory on the part of GAIL to offer any employment to the trainee on completion of the period of training. However, GAIL Management retains the discretion to consider the trainee for suitable absorption in the services of GAIL, subject to successful completion of training, performance on any interview/test (s) which may be conducted by the GAIL Management and on the terms and conditions of absorption as laid down. On completion of the period of training, the trainees may be absorbed at the minimum of the pay scale of the level/ grade in which they are to be placed."

2. The petitioners contended that the aforesaid offer of appointment was accepted and upon the completion of the training period of two years, the Management extended their training period by one year and thereafter, no letter of the extension of the training or for any other purpose, was issued and the management silently allowed the petitioners to continue as trainees in the project. It was submitted that the petitioners had been working since then continuously and that regular work was being taken from them and that they are performing the same work as done by the regular workers, and therefore, prayed that a mandamus be issued to the respondents to absorb them as regular junior firemen and pay them a regular salary.

Heard Sri Ashok Khare, Senior Advocate as well as Shri H.N. Singh, the learned counsels for the petitioners and Sri Navin Sinha, the learned Senior Counsel assisted by Siddharth Singh, Advocate for the respondents.

3. The learned counsel for the petitioners submitted that upon the completion of their training, the management had allowed them to work and that regular work was being taken by the management which was the same work as performed by the regular

workers, and therefore, there was no difference in the work performed by the petitioners as trainees with the work performed by the regular workers. The learned counsel for the petitioners further submitted that they are working in the project continuously for a continuous length of time, and therefore, they are now liable to be absorbed as regular employees of the project. The learned counsel for the petitioners further submitted that the action of the management in keeping the petitioners as trainees and paying them only a consolidated stipend was not only arbitrary but also amounted to an unfair labour practice. It was also urged that the management had given the appointment to the petitioners in lieu of the acquisition of their lands, and that such appointments was in the nature of a compassionate appointment which cannot be treated to be temporary in nature, and therefore, on this basis, the petitioners should be absorbed and should be treated as regular employees of the respondents.

4. On the other hand, the learned counsel for the respondents submitted that since the performance of the petitioners was not upto the mark, the training period was extended and that a Committee had been constituted to assess the performance of the petitioners which is under consideration. The respondents further submitted that the petitioners cannot claim absorption in the service of the answering respondents on the basis of their appointment letters. The respondents submitted that after the completion of their training, the petitioners had no right to remain in the service of the Company, but as a measure of good gesture and to avoid the pitiable situation of the petitioners, the respondents extended the training period, so that the petitioners could acquire the requisite training to enable them to compete with the other candidate at the time of the filling up of the vacancy. It was alleged that the land oustees are not entitled for an employment as the matter of right and having received the compensation, etc. under the Land Acquisition Act, the petitioners were, therefore, not entitled for an employment in the respondents establishment.

5. The learned counsel for the respondents further submitted that the offer of the training given to the petitioners does not give them any right of a regular employment and that the mere fact that they were continuing in the service of the respondents as trainees did not give them any indefeasible right for an absorption in the service. The learned counsel for the respondents further submitted that the petitioners were appointed by a back door method and therefore such appointments cannot be regularised. The tripartite agreement was executed under pressure, inasmuch as, the respondents were compelled to sign the agreement on the dotted line, which was against a public policy, and therefore, void under Section 23 of the Contract Act. In support of his submission, the learned counsel for the respondents placed reliance upon a decision of the Court in **Secretary State of Karnataka and others Vs. Uma Devi (3) and others, 2006(4) SCC 1.**

6. The Supreme Court in the case of Uma Devi [3] [supra] held that public employment had to be made on the basis of a procedure established by the Rules and Regulations and that only regular appointments could be made and that an

irregular appointment, without following the procedure, as per the Rules and Regulations, should not be adopted nor such irregular appointments namely, temporary, casual, daily rated persons or on contract, having continued to work year after year, should not be permitted to be regularised and such powers should not be exercised by the Courts under Article 226 of the Constitution. The Supreme Court held that the employer could engage persons on a temporary basis to meet the needs of the situation. However, the engagement, could not be used as a lever for the regularisation of their services, as it would defeat the scheme of public employment and therefore, the Courts, exercising powers under Article 226 of the Constitution, should refrain in directing absorption in a permanent employment of those who have been engaged without following the due process of selection as envisaged under the Rules and Regulations. The Supreme Court, further held, that equity would also not favour such persons who had been working for a considerable period of time nor sentiments should come in the way. The Supreme Court held that a person, who was engaged on a contractual basis, was not based on a proper selection as recognised by the rules or procedure and, such appointments could not invoke the theory of legitimate expectation for being confirmed on that post in the light of the fact that the said post could only be filled up after following a procedure prescribed under the Rules and Regulations. The Supreme Court further held that it could not be held that a promise of legitimate expectation was given by the respondents for the regularisation of their services on the mere ground, that these temporary or contract employees were allowed to continue for a period of time.

7. However, the Supreme Court in the case of Uma Devi [3] (supra) has carved out an exception. In paragraph-53 of the said judgment, the Supreme Court held that if the persons appointed on adhoc, casual or contract basis were duly qualified and were working against a sanctioned post and continued to work for several years without any intervention of an order of the court, in such an eventuality, the process of regularisation could be made, and if it was ultimately found that the employee was entitled for the relief, it would be possible for the Court to accordingly mould the relief.

8. In the light of the aforesaid, it has to be seen whether the petitioners were appointed by a back door method. In the present case, the petitioners were given appointments as trainees. They worked as trainees for two years and their period was extended for one more year. Their appointments as trainees was made under the Rules, Regulations and the policy of the respondents company. Therefore, it cannot be said that the appointment of the petitioners was made through a back door method. Further, there is no allegation that the petitioners were not qualified for the post or that they do not hold the requisite educational qualifications. The question that arises for consideration is, whether the petitioners were appointed on a sanctioned post or not. The respondents have stated that there are no vacancy available for their absorption in the regular cadre, but they have not denied the fact that their appointments as trainees was not against the existing posts. Consequently, it cannot be said that the appointment of the petitioners was against the existing strength.

9. As per Clause 12 of the terms and conditions of the offer of the appointment, it is clear that the management has a policy for absorption of trainees in the service of GAIL subject to successful completion of training, performance, etc. by the trainees. Consequently, the management has a policy for absorbing the trainees. In the present case, the petitioners were appointed as trainees and underwent the training for three years, and thereafter, they were allowed to continue as trainees. Their performance have been judged. The respondents in their counter affidavit have admitted that a committee has been constituted to assess the performance, but after filing of the counter affidavit, the respondents have not come out with any further affidavit indicating as to what recommendations was made by the committee. It is quite obvious that the respondents had stated these facts in the counter affidavit to gain time and left the matter at that.

10. The Supreme Court in **State of Haryana v. Piyara Singh, (1992) 4 SCC-118** held that the State should act as a model employer and should not exploit its employees nor take advantage of the helplessness and miseries of such persons, who are working for a long time. In the present case, the petitioners have been allowed to continue as trainees for a long time and is therefore indicative of the fact that the respondents are adopting unfair labour practice for the simple reason that the respondents are taking regular work from the petitioners on a consolidated amount and are not treating them as regular workers. The fact that regular work is being taken from the petitioners have not been denied by the respondents. That fact that the respondents are permitting the petitioners to work in the establishment is also indicative of the fact that there is a need for regular work. Therefore, even assuming that there are no vacancy in the regular cadre, nonetheles, there is a requirement for a regular post and accordingly, the Court could direct the respondents to create a post and regularise the services of the petitioners.

11. The Supreme Court in **Piyara Singh** (supra) further held:

"Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Art. 309 of the Constitution or (in the absence of such Rules) by issuing Rules /instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should

not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the Court presumes that there is need and warrant for a regular post and accordingly directs regularisation."

12. In view of the aforesaid, it is clear that the petitioners are working continuously from the date of their initial appointments as trainees. The action of the respondents in permitting the petitioners to work for considerable length of time gave them a flicker of hope for being absorbed in the services of the respondents. Clause 12 of the terms and conditions of the offer of appointment indicates that the management has a policy for the absorption of trainees in the regular cadre.

13. In view of the aforesaid, the petitioners are entitled to claim for their absorption in the service of the respondents. Consequently, the writ petition is allowed. A mandamus is issued to the respondents to consider the case of the petitioners for their absorption in the regular cadre within three months from the date of the production of a certified copy of this order.

In the event, the respondents deny the absorption on the basis that there is no vacancy, in that event, the petitioners would be allowed to continue on a minimum scale of pay till such time, as the requisite posts are created in the regular cadre. In the circumstances, of the case, the parties shall bear their own cost.

Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.09.2006

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

Criminal Misc. (IInd) Bail Application No. 9509 of 2006

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

Counsel for the Applicant:
Sri Dilip Kumar
Sri Arun K. Singh
Sri Rajiv Gupta

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

Code of Criminal Procedure-Section 439-Second Bail Application-the ground which are taken in second bail application-available at the time of disposal of first bail application-can not be termed as new ground.

Held: Para 10

The ground, which has been taken in Second Bail Application, was available to the applicant at the time of disposal of the First Bail Application. The ground available at the time of disposal of First Bail Application will not be taken to be a new fact for moving Second Bail Application. The Second Bail Application is maintainable on new developments or new facts and not on new ground based on the facts, which already existed at the time of disposal of First Bail Application.

Case law discussed:
1999 Cr.L.J. 3709
AIR 1992 SC-2292

(Delivered by Hon'ble K.N. Oiha, J.)

1. This is second bail application moved by Nipendra in Case Crime No.1400/2005 under section 302 IPC, Police Station Haldaur, district Bijnor.

2. The first bail application was rejected by this Court in Criminal Misc. Bail Application No. 3603 of2006 on 2.3.2006.

3. Heard Sri Arun Kumar Singh learned counsel for the applicant, learned AGA and have gone through the record.

4. According to prosecution Kulbeer Singh lodged FIR against applicant and one Vikram Singh under section 302 IPC on 12.11.2005 at 8.30 p.m. in respect of the occurrence which is said to have taken place on the same day about 5.15. p.m. It is said that Kulbeer Singh had gone from his village Jalalpur to market Heemapur alongwith Piyush Kumar and Vimal Kumar. After purchasing articles they were going back. He started to talk with his son Akshey Kumar, when Vikram Singh and Nipendra Singh came there and on exhortation of Vikram Singh, Nipendra Singh with country made pistol fired on Virnal Kumar. Both the accused fired and left the place. Vimal Kumar was carried to District Hospital, Bijnor where he was declared dead. One gunshot wound was found on chest of Vimal Kumar aged about 25 years alongwith it's corresponding wound on right of chest. One abrasion was also found on the body of Vi mal Kumar.

5. In the First Bail Application it was argued by learned counsel for the applicant that there was no motive to commit murder, no blood was found on the spot. There was no evidence that they were coming back from market and there is no independent witness of the occurrence. It was also argued that pellet crossed the chest but no blood was found on the ground. After considering these arguments speaking order was passed and bail application was rejected.

6. By moving instant second Bail Application it has been submitted by learned counsel for the applicant that there was no motive to the applicant to commit murder of Vimal Kumar. No article which was purchased from market and which was being carried by the victim and the witness was found on the spot. It is also submitted that according to prosecution fire was made from country made pistol of 12 bore but single bullet crossed the body resulting into the death of Vimal Kumar, it means the applicant had not fired on the victim.

7. Learned AGA submits that the point of motive was discussed in the First Bail Application also, Devendra brother of applicant was murdered and applicant suspected involvement of Vimal Kumar in such murder. If some persons were coming after making purchase from the local market and murder was committed those purchased articles were neither exhibits nor evidence of the case. Therefore, if the witnesses went alongwith those purchased articles and Investigating Officer did not take vegetable and other articles in custody it does not show any weakness in the prosecution evidence.

8. Occurrence is said to have taken place on 12.11.05 and 12-bore country made pistol is said to have been recovered from the possession of the applicant on

17.11.05. Besides it cartridge of 12 bore is said to have been found on the spot. FIR shows that while running away from the place Vikram Singh and applicant Nipendra both had fired. In FIR it is not written that country made pistol with which the applicant had fired was of 12 bore or 3.15 bore. In recovery memo copy of which has been filed by learned counsel for the applicant it is not written that the applicant had confessed that this recovered country made pistol was used in murder. The recovery memo speaks that it was recovered from the possession of the applicant.

9. While hearing argument this Court made observation that summoning of the record will specify as to whether this country made pistol was used in commission of the crime or not and the statement of prosecution witnesses which has been recorded uptil now and report of Ballistic Expert, if any, may be of some help. But learned counsel for the applicant has submitted that summoning of the record will delay final disposal of the trial, hence it be not summoned.

10. The ground, which has been taken in Second Bail Application, was available to the applicant at the time of disposal of the First Bail Application. The ground available at the time of disposal of First Bail Application will not be taken to be a new fact for moving Second Bail Application. The Second Bail Application is maintainable on new developments or new facts and not on new ground based on the facts, which already existed at the time of disposal of First Bail Application.

11. The position of law has been made clear in **1999 (Crl.LJ.)- 3709 Satyapal v. State of U.P.** wherein this Division bench has specified the law that fresh argument in Second Bail Application on same facts, which were available in earlier bail application, cannot be allowed. In **AIR 1979 SC 2292 State of Maharashtra v. Captain Buddhikota Subha Rao** it has been laid down by Hon'ble Apex Court that:

"The personal liberty of an individual can be curbed by procedure established by law. The Code of Criminal Procedure, 1973, is one such procedural law. That law permits curtailment of liberty of anti-social and antinational elements. Art. 22 casts certain obligations on the authorities in the event of arrest of an individual accused of the commission of a crime against society or the nation. In cases of under-trials charged with the commission of an offence or offences the court is generally called upon to decide whether to release him on bail or to commit him to jail. This decision has to be made, mainly in non-bailable cases, having regard to the nature of the crime, the circumstances in which it was committed, the background of the accused, the possilbity of his jumping bail, the impact that his release may make on the prosecution witnesses, its impact on society and the possibility of retribution etc.

In the instant case the successive bail applications preferred by the accused were rejected by the High court on merits having regard to the gravity of the offence alleged to have been committed under Official Secrets Act 1923, and Atomic Energy Act 1962. Undeterred the accused went on preferring successive applications for bail. All such pending bail applications were rejected by the single Judge of the High Court by a common order. However he was not

aware of the pendency of yet another bail application filed by the accused. Immediately two days thereafter the accused moved another single Judge of the High Court, who directed that the accused be enlarged on bail for a period of two months on his furnishing security in the sum of Rs.10,000/= with one surety on certain terms and conditions. Between the two orders there was a gap of only two days and it was nobody's case that during those two days drastic changes had taken place necessitating the release of the accused on bail.

Held, the order granting bail was not proper and liable to be set aside. Judicial discipline, propriety and comity demanded that the order granting bail should not have been passed reversing all earlier orders including the one rendered by the single Judge of the same High Court only a couple of days before, in the absence of any substantial change in the fact situation. In such cases it is necessary to act with restraint and circumspection so that the process of the Court is not abused by a litigant and an impression does not gain ground that the litigant has either successfully avoided one Judge or selected another to secure an order, which had hitherto eluded him. In such a situation the proper course, is to direct that the matter be placed before the same Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances, such a practice if adopted would be conducive to judicial discipline and would also save the Court's time as a Judge familiar with the facts would be able to dispose of the subsequent application. It will also result in consistency."

12. In view of the above position of law and the circumstances of the case this is not a fit case in which Second Bail Application moved by Nipendra be allowed.

13. It is a broad daylight occurrence. FIR was promptly lodged and applicant was named in the FIR. He is the main accused of the crime in murder of Vimal Kumar. Therefore, the Court does not find it appropriate to enlarge applicant on bail. The Second Bail Application for bail is **rejected**.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.08.2006

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Revision Defective No.500 of 2006

Ajay Singh @ Kallu & others ...Revisionists
Versus
State of U.P. ...Opposite Party

Counsel for the Revisionists:
Sri Indra Lal Yadav
Sri Prem Prakash

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

Code of Criminal Procedure-S.319-summoning order accused-not named in F.I.R. during trial-after recording the statements of P.W. I-regarding injury caused by the applicant by Axe-supported by medical report prima-facie case made out-objection that the

application not filed by the prosecution/complainant-hence the prosecution officer can not move application suo motu-held-not sustainable-session judge committed no error-can not be interfered.

Held: Para 13

Statement of PW-1 Balikaran was recorded by the trial court, wherein he has specifically stated that Kallu @ Ajay, who is the revisionist caused the sharp *edged* weapon injury by kulahari i.e, axe. Therefore, he is named in the version of FIT which is *prima facie* corroborated by the statement of PW-1 Balikaran regarding the role of the present revisionist and it is also supported by the medical report as he also sustained the sharp edged weapon injury. Therefore, learned court below has rightly deemed the prima facie case against the accused-revisionist for summoning him under section 319 Cr.P.C. and, if this evidence is not rebutted on behalf of the accused, he may be convicted.

Case law discussed:
AIR 2006 SC-415
AIR 2000 SC-1127
1999 Cr.L.J.-315
2005 (51) ACC-406

(Delivered by Hon'ble Shiv Shanker. J.)

1. This revision has been preferred against the impugned judgment and order dated 03-04-2006 passed in Session Trial No. 343 of 2005 (State of UP Vs. Ramanand & others), under sections 323, 324, 308 read with section 34 and 504, I.P.C. by Additional Sessions Judge (Fast Track Court No. 24) whereby the application moved by the prosecution under section 319 of Criminal Procedure Core against the revisionists was allowed.

2. Brief facts, giving rise to this revision, are that in Session Trial No. 343 of 2005 the accused persons Ramanand and others are facing trial before the Sessions Judge for the charges under sections 323,324,308/34 and 504 I.P.C..

3. After framing the charge, the statement of PW-1 Balikaran was recorded. Thereafter, the prosecution has moved an application under section 319 Cr.P.C. to summon the accused Kallu @ Ajay, against whom the charge-sheet was not filed and case was not committed, which was allowed. Feeling aggrieved by it, this revision has been filed.

4. Heard the arguments of learned Senior counsel appearing for the revisionists and learned A.G.A..

5. It is contended on behalf of the revisionists that application under section 319 Cr.P.C. was not moved by the complainant of this case and District Government Counsel (Criminal) has not obtained any instructions or direction on behalf of the State to move such application and this is not the duty of the State counsel according to the Legal Remembrancer Manual 7.20. Therefore, he was not empowered to move the application under section 319 Cr.P.C. However, it was allowed by committing the error of law by the concerned trial court.

6. This contention has no force. There is the latest pronouncement in the case of S.K. Shukla Vs. State of UP, AIR (2006 S.C.), 415, wherein it has been observed that for the withdrawal of the prosecution under section 321 Cr.P.C., Public Prosecutor cannot act on dictates of State Government. He has to act objectively being officer of Court. Courts are also free to assess whether prima facie case is made out or not. This latest

pronouncement is fully applicable in the case in hand and the contention of the learned counsel for the revisionists has no force.

7. It is further contended that though the revisionist no. 1 is named in the FIR but the charge-sheet was not filed against him. A Final report filed against him was accepted by the Court.

8. In these circumstances, they cannot be summoned by the Court on the basis of principle of *estoppel.* Therefore, the impugned order is liable to be quashed.

9. This contention has also no force. While exercising the power under section 319 of Criminal Procedure Code it has to be seen or considered whether the prima facie case is made out on the basis of the evidence recorded by the Trial Court after framing the charge against the accused. At this stage, principle of *estoppel* will not be applicable according to Section 300 Cr.P.C.

10. It is further contended that the copy of the application was not given to the counsel of the accused at the time of considering the application under section 319 Cr.P.C. by the trial court. This argument has also no force as the application was not moved against the accused, who were facing the trial. Therefore, there was no locus standi to file the objection against the application. It is further contended that there was no case against the revisionists and accused could only be summoned under section 319 Cr.P.C., if the evidence is available which is sufficient for conviction. In the present case, there was no sufficient evidence on the basis of which conviction could be made.

11. On the other hand, it is submitted by learned A.G.A. that learned court below has not committed any error of law or incorrectness in passing the impugned order.

12. Allegations made in the First Information Report briefly are that on 27-03-2002 at about 10:00 pm that Kallu @ Ajay accused on the exhortation of the co-accused Ramanand assaulted and inflicted a sharp edged weapon injury on the head of the injured Balikaran S/o Ram Lal and one accused Lallan was also named in the FIR. Injured sustained five injuries including a blunt object and a sharp edged weapon injury. Charge sheet was filed against two accused Ramanand Yadav and Lallan but charge-sheet was not filed against the revisionist who was named in the FIR.

13. Statement of PW-1 Balikaran was recorded by the trial court, wherein he has specifically stated that Kallu @ Ajay, who is the revisionist caused the sharp *edged* weapon injury by kulahari i.e, axe. Therefore, he is named in the version of FIT which is *prima facie* corroborated by the statement of PW-1 Balikaran regarding the role of the present revisionist and it is also supported by the medical report as he also sustained the sharp edged weapon injury. Therefore, learned court below has rightly deemed the prima facie case against the accused-revisionist for summoning him under section 319 Cr.P.C. and, if this evidence is not rebutted on behalf of the accused, he may be convicted.

14. In these circumstances, I do not find any force in the arguments advanced on behalf of the revisionists.

15. So far as the pronouncement of Hon'ble Apex Court in *Michael Machado and another Vs. Central Bureau of Investigation and another*, AIR 2000 S.C., 1127 is concerned, 54 witnesses had been examined including their cross-examination. Therefore, it was held that the de novo trial is not proper. In the present case, statement of PW-1 is only recorded.

16. The pronouncement in *Mahesh Chandra Misra and others Vs. State of UP and others*, 1999 Crl. L.J. 315 is also not applicable in the present case as there is direct evidence against the revisionists and main role has been assigned to him in the alleged occurrence.

17. Similar view has also been taken in *Ganga Prasad Mishra Vs. State of UP and another* 2005 (51) ACC 406.

18. In view of discussions made above, I come to the conclusion that the learned court below has not committed any error of law, illegality or incorrectness in allowing the application under section 319, Cr.P.C. against the revisionist and it is not liable to be interfered with.

19. Thus, this revision has no force and is liable to be dismissed hence dismissed. The impugned order passed by the court below is hereby affirmed.

Revision Dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2006

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Revision No. 3974 of 2006

Balveer Prasad ...Revisionist
Versus
State of U.P. & others...Opposite parties

Counsel for the Revisionist:
Sri S.C. Tiwari

Counsel for the Opposite Parties:
Sri S.C. Pandey
A.G.A.

Code of Criminal Procedure-Compromise Application-revisionist/Applicant facing Trail for offence under Section 407 I.P.C.-rejection by Session Judge-held-proper-offence being non - compoundable under section 320 Cr.P.C.-can not be settled on the basis of compromise.

Held: Para 10 & 11

Therefore, the trial court could not consider the offences to be compoundable, which are not mentioned under section 320 of the Criminal Procedure Code.

In these circumstances, this criminal revision has no force and is liable to be dismissed. Consequently, this revision is hereby dismissed.

Case law discussed:
ACC-200 Page-372
1999 ACC-372
1999 ACC (Vol. 38)-367

(Delivered by Hon'ble Shiv Shanker. J.)

1. This revision has been preferred against the impugned order dated

28.06.2006 passed in Session Trial No. 15 of 1998 (State Vs. Shiv Charan Lal & others) under section 307, IPC Police Station Lodha, District Aligarh passed by the Additional Sessions Judge, Aligarh, whereby the application moved on behalf of the accused person regarding permission, along with the compromise application between the parties was rejected.

2. Brief facts arising out of this revision are that the accused persons Shiv Charan Lal and others are facing trial before the Sessions Judge, under section 307, IPC and the case is still pending since 24th November 1999. Thereafter, the present application and compromise application moved before the trial Court were rejected. Hence, this revision.

3. Heard the arguments of leaned counsel appearing for the revisionist and learned AGA and perused the records.

4. The application was moved on behalf of the revisionist and time was taken to show the case law after lunch. No case law regarding permission to compromise in the case was produced. Thereafter, it was rejected on the ground that the offence under section 307, I.P.C. is not compoundable under section 320 of Criminal Procedure Code.

5. It is contended on behalf of the revisionist that there are several pronouncements of Hon'ble Supreme Court and Allahabad High Court that the case may be decided on the basis of the compromise. However, it is not compoundable.

6. Learned AGA has submitted that the Court below has not committed any error of law. Subordinate Court is the Court of law. Therefore, the provisions provided in the Act or Acts shall be complied. In the present case, revisionist and others were facing the trial for the charge under section 307 of Indian Penal Code, which is not compoundable under section 320 Cr.P.C. Therefore, learned court below has rightly rejected the application of compromise.

Learned counsel for the revisionist has attracted my attention towards the following pronouncements:-

1. Barsati and others Vs. State of UP and another ACC 2000 Page 372 passed by Hon'ble Apex Court.
2. Bhawani Prasad Vs. State of UP ACC 1999 Page 372 passed by Allahabad High Court, Lucknow Bench.
3. Km. Madhurima Bhargava and others Vs. State of UP and another 1999 Vol. 38 ACC Page 367.
4. Photostat copy of Criminal Revision No. 8106 of 2003 Pankaj Mishra and another Vs. State of UP and others.

7. Hon'ble Apex Court is the Court of justice and there are unfettered powers of the Hon'ble Apex Court. In the case of Barsati and others Vs. State of UP, It appears that the trial Court has convicted the accused for the charge under sections 147, 323/149, and 325/149 IPC and 304 Part II read with section 149, IPC but in the appeal the conviction for the charge under section 304 Part II was set aside and rest of the convictions was affirmed. Therefore, the compromise was moved before the Hon'ble Supreme Court for the charge under section 147, 323/149 and 325/149 IPC, which was allowed by the Hon'ble Supreme Court. Therefore, the Supreme Court has not allowed the compromise application regarding the

offence under section 304 Part II of the Indian Penal Code.

8. So far as the case law of Km. Madhurima Bhargawa and others Vs. State of UP is concerned, it has been held that offence under section 302, I.P.C. is non-compoundable offence. It cannot be compounded under the provision of section 482, Cr.P.C.. The proceedings can be quashed under Article 226 of the Constitution, if parties are ready to compromise. Therefore, the revisionist is not liable to get any benefit from the above two pronouncements.

9. So far as unreported case of Criminal Revision No. 8106 of 2003 (Pankaj Mishra and another Vs. State of UP and others) is concerned, it relates to the family disputes under section 498-A, 323 and 506, IPC. It does not relate to the heinous crime for the offence under section 307, IPC.

10. Therefore, the trial court could not consider the offences to be compoundable, which are not mentioned under section 320 of the Criminal Procedure Code.

11. In these circumstances, this criminal revision has no force and is liable to be dismissed. Consequently, this revision is hereby dismissed.

12. It is very old case. In the circumstances, the trial court is directed to decide the same after giving opportunity of hearing to both parties within three months as far as possible and information be sent by the trial court regarding disposal of the case thereafter.

Revision Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.46982 of 2006

Ugrasen Tiwari ...Petitioner
Versus
Narvadeshwar Tiwari ...Respondent

Counsel for the Petitioner:
Sri R.C. Singh

Counsel for the Respondent:

Code of Civil Procedure-Order 17 rule I-Power to grant adjournments-more than five adjournments-court by exercising inherent power can grant further adjournment-on exceptional circumstances-provisions of order 17 rule I are not mandatory.

Held: Para 4

The provision of Order XVII Rule 1 C.P.C. is procedural in nature and even though the provision is couched in a negative manner, it does not mean that under exceptional circumstances, the court is not empowered to grant an adjournment. The Court has the inherent power to grant an adjournment in exceptional circumstances on sufficient reasons being recorded. In the present case, the revisional court had rightly granted the adjournment upon payment o cost of Rs.200/-. The Supreme Court in Shikh Salim Haji Abdul Khayumsab v. Kumar and others AIR 2006 SC 396 has held that the provisions of Order 8 Rule 1 C.P.C. is not mandatory in nature and that the Court has the inherent power to grant further time to file a written statement even after the expiry of 90 days. The same principle would squarely apply in Order XVII Rule 1 C.P.C. Consequently, I do not find any error in

the impugned revisional order. The writ petition fails and is dismissed.

AIR 2006 SC-396 relied on.

(Delivered by Hon'bleTarun Agarwala, J.)

1. The plaintiff filed a suit for the cancellation of a decree in Suit no.326 of 1997. It transpires that the plaintiff sought repeated adjournments and, eventually by an order dated 4.10.2004, the trial court rejected the adjournment application on the ground that continuous adjournment on five occasions was sought and therefore, no further adjournment would be allowed. An application for the recall of the order was also rejected by an order dated 3.3.2005. Consequently, the plaintiff filed a revision which was allowed and the order dated 4.10.2004 and 3.3.2005 was set-aside on payment of cost of Rs.200/-. The defendant, being aggrieved by the order of the revisional court has filed the present writ petition.

Heard Sri R.C. Singh, the learned counsel for the petitioner.

2. The learned counsel for the petitioner drew the attention of the Court to the provisions of Order XVII Rule 1 C.P.C., as amended by Act No.46 of 1999, which reads as under:

"**1. Court may grant time and adjourn hearing- [1]** The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing."

Provided that no such adjournment shall be granted more than three times to a party during of the suit.

(2) **Cost of adjournment-** In every such case the Court shall fix a day for the further hearing of the suit, and [shall make such orders as to costs occasioned by the adjournment or such higher costs as the court deems fit];

Provided that—

(a) when the hearing of the suit has commenced, it shall be continued from day today until all the witnesses in attendance have been examined, unless the Court finds that, for the exceptional reason to be recorded by it, the adjournment of the hearing beyond the following day is necessary.

(b) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party,

(c) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment,

(d) where the illness of the pleader or his inability to conduct the case for any reason, other than his being engaged in another Court, is put forward as a ground for adjournment, the Court shall not grant the adjournment unless it is satisfied that the party applying for adjournment could not have engaged another pleader in time,

(e) where a witness is present in Court but a party or his pleader is not present or the party or his pleader, though present in Court, is not ready to examine or cross-examine the witness, the Court may, if it thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the

case may be, by the party or his pleader not present or not ready as forwarded.

3. Learned counsel for the petitioner further submitted that the proviso clearly indicates that no adjournment shall be granted more than three times to a party during the hearing of a suit and submitted that the word "shall", as indicated in the proviso, clearly indicates, that the provision was mandatory and therefore it was no longer open to the revisional court to grant further adjournment, especially, when adjournment on three previous occasions had already been taken. The learned counsel, consequently submitted, that the order of the revisional court was wholly illegal and without jurisdiction and against the teeth of the mandatory provision provided under Order XVII Rule 1 C.P.C.

4. In the opinion of the Court, the submission of the learned counsel for the petitioner is bereft of merit. The provision of Order XVII Rule 1 C.P.C. is procedural in nature and even though the provision is couched in a negative manner, it does not mean that under exceptional circumstances, the court is not empowered to grant an adjournment. The Court has the inherent power to grant an adjournment in exceptional circumstances on sufficient reasons being recorded. In the present case, the revisional court had rightly granted the adjournment upon payment o cost of Rs.200/-. The Supreme Court in **Shikh Salim Haji Abdul Khayumsab v. Kumar and others AIR 2006 SC 396** has held that the provisions of Order 8 Rule 1 C.P.C. is not mandatory in nature and that the Court has the inherent power to grant further time to file a written statement even after the expiry of 90 days. The same principle would squarely apply in Order XVII Rule 1 C.P.C. Consequently, I do not find any error in the impugned revisional order. The writ petition fails and is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 11207 of 1999

U.P. State Road Transport Corporation, Jhansi ...Petitioner
Versus
Smt. Meena Kumari Dixit and another ...Respondents

Counsel for the Petitioner:
Sri Vivek Saran
Sri Rahul Anand Gaur

Counsel for the Respondents:
Sri D.N. Dubey
S.C.

Industrial Dispute Act, 1947-Section 11-A-Power of Labour Court-interference with-punishment of dismissal-awarded on the ground of serious misconduct-not open for Labour court or the Tribunal to interfere with such discretion exercised by the employer-not justified.

Held: Para 17 & 18

In the case in hand the duty of the workman concerned was to protect the revenue of the Corporation by checking that no passenger is traveling in the bus without ticket and to issue tickets by collecting fair from the person traveling in the bus without ticket. He admittedly failed in his duty when out of 50 passengers, 24 were found traveling without ticket. The workman-conductor

of the bus engaged in financial transactions, was acting in fiduciary capacity and was expected to show highest degree of integrity and trust-worthiness. He failed to satisfy the same. In the circumstances merely for the reasons that in the past no such misconduct of the workman came to the light of the employer, it could not have been a ground to interfere with the punishment, since the charge found proved against the workman itself is extremely grave and serious. The observations of the Apex Court in Hoti Lal (Supra) are fully applicable to the facts of this case.

This Court is aware of the circumstances that during the pendency of the dispute the workman died and his widow was pursuing the matter. This aspect has also influenced the approach of the Labour Court in interfering with the quantum of punishment. However, in my view this approach would show displaced sympathy for the reasons that the employer, if found his workman to be guilty of such a grave and serious misconduct, and decide to impose punishment of removal, for any subsequent event, it is not open to the Labour Court or the Tribunal to interfere with any such discretion exercised by the employer since it cannot be said that the discretion as exercised by the employer at the time of dismissal was not justified.

Case law discussed:

1998 (3) SCC-192
AIR 2005 SC-1924
2000 (3) SCC-324
2003 (3) SCC-605
2004 (8) SCC-200
AIR 2005 SC-2206
2006 (1) SC-430

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

1. Heard Shri Rahul Anand Gaur, learned counsel appearing on behalf of U.P. State Road Transport Corporation (hereinafter referred to as the Corporation) the petitioner and Shri D.N. Dubey, learned standing counsel appearing for contesting respondent no. 1.

2. The writ petition is directed against the award of the Labour Court dated 16.7.1988 holding that punishment of dismissal of the workman (Shri Laxmi Kant Dwivedi) from the post of Conductor on the charges of carrying passengers without ticket is harsh and disproportionate and thereby setting it aside, it has granted relief of back wages to the extent of ¼ th of the salary to the workmen.

3. The brief facts giving rise to the writ petition are that the workman, late Laxmi Kant Dwivedi, was appointed as Ticket Conductor at Mahoba Depot of Corporation in October 1990. While he was discharging his duty at bus no. U.P.93/2349 running between Kanput and Khajuraho, the aforesaid bus was checked by Senior Station Incharge, in which 24 passengers out of 50 passengers were found traveling without ticket. His explanation was sought for and thereafter departmental enquiry was conducted whereupon the charges were found proved and by order dated 30.6.1994 he was dismissed from service. The workman raised an industrial dispute, which was referred for adjudication to the Presiding Officer, Labour Court, Kanpur registered as Adjudication case No.297 of 1996. The workman concerned sought to assail order of punishment on the ground that no passenger was found without ticket, enquiry was conducted ex-parte, an outsider was appointed as Enquiry Officer and he was not afforded any opportunity to cross-examine witnesses. When the proceedings were pending before the Labour Court, the workman died and

substituted by respondent no.1 being his legal heir.

4. The Labour Court after hearing all the parties held that the charge leveled against the workman that he was carrying 24 passengers without ticket is proved. He discarded the defence that the allegations were leveled against the workman for extraneous consideration, and, has recorded a finding of fact that the charge stands proved. Thereafter, he proceeded to consider the question of punishment and considering the fact that the workman died leaving behind his widow having two minor children who are facing starvation on account of non-availability of any source of earning livelihood, set aside the punishment of 'dismissal' and has directed the appellant to pay arrears of salary to the widow from the date of the order of the dismissal to the extent of 1/4th of the arrears of salary.

5. Learned counsel for the employer, Corporation vehemently contended that once the charge of serious misconduct of carrying passengers without ticket was found proved the Labour Court erred in law and committed manifest error apparent on the face of record by interfering with the quantum of punishment.

6. On the contrary learned counsel for respondent no. 1 contended that enquiry was no conducted fairly, the workman was not afforded opportunity, there was no material to show that passengers were traveling without ticket and the entire finding is perverse.

Heard learned counsel for the parties and perused the record.

7. From the perusal of record it is apparent that the Labour Court has recorded a finding of fact that departmental proceedings have been conducted against the petitioner workman giving him due opportunity of defence and the charges were also found proved. In this view of the matter it is not permissible to review such finding particularly at the instance of respondent No. 1 who has not challenged the same.

8. Now coming to the question as to whether the Labour Court was justified in setting aside the punishment of removal on the ground of being harsh, excessive and non-commensurating to the gravity of charge, it has to be answered considering the ambit of power which the Labour Court have exercised in such matters. It will be appropriate to have a brief resume of precedents on the question as to whether and when it is open to Industrial Tribunal or Labour Court to interfere with the quantum of punishment.

9. Under Section 11-A of the Industrial Disputes Act, 1947 the Labour Court and Tribunal have been empowered to set aside the order of discharge or dismissal where an industrial dispute relating to the discharge or dismissal where an industrial dispute relating to the discharge or dismissal is referred for its adjudication and in the course of adjudication proceedings, it found that the order of discharge or dismissal is not justified. The Labour Court and the Tribunal is also empowered, in such case, to direct the employer to reinstate the workman on such terms and conditions as it deems fit or to give such other relief to the workman including the award of lesser punishment in view of discharge or dismissal.

10. Sec. 11-A of the Industrial Disputes Act, 1947 is reproduced as under:-

11-A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen-

Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter."

11. This provision came up for consideration before a three-Judge Bench of the Apex Court in Union of India Vs. B.C. Chaturvedi (1995) 6 SCC 749 and it was held that interference on the proportion of punishment of penalty is permissible only when the punishment or penalty is shockingly disproportionate.

In ***Colour-Chem Ltd. V. A.L. Alspurkar and others (1998) 3 SCC 192*** *it was held:-*

"Consequently, it must be held that when looking to the nature of charge of even major misconduct which is found proved if the punishment of dismissal or discharge as imposed is found to be grossly disproportionate in the light of the nature of the misconduct or the past record of the employee concerned involved in the misconduct or is such which no reasonable employer would ever impose in like circumstances, inflicting of such punishment itself could be treated as legal victimization."

12. In ***U.P. State Road Transport Corporation Vs. Subhash Chandra Sharma & Ors. (2000) 3 SCC 324*** the Court referred to section 11 of Industrial Disputes Act, 1947 held where the charge of misconduct found proved against the workman is serious, the Labour Court is not justified in interfering with the order of removal. In the aforesaid case, the charge against the workman was that he, in a drunken state, went to the Assistant Cashier in the Cash room alongwith the Conductor and demanded money from the Assistant Cashier. When refused the workman abused him and threatened to assault him. The aforesaid charge was proved but the Labour Court held that the punishment of removal is not justified and therefore set aside the same. The Apex Court disapproving interference of the Labour Court in the matter of punishment, observed as under:-

"It was certainly a serious charge of misconduct against the respondent. In such circumstances, the Labour Court was not justified in interfering with the

order of removal of respondent from the service when the charge against him stood proved. Rather, we find that the discretion exercised by the Labour Court in the circumstances of the present case was capricious and arbitrary and certainly not justified. It would not be said that punishment awarded to the respondent was in any way "shockingly disproportionate" to the nature of the charge found proved against him."

13. In ***Krishnakali Tea Estate Vs. Akhil Bharatiya Chah Mazdoo Sangh (2004) 8 SCC 200*** it was held that the punishment of dismissal awarded to the workman could have been interfered only if it is disproportionate to the misconduct proved by the workman and not otherwise. In ***Muriadiah Colliery Kamgar Union Vs. Bihar Collieri Kamgar Unior AIR 2005 SC 2006*** referring to Section 11-A of the Industrial Dispute Act, 1947. The Apex Court held:-

"It is well established principle in law that in a given circumstance it is open to the Industrial Tribunal acting under Section 11 (A) of the Industrial Disputes Act, 1947 has jurisdiction to interfere with the punishment awarded in the domestic inquiry for good and valid reasons. If the Tribunal decides to interfere with such punishment it should bear in mind the principle of proportionality between the gravity of the offence and the stringency of the punishment……."

14. In ***Hombe Gowda Education Trust & anr Vs. State of Karnataka and ors. 2006 (1) SCC 430*** the Apex Court after a review of the entire earlier case law observed as under:-

"This Court repeatedly has laid down the law that such interference at the hands of the Tribunal should be inter alia on arriving at a finding that no reasonable person could inflict such punishment. The Tribunal may furthermore exercises its jurisdiction when relevant facts are not taken into consideration by the Management which would have direct bearing on the question of quantum of punishment."

15. In ***M.P. Electricity Board Vs. Jagdish Chandra Sharma AIR 2005 SC 1924*** the Apex Court observed that the punishment of termination of service awarded to a workman found guilty of breach of discipline cannot be said to be disproportionate or harsh.

16. In the matter of Transport Corporation itself where the workman is found guilty in financial matters, the Apex Court found that the punishment of dismissal or termination is not disproportionate since such misconduct should not be dealt with leniently. In ***R.M.U.P.S.R.T.C. Etawah & Ors (2003) 3 SCC 605*** it was held:-

"It is not only the amount involved, but the mental set-up, the type of duty performed and similar relevant circumstances which go into the decision-making process while considering whether the punishment is proportionate or disproportionate. If the charged employee holds a post of trustworthiness and integrity are inbuilt requirements of functioning, it would not be proper to dealt with the matter leniently. Misconduct in such cases has to be dealt with iron hands. Where the person deals with public money or is engaged in financial transactions or acts

in a fiduciary capacity, the highest degree of integrity and trustworthiness is a must and exceptionable. Judge in that background, conclusions of the Division Bench of the High Court are not proper."

17. In the case in hand the duty of the workman concerned was to protect the revenue of the Corporation by checking that no passenger is traveling in the bus without ticket and to issue tickets by collecting fair from the person traveling in the bus without ticket. He admittedly failed in his duty when out of 50 passengers, 24 were found traveling without ticket. The workman-conductor of the bus engaged in financial transactions, was acting in fiduciary capacity and was expected to show highest degree of integrity and trust-worthiness. He failed to satisfy the same. In the circumstances merely for the reasons that in the past no such misconduct of the workman came to the light of the employer, it could not have been a ground to interfere with the punishment, since the charge found proved against the workman itself is extremely grave and serious. The observations of the Apex Court in Hoti Lal (Supra) are fully applicable to the facts of this case.

18. This Court is aware of the circumstances that during the pendency of the dispute the workman died and his widow was pursuing the matter. This aspect has also influenced the approach of the Labour Court in interfering with the quantum of punishment. However, in my view this approach would show displaced sympathy for the reasons that the employer, if found his workman to be guilty of such a grave and serious misconduct, and decide to impose punishment of removal, for any subsequent event, it is not open to the Labour Court or the Tribunal to interfere with any such discretion exercised by the employer since it cannot be said that the discretion as exercised by the employer at the time of dismissal was not justified.

19. In my view therefore, the Labour Court erred in law in setting aside the punishment of removal and by directing for payment of 1/4th of arrears of salary to the respondent no. 1.

20. In the result, the writ petition succeeds and is allowed. The award impugned in the writ petition is set-aside to the extent it interferes with the punishment of removal imposed upon the workman concerned and direct for payment of 1/4th arrears of salary to the respondent. The punishment of removal as imposed upon the workman is up-held.

Parties shall bear their own costs.

Petition Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.10.2006

BEFORE
THE HON'BLE V.D. CHATURVEDI, J.

Criminal Revision No.1563 of 2004

Shaukat Rana ...Revisionist
Versus
State of U.P. & another...Opposite Parties

Counsel for the Revisionist:
Sri Mohd. Aslam Ansari
Sri Mukhtar Alam

Counsel for the Opposite Parties:
Sri Onkar Singh

A.G.A.

Code of Criminal Procedure-Section 173 (B)-further investigation-can not be claimed as a matter of right by the accused-where the charge sheets submitted after investigation-held-it is sole discretion of magistrate.

Held: Para 6

The accused cannot claim as a matter of right, a discretion from the Court commanding further investigation by I.O. under Section 173(8) Cr.P.C., after a charge sheet has been filed after the investigation.

(Delivered by Hon'ble V.D. Chaturvedi, J.)

1. This revision has been flied by Shaukat Rana, an accused of case crime No. 169 of 1998, under section 302 I.P.C., against the order dated 24.2.2004 whereby the learned C.J.M. Muzaffarnagar, has rejected his application for further Investigation.

2. None is present for the revisionist even on the revision of the list. Sri Onkar Singh, learned counsel for the respondent No.2 has been heard and the record of the case has been perused.

3. The relevant facts are that the complainant Sadakat lodged an F.I.R. at Crime No. 169 of 1998 u/s 302 I.P.C. P.S. Kotwali, district Muzaffamagar stating therein that Shaukat Rana (revisionist) and others had earlier committed the murder of Sakhawat and Aslam by firing at them and another; that the said case was pending for evidence; that the complainant's father was an eye witness of the said occurrence; that the revisionist and other co-accused were pressurising the complainant's father Rifakat to make compromise but the complainant's father declined. Hence on3.5.1998 at 5:45 A.M. Shaukat Rana (revisionist) and his brothers met his father and Shaukat Rana has committed the murder of the complainant's father by firing at him. The local police conducted the Investigation and submitted charge sheet against the revisionist and others. Later the investigation was conducted by the C.B., C.I.D. under the orders of the Government. The Investigating Officer of C.B., C.I.D. ratified the charge sheet submitted by the local police.

4. The learned Magistrate took the cognizance and thereafter supplied the necessary copies to the revisionist and others. On 24.2.2004 the learned C.J.M. was to commit the case to the Court of Session but meanwhile the revisionist moved an application u/s 173 (8) Cr.P.C. for further investigation, which was rejected on reasons given by the C.J.M. and he committed the case same day to the Court of Session. Aggrieved by the said order dated 24.2.2004 the accused-revisionist Shaukat Rana has filed this revision.

5. I have perused the impugned order dated 24.2.2004, which goes to show that the charge sheet by the local police was submitted and thereafter C.B., C.I.D. conducted further investigation and ratified the charge sheet. The learned C.J.M. felt no need to pass an order for further investigation hence rejected the application.

6. The accused cannot claim as a matter of right, a discretion from the Court commanding further investigation by I.O. under Section 173(8) Cr.P.C.,

after a charge sheet has been filed after the investigation.

7. The power to pass an order for further investigation is discretionary. This discretion was properly exercised by learned C.J.M. The learned C.J.M. has exercised his discretion on reasons. I see no illegality or incorrectness in the impugned order warranting interference.

8. The revisionist was named in the F.I.R .. The motive to commit the murder was to pressurize the eye witness of a murder case to give evidence in accused's favour. When such witness declined, the revisionist committed his murder. The charge sheet submitted by the police was ratified by the C.B., C.I.D.. Yet the revisionist filed this revision. Unfortunately the trial remained stayed for about two years due to the pendency of this revision.

9. The revision is devoid of merits. It is therefore dismissed with a cost of Rs.5000/- equally payable to the respondent nos. 1 and 2. The parties are directed to put in their appearance in court below on 22.11.2006. The trial court is desired to expedite the trial as early as possible.

Certify this order to the court below.

The interim order is hereby vacated.

Revision dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.10.2006

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 28603 of 2006

Rajneesh Shukla ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Amitabh Tripathi
Sri P.K. Singh

Counsel for the Respondents:
Sri Dr. A.K. Nigam, Addl. S.G. of India
Sri A.B.L. Gaur
Sri Ram Gopal Tripathi

Constitution of India, Art. 226-Education-Cancelation of L.L.B. I year-Ist semester examination-without disclosing any evidence or material-used by the petitioner-valuable years of petitioner's lost without of his fault-cost of Rs. Five Thousand imposed.

Held: Para 8

In the present case, for reasons best known to the University authorities, an order cancelling the result of the examination of the petitioner has been passed without there being any evidence or material on record to show that the petitioner had used the material, or could have used the same for answering the questions in the examination. As such, while allowing this writ petition, in my view, the petitioner would also be entitled to costs as he has, for no fault of his, lost one valuable year of his academic career. In my assessment, a token cost of Rs. 5,000/- (Rs. Five thousand) should be imposed on the University authorities, although the same may not be sufficient

compensation to the petitioner for the loss of his one year.

Case law discussed:

1994 (1) SCC-6

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

1. Brief facts of this case are that the petitioner was a student of LL.B. First Year. In the Environmental Law Paper of the First Semester Examination of LL.B. First Year, 2006 held on 23.1.2006, on inspection, the flying squad found that the petitioner was using unfair means and thus on 24.1.2006 the Examination Controller, Allahabad University, Respondent no.2, issued a notice to the petitioner requiring him to reply to the following charge:-

"The college flying squad recovered from the possession of the examinee the admit card on the back page of which the examinee has written with pencil u. f.m. (*unfair means*) matter."

2. The petitioner thereafter submitted his reply on 1.3.2006, denying the charge, and categorically stating that he did not make use of any unfair means in the examination. However, thereafter on 12.4.2006 the Deputy Registrar (Examination), Respondent no.3, held the petitioner to be guilty of using unfair means and cancelled his result of LL.B. 1st Year First Semester Examination, 2006. Aggrieved by the said order, this writ petition has been filed.

3. I have heard Sri Amitabh Tripathi, learned counsel for the petitioner as well as Sri A.B.L.Gaur, learned Senior counsel appearing with Sri Ram Gopal Tripathi, learned counsel for the contesting Respondents no.2 and 3. Pleadings between the parties have been exchanged and with the consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage.

4. By order dated 19.7.2006, this Court had directed the respondents to produce the admit card which formed the basis of the charge against the petitioner of using unfair means; and also the answer copy of the petitioner, which have both been produced today. On perusal of the admit card it appears that on the back of the same only one number i.e. 482192 has been written by hand. Besides this, two words have been scored out by pen (not by pencil as has been charged). By no stretch of imagination can the number written on the back of the admit card be said to be any sufficient material for substantiating the allegation that the petitioner used the same for cheating in the examination. Even if it is presumed that two words were written which had been scored out by pen, the same also cannot form sufficient material for substantiating the charge against the petitioner. I have also perused the answering copy of the petitioner in which detailed answers have been given by the petitioner in his own hand-writing. The answers run into several pages. It is not understood as to how the said number or mere two words could be used by the petitioner in answering the questions to which detailed reply has been given. As such, in my view, the basis on which the impugned order has been passed holding that the petitioner was guilty of using unfair means cannot be justified by any standards.

5. Sri Gaur, learned Senior counsel appearing on behalf of the contesting respondents, has submitted that Courts

should not interfere with the decisions of the examining bodies with regard to use of unfair means. In this regard he has placed reliance on a decision of the Apex Court rendered in the case of Central Board of Secondary Education vs. Vineeta Mahajan (1994) 1 S.C.C. 6 wherein it has been held that "*the sine qua non, for the misconduct under the Rule, is the recovery of the incriminating material from the possession of the candidate.* ***Once the candidate is found to be in possession of papers relevant to the examination****, the requirement of the Rule is satisfied and there is no escape from the conclusion that the candidate has used unfair means at the examination. The Rule does not make any distinction between bona fide or mala fide possession of the incriminating material. .....The very fact that she took the papers relevant to the examination in the paper concerned and was found to be in possession of the same by the invigilator in the examination hall is sufficient to prove the charge of using unfair means by her in the examination under the Rule."*

6. In the said case before the Supreme Court the candidate was found in possession of sufficient material which could have been used for answering the questions in the examination and in such circumstances, the Apex Court refused to interfere with the findings arrived at by the authorities. However, in the present case, no material whatsoever worth the name has been found in possession of the petitioner which could be said to be relevant to the examination. As already mentioned above, the number written on the back of the admit card, which formed the basis of passing the impugned order, could not in any manner help the petitioner in answering the questions of Environmental Law. As such, the finding of the University authorities that the petitioner was found in possession of material which could be used for answering the questions does not have any basis. It may be pertinent here to refer to the definition of "unauthorized material" in Clause 1.2 (c) of Chapter XXVIII of University Ordinances. The said definition of unauthorized material enumerates that it must be material related to the subject of the examination. In the present case, a few digits can by no stretch of imagination be considered related or even remotely relevant to an Environmental Law Paper.

7. There is no other charge against the petitioner nor has the counsel for the respondents placed before me any other ground for passing the impugned order. As such the order dated 12.4.2006, by which the result of First Semester of LL.B. 1st Year Examination, 2006 of the petitioner has been cancelled is totally unjustified, and thus liable to be set aside.

8. It is true that Courts should normally not interfere with orders passed by examining bodies in cases of use of unfair means. However, in cases where the authorities act in a totally arbitrary manner which may prick the conscience of the Court, and pass orders charging a candidate of using unfair means, even when there is no material whatsoever for substantiating such charge, this Court would be failing in its duty if it refuses to exercise its extraordinary jurisdiction under Article 226 of the Constitution of India to set right the wrong committed by the University authorities. In the present case, for reasons best known to the University authorities, an order cancelling the result of the examination of the

petitioner has been passed without there being any evidence or material on record to show that the petitioner had used the material, or could have used the same for answering the questions in the examination. As such, while allowing this writ petition, in my view, the petitioner would also be entitled to costs as he has, for no fault of his, lost one valuable year of his academic career. In my assessment, a token cost of Rs.5,000/- (Rs. Five thousand) should be imposed on the University authorities, although the same may not be sufficient compensation to the petitioner for the loss of his one year.

9. Accordingly, this writ petition stands allowed. The order dated 12.4.2006 passed by Deputy Registrar (Exam.) is quashed. The petitioner shall be entitled to cost of Rs.5,000/- (Rs. Five thousand) from the respondent no.2.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2006

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE SUDHIR AGARWAL, J.

Special Appeal No. (221) of 2004

Achhaibar Maurya ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri S.C. Kushwaha
Sri D.K. Maurya

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

U.P. Basic Education (Teachers Service Rules, 1981-Rule 29-Benefit of academic session-Assistant teacher in primary school-date of birth as recorded in service book 1.7.43 petitioner shall achieve the age of 60 years on 30.6.2003-not entitled for benefit of academic session-petition rightly dismissed.

Held: Para 9

The appellant having born on 1st July, the day of his birth is to be counted as a whole day and that being so, he completed one year of age on 30th June in the next year. Thus he attained 60 years of age on 30th June, 2003. That being so, he is not entitled for the benefit of extended employment up to 30th June inasmuch as rule 29 as amended in 1987 clearly exclude such teachers who attain age of superannuation on 30th June.

Case law discussed:
LR (1918) 1 Ch. 263
LR (1930) 1 K.B.-741
AIR 1967 Maysore-135
AIR 1986 SC-1948

(Delivered by Hon'ble S.Rafat Alam, J.)

1. We have heard Sri D.K. Maurya, learned counsel for the appellant and also perused the order of Hon'ble Single Judge.

2. The short controversy involved in this appeal is whether the petitioner/appellant whose date of birth is 1st July, 1943 is entitled to get Sessions benefit available to a person who attained the age of superannuation ongoing Session.

3. The brief facts giving rise to this appeal are that the petitioner/appellant was appointed as Assistant Teacher on 21st July 1975 in a Primary School

namely Kishan Pura Madhyamic Vidyalaya, Itally Gazna, District Jaunpur. The date of birth of petitioner/appellant recorded in his service book is 1st July, 1943. The recruitment and conditions of service of Assistant Teacher of Primary School in which the petitioner/appellant was appointed are governed by the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as 1981 Rules) promulgated in exercise of power under sub-Section 1 of Section 19 of U.P. Basic Education Act, 1972. The age of superannuation is prescribed under Rule 29. The aforesaid Rule was amended by U.P. Basic Education (Teachers) Service 3rd Amendment Rule, 1987 published on 12th June, 1989 and under Rule 2 the definition of Academic Session was inserted, Rule 29 as amended reads as under:-

प्रत्येक अध्यापक उस मास के जिसमें उसने अपनी आयु के ६० वर्ष पूरे कर लिये हों अन्तिम दिन अपराहन में सेवा निवृत्त होगा। परन्तु ३० जून को सेवा निवृत्त होने वाले किसी अध्यापक को छोड़कर कोई अन्य अध्यापक जो शिक्षा सत्र के दौरान सेवा निवृत्त होता है। सेवा निवृत्ति के दिनांक के पश्चात आगामी ३० जून तक कार्य करता रहेगा और सेवा की ऐसी अवधि को नियोजन की विस्तारित अवधि समझा जायेगा।

4. A perusal of aforesaid Rule 29 shows that if a person completes 60 years of age during the month he shall retire on the last date of such month. However, except such teachers who retire on 30th June, all other teachers who retire during an Academic Session would be allowed to continue till 30th June and the aforesaid period shall be deemed as extended period of employment. The date of birth of the petitioner/appellant being 1st July, 1943, he attained 60 years of age on 30th June, 2003.

5. However, the learned counsel for the petitioner/appellant vehemently contended that his date of birth being 1st July, 1943 he cannot be treated to have attained 60 years of age on 30th June, i.e. the day preceding the date of birth and since he attained the age of 60 years on 1st July, 2003, therefore, is entitled for the benefit of Academic Session i.e. to continue till 30th June, 2004. The aforesaid submission in our view is not correct. There is a general misconception that person attains a particular age on the date on which he was born. The correct position is that in the absence of an express provision, the settled principle is that a specified age in law is to be computed as having been attained on the day preceding the anniversary of the birthday. In **Halsbury's Laws of England, 3rd Edition, Vol. 37, para 178 at page 100** the law on the subject has been stated as under:-

"In computing a period of time, at any rate when counted in years or months no regard is, as a general rule, paid to fractions of a day, in the sense that the period is recorded as complete although it is short to the extent of a fraction of a day--------- similar, in calculating a person's age the day of his birth counts as a whole day, and he attains a specified age on the day next before the anniversary of his birthday."

6. The issue was considered in an English decision. In **Re Shurey Savory Vs. Shurey [LR(1918) 1 Ch. 263]** where the question came up for consideration was: does a person attain a specified age in law on the anniversary of his or her birthday or on the day preceding that anniversary. It was held that law does not take cognizance of part of a day and the consequence is that person attains required age on the day preceding the anniversary of his birthday. The same

view is taken in another English case in **Rex Vs. Scoffin [LR (1930) 1 KB 741].**

Probably the legislature recognizing the aforesaid principle expressly provided in section 4 of Indian Majority Act, 1875 criteria for computation of age of majority. Section 4 of the Act of 1875 reads as under:-

4. Age of majority how compute:-*In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of Section 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second paragraph of Section 3, at the beginning of eighteenth anniversary of that day.*

7. A Division Bench of Hon'ble Mysore High Court in **AIR 1967 Mysore 135 G. Vatsala Rani Vs. Selection Committee** following the aforesaid judgments, has also taken same view and has observed as under:-

"But in the absence of any such express provision, we think, it is well settled that any specified age in law has to be computed as having been attained or completed on the day preceding the anniversary of the birth day, that is, the day preceding the day of calendar corresponding to the day of birth of the person."

8. The apex Court has also approved the aforesaid principle and in **Prabhu Dayal Sesma Vs. State of Rajasthan and another AIR 1986 SC 1948** has held as under:-

"In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding the anniversary of his birthday."

9. The appellant having born on 1st July, the day of his birth is to be counted as a whole day and that being so, he completed one year of age on 30th June in the next year. Thus he attained 60 years of age on 30th June, 2003. That being so, he is not entitled for the benefit of extended employment up to 30th June inasmuch as rule 29 as amended in 1987 clearly exclude such teachers who attain age of superannuation on 30th June.

10. In the result we are of the view that the Hon'ble Single Judge has rightly dismissed the writ petition since the petitioner is not entitled for any relief. Accordingly, the special appeal lacks merit and is dismissed without any order as to costs. Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2006

BEFORE
THE HON'BLE A.K. YOG, J.
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE (MRS.) SAROJ BALA, J.

Reference No. 1 of 1994

Ramesh Chandra Srivastava ...Applicant
Versus
State of U.P. and others ...Respondents

Counsel for the Applicant:
Sri Sharad Malviya

Counsel for the Respondents:
Sri S.M.A. Kazmi, Adv. General
Sri R.V. Singh

S.C.

Indian Stamp Act, 1899-Section 47-A(1)-charging of Stamp duty whether the stamp duty can be charged on the amount mentioned in civil court decree or on the market valuation of the property-held-for evoking power under section 47-A(1) stamp duty chargable on the basis of market value.

Held: Para 21

We, therefore, hold that the stamp duty is chargeable on the basis of market value of the property conveyed by the instrument of conveyance and the fact that in the instrument executed by Civil Court is of no relevance for the purposes of invoking power under Section 47-A of the Act. The question no. 1 is answered accordingly.

Indian Stamp Act, 1899, Section 47-A(1)-relevant date for charging stamp duty-is the date when the court executed the sale deed on behalf of renders.

Held: Para 56

In view of the above discussion we answer the second question by holding that the relevant date for determining the market value of the property for being subject matter of the sale deed is the third i.e. January 3, 1985 when the Court executed the sale deed in question on behalf of the vendors.

Case law discussed:

1999 (2) ACJ 1211, AIR 1986 Alld-107 (D.B.), 1998 (1) ACJ-199, AIR 1972 SC-899, AIR 1987 SC-720, 1991 U.P.T.C.-1209, AIR 2002 A.P.-8, AIR 1966 Myssore-229, 1999 ACJ-1299, 1998 ACJ-199, AIR 1986 Alld.-107, CCRA-2000, AIR 1954 W.P. 51, AIR 1999 SC-2129, 1881 (5) ILB (Bom.)-188

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

1. Bungalow known as "White House' being House No. 15/71, Civil Lines Kanpur standing on plot nos. 104, 104-A 104-B, total area of about 14972 sq. yards was sought to be purchased by the present applicant, namely, Sri Ramesh Chandra Srivastava (now dead) and represented by his heirs and legal representatives from its owner namely Lucknow Diocesan Trust Association (L.D.T.A), duly incorporated under the Companies Act, for a sum of Rs.1,50,000/-. On 5th May, 1960 the applicant and LDTA entered into registered agreement to purchase the aforesaid premises by means of a registered agreement to purchase. Applicant paid Rs.5000/- as earnest money for the aforesaid bungalow standing on lease hold property and there was a condition in the lease deed prohibiting alienation except with the sanction of the District Magistrate, and, therefore, an application for permission to sell the lease hold rights in favour of the applicant was moved. Requisite permission was granted by the District Magistrate on 27th August, 1970. The owner of the aforesaid property, for one reason or the other failed to execute the sale deed in pursuance of the aforesaid agreement, which led to the filing of Suit No. 207 of 1982 in the Court of Ist Addl. Civil Judge, Kanpur, for specific performance of the aforesaid sale agreement. The suit was decreed on 14th May, 1984 directing the vendors to transfer the said property as agreed upon by the sale agreement, within three months, failing which the Court will execute the sale deed. The Court as a matter of fact on the failure of the vendor (owner), executed sale deed on 3rd January, 1985. The said sale deed/sale certificate under signature of Civil Judge Ist Kanpur was sent for its registration to the Sub Registrar Kanpur, who in turn in

exercise of power conferred on its under Section 47-A (1) of the Indian Stamp Act, 1899 (hereinafter referred to as the Act), referred it to the District Stamp Officer for determination of proper stamp duty on the aforesaid sale deed. It was registered as Stamp Case No. 87 of 1986.

2. In response to the show cause notice issued by the District Stamp Officer, the applicant took a stand that legally leviable stamp duty has been paid and affixed on the document, in as much as the sale deed in question was executed in pursuance of agreement to sell, dated 5th May, 1960, although sale deed was executed by the Court on 3rd January, 1985, but for the purpose of stamp duty, the sale consideration mentioned in the said sale agreement should be taken into account, market value of the premises in question prevailing on the date of execution of agreement to sell - alone is relevant, and the present market value of the property in question in the year 1985 is irrelevant.

3. The Assistant Commissioner Stamps, Kanpur, who received the file on transfer, vide order dated 18th March, 1991 rejected above contention of the applicant and found that the market value of the property in question should be determined with reference to the date of execution of the deed, i.e. on the basis of the prevailing circle rate (as fixed by the District Magistrate) applicable on the date of execution of the deed in question i.e. 3.1.1985. On that criterion, he calculated market value of the property at Rs.48,91,040/- which required stamp duty of Rs.5,13,607-50; after adjusting stamp duty already paid he detected deficiency in stamp duty to the tune of Rs.4,97,857-50 and also imposed penalty of Rs.2,20,142-50. Thus, by the order dated 18th March, 1991, the liability of Rs. seven lac was created towards payment of deficit stamp duty and penalty.

4. The aforesaid order was challenged by way of Revision, under Section 56 (1) of the Act, before the Chief Controlling Revenue Authority i.e. Board of Revenue, Allahabad who in turn referred the matter after framing the following two questions of law under Section 57 (1) of the Act for determination to this Court. The questions referred to this Court are as follows:-

Q. No.1. Whether the stamp duty is chargeable according to the amount mentioned in the civil court decree or on the basis of market valuation of property conveyed by this instrument of conveyance.

Q. No.2. If stamp duty is to be charged on the basis of market value of the property what should be the date with reference to which the market value of the property forming the subject matter of the instrument is to be determined? What should be the date with reference to which the market value of the property forming the subject matter of this sale deed is to be determined? In this matter prima facie three dates appear, first is 23/5/1960 when the earnest money was accepted in part performance of the agreement by the vendor, the second date is 14/5/1984 when the vendees case of specific performance was decreed by the court of Civil Judge first Kanpur and third is 03/01/1985 when the court executed the sale deed in question on behalf of the vendors.

5. Sri Sharad Malaviya, learned counsel for the applicant submitted that stamp duty is payable on sale consideration as mentioned in the document in question, the market value in the present case of the property in question should be market value for the purpose of payment of stamp duty as it was on the date of agreement. Elaborating the argument he submitted that the applicant should not suffer for the delay in execution of sale deed. The agreement in question was executed in the year 1960, on the basis of the then prevailing market value of the property in question and sale deed was executed by the Court in pursuance of decree passed in Suit No. 270 of 1982 in the year 1985. He submitted that the valuation of the property in question which was agreed in the agreement and said agreement since being specifically in force, the valuation as mentioned in the agreement is to be adhered to and the same can not be different for the purpose of payment of stamp duty under the provisions of the Act. He has placed reliance on the definition of Section 2 (6) which defines "chargeable' Sec.2 (10) which defines "conveyance' Sec.2 (12) which defines "executed and execution' and Section 17 of the Act. Heavy reliance is placed by him on a judgment of Madras High Court in the case of **S.P. Padamawati Vs. State of Tamil Nadu, A.I.R. 1997 Madras 296**. Further reference was made by him to the following decisions:-

(1) 1999 ACJ 1299 Smt Har Pyari and another Vs. District Registrar.

(2) 1998 ACJ 199 Girish Kumar Srivastava Vs. State of U.P.

(3) AIR 1986 Allahabad 107 Kaka Singh Vs. Addl. Collector and others.

6. In contra, Sri SMA Kazmi, learned Advocate General assisted by Sri R.V. Singh, learned Standing Counsel submitted that the Stamp Act is a fiscal statute and it should be construed on its plain language. Nothing can neither be added or ignored in the statute. The only relevant date for the purpose of determination of stamp duty on deed of conveyance is the date of its execution. The fact that the deed is executed in pursuance to a "Decree' passed by the Court is wholly immaterial. The sale consideration, as mentioned in the agreement to sell, is not a guiding factor for the purpose of determination of stamp duty payable on a sale deed executed in pursuance of said agreement to sell. To put it differently, he submitted that the "relevant fact' for the purposes to determine the stamp duty, with respect to deed of conveyance, is the date on which said deed is executed. The charging provision is Section 3 of the Act. Elaborating the argument, it was submitted that a document has to be considered as chargeable to stamp duty when it is executed. Reference is made to the definition clauses of the words "instrument,' "conveyance,' chargeable', duly stamped, as defined under the Act. Reliance is placed on Single Judge judgment of this Court in the case of Govind Ram Mishra Vs.. CCRA,- 2000 Revenue Decision 394. In Re Shri Kirti Ram AIR 1954 HP 51, and a Division Bench decision of this Court in the case of Har Pyari Vs. District Registrar (supra).

7. We have given our careful consideration to the respective submissions of the learned counsel for the parties and propose to answer the questions referred to us in seriatim.

Question No. 1.

8. Suit for specific performance of contract to sell is required to be valued under the provisions of Suits Valuation Act. On the relief of specific performance to sell court fee is to be valued in accordance with the provisions of Court Fees Act. Stamp duty, on an instrument, is liable to be paid in accordance with the provisions of the Indian Stamp Act. All the three statutes referred to above have been enacted with distinct and separate "aims and objects' contained in these Acts and operate in different fields. In U.P. the court fees in a suit for specific performance of contract is payable on the sale consideration of the property in question as disclosed in the agreement deed executed by the parties. An owner is free to sell his property at any price provided there is a willing purchaser to pay it. An owner may be willing for various good reasons in good faith to alienate his property below prevailing market rate, unless there is some restriction or prohibition under law. There may be circumstances, in which an owner may be impelled to sell property below prevailing reasonable market value. For the purposes of court fees, and Suit Valuation Act, the sale consideration as mentioned in the agreement deed alone is relevant, notwithstanding that market value prevailing at the time of execution of Agreement to sell of or the institution of suit for specific performance is higher. It may be noted that in a suit for specific performance of contract under the Specific Relief Act inadequacy of consideration is not a valid defence. Explanation 1 to Section 20 that mere inadequacy of consideration shall not be good ground to refuse the passing of decree by a court, in its exercise of its discretionary jurisdiction. The question of market value of the property covered under the agreement to sell is, therefore, generally irrelevant and foreign to such suit and consequently a Civil Court is hardly called upon in the suit for specific performance to sell to adjudicate upon the question of market value of property in question.

9. This Court in the case of Smt. Har Pyari Vs. District Registrar, 1999 ACJ 1211 has considered the nature of sale deed executed by Civil Court in pursuance of a decree of specific performance, passed in a suit and has come to the conclusion that in view of Order 21 Rule 34 C.P.C. the legal position is that the Court executes the decree on behalf of the vendor and whatever stamp duty is to be paid is paid by the purchaser decree holder when the Court executes the sale deed. There is no difference in between the sale deed executed by a vendor or through Court in pursuance of decree for specific performance of contract. Sale deed executed by Court is as good as the one executed by the Vendor/judgment debtor A sale deed executed by a court, makes no difference.

10. Section 47-A as amended in State of U.P. as it then existed provides an instrument of conveyance is undervalued to deal with such instrument of conveyance and reads:-

"47-A, Instrument of Conveyance etc. (As was existed prior to 1991 Amendment) - If undervalued, how to be dealt with *(1) If the market value of any property which is the subject of any instrument of conveyance, exchange, gift, settlement, award or trust, as set forth in such instrument is less than even the*

minimum value determined in accordance with any rule made under this Act, the registering officer appointed under the Indian Registration Act, 1908, shall refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon on".

***(2)** Without prejudice to the provisions of sub section (1), if such registering officer, while registering any instrument on which duty is chargeable on the market value of the property, has reason to believe that the market value of the property which is the subject of such instrument, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.*

***(3)** On receipt of a reference under sub section (1) or sub section (2) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an inquiry in such manner as maybe prescribed by rules made under this Act, determine market value of the property which is the subject of the instrument and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.*

***(4)** The Collector may, suo moto or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf, within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property, not already referred to him under sub section (1) or sub section (2), call for and examine the instrument for the purposes of satisfying himself as to the correctness of the market value of the property which is the subject of such instrument and duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value for such property and the duty payable thereon in accordance with the procedure provided for in sub section (3). The difference, if any, in the amount of duty, shall be payable by the person liable to pay the duty."*

11. Section 47-A of the Act contemplates two situations to deal with, when the instrument of conveyance etc. is undervalued, (1) before registration of instrument (ii) after registration of instrument.

Section 47-A (1) contemplates a situation, when an instrument of conveyance, (like exchange, gift, settlement, award or trust) shall be referred by Registering Officer (appointed under the Indian Registration Act) to the Collector for determination of market value of such property if market value of property, as set forth in instrument in question is less than even the minimum value determined in accordance with rules made under the Act.

12. In the case in hand, the Registering Officer invoked its power under Sub Section (1) of Section 47-A and referred the instrument to the Collector (District Stamp Officer) for determination of the market value of the property in question.

13. Reverting back to the facts of the case, Rs.1,50,000/- was set forth as sale consideration in the instrument as agreed upon in the year 1960. The Registering Officer was of the opinion that stamp duty was chargeable on Market Value of the property on the date of registration of the instrument which was not correctly set forth in the instrument in question as it was less than the minimum market value determined in accordance with Rule 341 and the sale consideration (Rs.1,50,000/-) as set forth in the agreement to sell or the decree of Civil Court was not relevant. .

14. The Assistant Commissioner (Stamps), to whom the matter was ultimately referred, was of the view that the instrument was under valued inasmuch the valuation of the property as prescribed under Rule 341 of the of the Stamp Rules 1942 (as enacted in the State of U.P.), is much more. Section 47-A (1) confers power on a Registering Officer to look into the document and if it is found that the market value of any property has not been correctly set forth in the instrument mentioned in this Section, he may refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon. The Stamp Act does not provide for a separate treatment when an instrument is executed by a court.

15. A Division Bench of this Court in the case of Kaka Singh Vs. Additional Collector and District Magistrate (supra) has held that Section 47-A empowers the Collector to deal with those cases where the parties by arrangement deliberately under valued the property by setting forth the market value less than the minimum determined under Rule 341 with a view to defraud the Government of the legitimate revenue by way of stamp duty. It repelled the argument contrary to above.

16. Apex Court in the case of **Trideshwar Dayal and another Vs. Maheshwar Dayal AIR 1990 SC 485**, rejected the contention that Collector has no power to enquire into the correct valuation of the property which was subject matter of the instrument (in that case an award) on the basis of Section 47-A as inserted in U.P. authorizing the Collector to examine correctness of the valuation.

17. In **Ramesh Chand Bansal and others Vs. District Magistrate, AIR 1999 SC 2129** the Apex Court had occasion to interpret Section 47-A of the Act and it noticed that Section 47-A, as introduced by U.P. Act No. XI of 1969, confers power upon a registering authority to deal with case of under valuation. After reproducing Section 47-A, it has observed as follows:-

"Sub section (1) provides, in case valuation described in a n instrument is less than the minimum value determined in accordance with the said Rule then such officer shall refer it to the Collector for ascertainment of the market value of such property, for levying proper duty on such instrument. Sub section (2) is without prejudice to sub section (1), Similarly, under it if the Registering Officer believes that the market value of the property described in an instrument has not been truly set forth, he may, after registering such instrument refer the same to the Collector for determination of true market value of such property. So, we find both under sub section (1) or (2) where the value described in such instrument is less than the minimum value fixed under the Rules or even otherwise if

such Registering Officer under sub section (2) has reason to believe that the market value of the property has not been truly set forth he may refer the matter to the Collector for true ascertainments of its market value. On receipt of such reference by the Collector under sub section (3) he issues notice to the concerned party and after giving such party reasonable opportunity of being heard, may be after holding an enquiry determine the market value of such property. Reading Section 47-A with the aforesaid Rule 340 -A it is clear that the circle rate fixed by the collector is not final but is only a prima facie determination of rate of an area concerned only to give guidance to the Registering Authority to test prima facie whether the instrument has properly described the value of the property. The circle rate under this Rule is neither final for the authority nor to one subjected to pay the stamp duty. So far sub sections (1) and (2) it is very limited in its application as it only directs the Registering Authority to refer to the Collector for determination in case property is under valued in such instrument. The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made. This also marks the dividing line for the exercise of power between the Registering Authority and the Collector. In case the valuation in the instrument is same as recorded in the circle rate or is truly described it could be registered by Registering Authority but in case it is under valued in terms of sub section (1) or sub section (2), it has to be referred and decided by the Collector. Thus, the circle rate, as aforesaid, is merely a guideline and is also indicative of division of exercise of power between the Registering Authority and the Collector."

18. Section 47-A refers to the minimum value determined in accordance with any rules made under this Act. The State of U.P. in exercise of rule making power under Section 75, has inserted Section 47-A with a view to avoid evasion of Stamp Duty.

19. Section 47-A uses the words - "minimum value determined in accordance with any rules made under the Act. Rule 341 for the purpose of payment of stamp duty prescribes the mode to determine the minimum market value of immovable property forming subject of instrument of conveyance, exchange, gift etc. The emphasis in the case of deed of conveyance is on the market value of any property covered under the instrument of conveyance etc.

20. On plain reading of Section 47-A, we are of the opinion that this Section confers ample power on registering authority to refer the instrument to the Collector for determination of market value of the property covered by the deed of conveyance, if market value has not been correctly disclosed and is less than even the minimum value determined in accordance with Act. The Stamp Act thus operates in exclusion of the area, not occupied by the Court Fees Act or Suits valuation Act.

ANSWER

21. We, therefore, hold that the stamp duty is chargeable on the basis of market value of the property conveyed by the instrument of conveyance and the fact

that in the instrument executed by Civil Court is of no relevance for the purposes of invoking power under Section 47-A of the Act. The question no. 1 is answered accordingly.

Question No. 2.

22. For proper appreciation of the controversy involved in the present case it is necessary to have a look to the relevant terms as defined under the Act

Section 2 (6) "Chargeable" Chargeable means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at difference times, first executed,

Section 2(10) "Conveyance" "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically, provided for by Schedule I,. Schedule I A or Schedule I-B as the case may be :

Section 2 (11) - "Duly Stamped" "Duly Stamped' as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India:

Section 2 (12) - "Executed" and "Execution" "Executed" and Execution, used with reference to instrument, means "signed' and "signature";

Section 2 (14)- "Instrument" Instrument includes every document by which any right, or liability, is or purports to be created transferred, limited, extended, extinguished or recorded.

23. It is not in dispute that the Act is a Taxing Statute. The Apex Court in the case of **District Registrar & Collector, Hyderabad & another Vs..Canara Bank etc. JT 2004 (9) SC 379** has observed as follows :-

"Stamp Act is a piece of fiscal legislation. Remedial statutes which have come to be enacted on demand of the permanent public policy generally receive a liberal interpretation. However, fiscal statutes cannot be classed as such, operating as they do to impose burdens upon the public and are, therefore, construed strictly. A few principles are well settled while interpreting a fiscal law. There is no scope for equity or judiciousness if the letter of law is clear and unambiguous. The benefit of any ambiguity or conflict in different provisions of statute shall go for the subject. ***In Dowlatram Harji & Anr. Vs. Vitho Radhoti & Anr. (1881) 5 ILR (Bom) 188*** *the full bench indicated the need for balancing the harshness which would be inflicted on the subjects by implementation of the Stamp Law as against the advantage which would result in the form of revenue to the State, the later may not be able to compensate the discontent which would be occasioned amongst the subject."*

24. Chapter II of the Act deals with the liability of instrument to duty and it has been divided in different sub heads as ABCD and E. Sub Division A of Chapter

2 deals with the liability of instrument to duty Section 3 is the charging Section which envisages the instrument mentioned therein shall be chargeable with duty of the amount indicated in schedule I as proper duty there for. Deed of conveyance finds mention in Schedule I-B of the Act at entry no. 23.

25. The relevant portion of Section 3 of the Act is reproduced below:-

Section 3.- Instrument chargeable with duty :- Subject to the provisions of this Act and the exemption contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore, respectively, that is to say-

(a).....
(b).....
(c).....
(aa) every instrument mentioned in Schedule 1-A or 1-B, which not having been previously executed by any person was executed in Uttar Pradesh:
(i).....
(ii).....
(bb).....
(i).....
(ii).....
(i).....
(ii) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, or any ship of vessel, or any part, interest, share or property of or in any ship or vessel, registered under the Merchant Shipping Act, 1894, or under Act XIX of 1838, or the Indian Registration of Ships Act, 1841 (x of 1841), as amended by subsequent Act.

Article 23 of Schedule 1-B reads as follows :-

Description of instrument	Proper stamp duty
Article 23 Conveyance [as defined by sec.2(10)] not being a transfer charged or exempted under no.62	**Sixty rupees**
(a) if relating to immovable property where the amount or value of the consideration of such *conveyance as set forth therein* or the *market value* of the immovable property which is the subject of such conveyance, whichever is *greater* does not exceed Rs.500/-	
Where it exceeds Rs.500/- but does not exceed Rs.1000/-	One hundred and twenty five rupees
and for every Rs.1000/- or part thereof in excess of Rs.1000/-	One hundred that the duty payable shall be rounded off to the next multiple of ten rupees.
(b) if relating to movable property where the amount or value of the consideration of such conveyance as set forth therein does not exceed Rs.1000/-	Twenty rupees..
and for every Rs.1000/- or part thereof in excess of Rs.1000/-	Twenty rupees

26. A close reading of aforesaid section 3 would clearly show that on every instrument mentioned in Schedule I-A or I-B executed by any person in U.P., liability to pay duty is there as soon as soon as it is executed. The contention of the applicant is that word "executed' with reference to a date of conveyance which has been followed in pursuance of the agreement of sale, refers execution of date of execution of the sale agreement, requires examination in the light of the definition of the word "executed" as defined under the Act. The definition of word "execution" as per section 2 (12) of the Act means "signed and "signature'. The "instrument" includes under section 2 (14) every document by which any right or liability is, or purported to be created, transferred, limited, extended, extinguished or recorded.

Section 17 of the Act reads as follows:-

"17. Instruments executed in India. All instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution."

From a conjoint reading of words "instrument", "executed" as defined under Section 2 (14) and 2 (12) with Section 17, it is clear that the stamp duty payable on instrument refers to, at the time of execution occurring in Section 17, leaves no room of doubt that the duty on the instrument is to be paid at the time of execution. It does not refer to any other thing which have preceded prior to the execution of the instrument. On plain reading of Section 17 with Charging Section 3 it is clear that relevant point for determining the stamp duty on instrument is the date of execution of the instrument. i.e. not the date of registration as such.

27. The Apex Court in the case of **Hindustan Lever and another Vs. State of Maharastra JT 2003 (9) SC 67** has held that *"duty under the Stamp Act is charged on the instrument and it is on execution of the instrument. The measure of charging stamp duty may be fixed or ad voleram it is to be determined by the Legislature."*

Stamp duty is levied on the instrument as soon as it comes into existence by way of execution and the measure is the valuation of the property transferred. In that case a dispute arose as to whether the stamp duty is payable on the order passed by the High Court granting amalgamation of companies. In that connection the Apex Court observed that the judgment, order and award of the court and of tribunal are instrument and liable to stamp duty if they create or transfer any right, title or interest in the property. On the same analogy, the deed of conveyance, transfers of ownership right is liable to be stamped by way of payment of duty and the instrument is complete, moment it is signed and executed, the prevailing market value on the date of execution of deed of conveyance is chargeable under the Stamp Act.

This view is further fortified by Rules framed in exercise of power under Section 76 of the Act. The learned Advocate General has rightly placed reliance upon the then Rules 340 & 341 of the Stamp Rules framed by the State Government.

The relevant portion of the said Rules is reproduced below:-

340. *In the case of an instrument of conveyance, exchange, gift, settlement, award or trust relating to immovable property chargeable with an ad valorem duty on the market value of the property, the following particulars shall also be fully and truly given in the instrument in addition to the market value of the property in compliance with sub section (2) of section 27 of the Indian Stamp Act as amended in its application to Uttar Pradesh :-*

(1) In case of land :
(a) .....
(b) .....
(c) being non agricultural land situate within the limits of any local body constituted under the U.P. Nagar Mahapalika Adhiniyam, 1939, U.P. Municiplaities Act, 1916, or U.P. Town Areas Act 1914, as the case may be, the arera of the land in square meters with the average price per square metre prevailing in the locality in which the land is situate on the date of the instrument.
(2).....
(3).....

341. *For the purpose of payment of stamp duty, the minimum market value of immovable property forming the subject of an instrument of conveyance, exchange, gift, settlement, than that as aggrieved on the basis of the multiple given below*

(i) Where the subject is land :-
(a) in case of Bhimidhari- 800 times the land revenue;
(b) in case of Sirdari land 400 times the land revenue;
(c) .....
(d).....
(d) where the land is non agricultural and is situate within the limits of any local body referred to in clause (e) of sub rule (i) of rule 340- equal to the value worked out on the basis of the average price per square metre, prevailing in the locality on the <u>date of the instrument. (emphasis supplied</u>)

(ii) where the subject is grove or garden :
(a).....
(b).....
(iii) Where the subject is building :-

(a) where the building is assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants 25 times the actual or assessed annual rental value, whichever is higher as the case may be;
(b) where the building is not assessed to house tax and is occupied by the owner or is wholly or partly let out to tenants- 25 times the actual or assumed annual rental value, whichever is higher as the case may be."

28. From conjoint reading of Section 3 which is charging Section), Article 23 of Schedule 1- B prescribing duty on deed of conveyance and Rules which specifies certain facts and particulars to be stated fully and truly in instrument for conveyance, exchange, gift, settlement, award or trust relating to immovable property and Rule 341 wherein made all determination of the minimum market value of immovable property forming the subject of instrument referred to above, clearly spells out the following :-

(i) Deed of conveyance, exchange, gift, settlement, award or trust relating to immovable property is chargeable with ad voleram duty;

(ii) Taxable event for the purpose of payment of stamp duty on the aforesaid documents, is the execution of such document, vide Section 3 of the Act;
(iii) Duty on such instrument is payable "on market value of such property'.
(iv) For the purpose of determination of duty under Article 23 of Schedule 1-B of the Act, it is the value of consideration as set forth in the deed or the "market value' "whichever is greater'.
(v) The minimum market value is to be ascertained as per Rule 341 (i) (d), wherein it has been provided for as "on the date of the instrument".

29. The argument is that although under the Act it is provided that the stamp duty is payable on the market value of the subject matter of instrument of conveyance but the Act is silent and does not speak about the date in respect of which the market value of the subject matter of instrument of conveyance is to be looked into for the purpose of determination of the stamp duty. He submitted that in the present case the instrument of conveyance is chargeable to the market value of the subject matter of the instrument as it was on 5th May, 1960, viz the date on which the agreement to sell was executed between the parties. It is difficult to accept the aforesaid submission. It may be that the Act does not specifically say so, about the date in respect of which the market value of the instrument is to be determined but it is also equally evident that on plain reading of the various Sections of the Act and giving them harmonious construction, the market value of instrument of conveyance is referable to only one date i.e. the date of execution of the instrument. Article 23 Schedule 1-B prescribing the rate of duty on the instrument of conveyance has contemplated a situation where the sale consideration as set forth in the instrument of conveyance is lesser than the market value of the property sought to be conveyed by the deed of conveyance. It is provided that in such situation the duty would be payable on the on the amount which is greater in between the sale consideration set forth in the instrument or the market value of the property. Under Rule 340, reproduced above, it has been provided that the instrument of conveyance etc. in the case of non- agricultural land average price per sq. meter prevailing in the locality in which the amount is situate on the date of instrument has to be provided. This gives sufficient indication that the market value means the market value prevailing on the date of instrument. Rule 341 further strengthens the above view wherein in Clause (e) it has been provided that where the subject matter is non agricultural land, the minimum market value of such immovable property would be as prevailing in the locality on the date of instrument. Obviously the word instrument refers to instrument of conveyance and duty of the instrument means the date on which the deed of conveyance came into existence. The deed of conveyance would come into existence as soon as it is executed as defined under Section 2 (12) of the Act, and not hitherto.

30. On plain reading of Rule 340 and 341, reproduced above it is difficult to subscribe the view point of the applicant. There is no ambiguity in the aforesaid Rules. It in no uncertain terms prescribes that with minimum market value for the purpose of payment of

Stamp Duty is to be worked out, with respect to non agricultural land situate within the limits of any local body on the basis of average price per sq. meter, prevailing in the locality on the date of instrument includes the minimum market value of land is to be determined at the circle rate (as determined by the Collector under Rule 340) on the date of instrument. The validity of said Rules is not the questioned either before the authorities below or before this Court. The aforesaid Rules have been framed in exercise of various powers conferred on the State Government as mentioned in the notification itself which reads as follows:-

"In exercise of the powers conferred by the Indian Stamp Act, 1899 (II of 1899), and in pursuance of the powers conferred by the notification of the Government of India Finance Department (Central Revenues) no. 9/Stamps, dated November 13, 1937, and in supersession of all previous notifications of the Government of India and the Provincial Government on this behalf; and in exercise of the powers conferred by Section 21 of the United Provinces Court-Fees (Amendment) Act, 1938 (XIX of 1938), and in pursuance of the power conferred by the notification of the Government of India Department no. 158/38, dated February 15, 1939, and in supersession of all previous notifications of the Government of India and that Provincial Government on this behalf, with the concurrence of the Hon'ble Chief Justice of the High Court of Judicature at Allahabad and the Hon'ble Chief Judge of the Chief Court of Oudh at Lucknow, where such concurrence is necessary, the Governor is pleased to make the following rules, namely :

31. At this juncture it is apt to note the observations of the Apex Court made in the case of New Central Jute Mills Company Ltd. Vs. State of West Bengal & others AIR 1963 SC 1307. The Supreme Court was examining the question of sufficiency of Stamp Duty with reference to U.P. Stamp Rules 1942 wherein mortgage deed was executed in U.P. though it related to the property situated in West Bengal was received in that State for registration. It observed that

"primarily the liability of instrument to stamp duty arise on execution. Execution in India itself made the instrument liable to stamp duty under Section 3 (a) as it stood before the amendment"..... It has been further observed that "after amendment by U.P. Legislature the position in law is that execution of an instrument in U.P. is made the primary dutiable event and liability to stamp duty arises on such execution".....

32. The above observation do support the view which we are proposing to take in the present case i.e. the relevant date for the purpose of determining the market value on which the stamp duty is payable is the date on which the instrument in question is executed, or in other words when the taxable even takes place.

33. In the above case the Apex Court also observed that U.P. Stamp Rules in view of Section 76 of the Act "operates as part of the Stamp Act". If that is so, resort to rules 340 and 341 to interpret the Act cannot be faulted.

34. Now we will consider the star case on which heavy reliance has been

placed by the applicant. i.e. ***S.P. Padamavati Vs. State of Tamil Nadu*** (supra) This is the anchor sheet of the applicant's contention. No doubt the controversy involved therein was more or less similar to the present case except that the amendment carried in the State of Tamil Nadu by way of insertion of Section 47-A is some what different. We will notice the difference in the later part of this judgment. The Division Bench of Madras High Court has answered the controversy in para 28 of the report which reads:-

"In the case of instrument of conveyance executed pursuant to the decree for specific performance passed by the Civil Court, in which there is no allegation of deliberate under-valuation of lack of bona fides in valuing the subject of transfer with a view to evade payment of proper stamp duty, the mere fact that there is a time-gap between the agreement of sale and the execution of the document by itself is not sufficient for the Registering Officer to invoke his power under section 47A of the Stamp Act, unless there are reasons to believe that there is an attempt on the part of the parties to the instrument to under-value with a view to evade payment of proper stamp duty".

35. The Madras High Court proceeded to decide the controversy on the basis of that Section 18 of the Stamp Act "also does not suggest that the market value on the date of execution, alone be the basis for stamp duty' after referring Clause (12) of Section 2 of the Act, which defines words "executed" and "execution" means "signed" and "signature" proceeded to hold that "it is not possible to hold that only inference possible from this provisions that its market value of the property on the date of execution of sale deed alone should be basis for stamp duty. It then proceeded to hold that in the absence of finding that "there was lack of bona fide or any reason to believe that there was no valuation" it reached to the conclusion as quoted above.

36. We regret that we are unable to agree with the aforesaid approach of Madras High Court. Indisputably the Stamp Act is to be interpreted like any other taxing statute. In taxing statute lack of bona fides or mala fides unless so provided is wholly irrelevant for the construction of the statutory provision. Lack of bona fide no where finds place under Section 47-A of the Act specially as inserted in U.P. We have already reproduced the interpretation placed by the Apex Court on Section 47-A (1) of the Act, which empowers the Registering Officer to refer the instrument even before registration if the instrument is under valued in the sense that the market value of the property mentioned in the instrument in question is less than the minimum market value as determined under the relevant Rules. Therefore, the aforesaid judgment of the Madras High Court is quite distinguishable and we find hardly its application in the State of U.P.

37. Section 47-A as inserted in the State of Tamil Nadu has been reproduced in para 8 of the report. The said Section empowers the Registering Officer after registering such instrument to refer the same to the Collector for determination of the market value if the Registering Officer "has reason to believe' that the "market value of the property has not been truly set forth in the instrument. On comparison with as amended in the State of Tamil

Nadu it is not analogous to Section 47-A (1), as amended in U.P. but is analogues to Section 47-A (2) of the State of U.P. Amendment in Sub Section (1) of Section 47-A as amended in U.P. does not correspondence to the Amendment made by the State of Tamil Nadu in Section 47-A of the Act.

38. The argument of the applicant that consideration as disclosed in the agreement should be taken as market value of the property on the date of execution of the sale deed can not be accepted for the simple reason that the agreement to sell and sale deed do not stand at par. A person who has got only contract for sale or has got decree for specific performance of contract, has got no interest in the land. He can only enforce the contract compelling the other side to execute a sale deed, failing which the Court might execute the sale deed. Section 54 of the Transfer of Property Act also says so, that a mere contract to sell does not create any interest in favour of the vendor. A Full Bench of this Court in the case of ***Mahendra Nath Vs. Smt. Baikunthi Devi AIR 1976 Allahabad 150*** has held that the question of ceasing of interest would arise only when the plaintiff had any interest in the land, but till the sale deed was executed, the plaintiff could not get any right in the land. It has quoted a passage from the judgment of Supreme Court in the case of ***Satyavrat Ghosh Vs. Mungeeram Bangur and Co. AIR 1954 SC 44***, which is reproduced below:-

"According to Indian Law which has embodied in Section 54 of the T.P. Act, a contract for sale of land does not of itself create any interest in the property which is subject matter for the contract, the obligation of the parties to contract for sale of land are, therefore, the same as in other ordinary contracts....."

39. This Court in Inayat Ullah Vs.. Khalil Ullah AIR 1938 Allahabad 432 has held that (i) that decree for specific performance only declares rights of the decree holder to have a transfer of property covered by decree executed in his favour (ii) that a decree by itself does not transfer the title (iii) the decree gives rights to have the decree executed (iv) that on his failure to have a sale deed executed on behalf of the judgment debtor. The relevant passage is reproduced below;-

"A decree for specific performance only declares right of decree holder to have a transfer of property covered by the decree executed in his favour. The decree by itself does not transfer the title. That themselves so is apparent from the fact that in order to get the title of the property the decree holder is to proceed in execution in accordance with the provisions of Order 21 of the Code. So long the sale deed is not executed in favour of the decree holder either by the defendant in the suit or by the Court the title to the property remains vested in the defendant and till the execution of the sale deed, decree holder has no right to possession of the property. It is only the execution of the sale deed that transfers the title of the property."

40. The aforesaid judgment has been followed by the Madras High Court in the case of **Christine Pais Vs. K. Ugappa Setty AIR 1966 Mysore 229**, wherein it has been held that in a suit for specific performance of contract to sell, title passes with execution and registration of sale deed and does not flow from decree.

41. We find that an identical view has been taken by Full Bench of Andhra Pradesh High Court in the case of **K. Venkatasarullu Vs.. K. PiddaVenket AIR 2002 AP 8 wherein Sri S.B. Sinha, CJ**, as he then was held that in a suit for specific performance of contract the relevant date would be that the date of execution of the deed of sale.

42. In **Dinesh Kumar Mittal Vs. ITO 1991 UPTC 1209, Justice B.P. Jeevan Reddy** as he then was has observed that *"we can not recognize any rule of law to the effect that the valuation determined for the purposes of stamp duty is the actual consideration passing between the parties to a sale the actual consideration may be more or may be less."*

"Market value" means what a willing purchaser would pay to a willing seller for the property, having regard to the advantages available to the land and the development activities which may be going on in the vicinity and potentiality of the land and as such, an offer of sale of land to an industrialist on concessional rate with a view to induce him to set up industry in a particular area is not market value, Mahabir Prasad Vs. Collector, Cuttack, AIR 1987 S.C. 720.

"Market value' of land means A price at which both buyers and sellers are willing to do business; the market or current price.

43. The upshot of the above discussion is that the decree of specific performance passed by the Civil Court does not itself extinguish nor create right, title or interest of a party to the suit. The title is passed on the date the sale is executed by Court in place of the defendant. This also indicates that for the purpose of stamp duty besides UP Rule 341 reproduced above, the date of the execution of the sale deed is the relevant date for determining the market value covered under the instrument of conveyance. We find, the view we are taking has been taken by the learned Single Judge in the case of Ram Govind Misra and others Vs.. CCRA (supra) and D.B. in the case of Smt. Har Pyari and others Vs.. State of U.P. (supra). We find no reason to disagree with the above view taken by the learned Single Judge as well as Division Bench of this Court.

44. We would further add, for future guidance, as to when "penalty' can be imposed under Section 47-A of the Act. In the instant case, the Assistant Commissioner (Stamps), Kanpur, on receiving the file from District Stamp Officer, apart from determining deficiency in stamp duty to the tune of Rs.4,96,887-50 P., also imposed "penalty' to the tune of Rs. 2,02,142.50 P.

45. It is true that the question relating to "imposition of penalty', in the admitted facts and circumstances of the case, has not been referred but it is appropriate that this Court should deal with this question which is not only inherent but also incidentally covered under question No. 1 and 2 and it is desirable to decide this issue also. Section 27(1) of the Act reads:

"27. Facts affecting duty to be set forth in instruments- (1) The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of duty with which it is

chargeable, shall be fully and truly set-forth therein."

46. Aforesaid provision provides that "consideration' and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein . This provision came up for consideration before Supreme Court in *Himalaya House Company V. Chief Controlling Revenue Authority*, AIR 1972 SC 899. The Apex Court explained that even where a person did not set forth the "true market value' of the property in question, law conferred no jurisdiction upon the authorities impose penalty or to recover deficient stamp duty on the real market value. To overcome the difficulty, large number of States in India, including State of U.P., amended Stamp Act.

47. Section 2 of U.P. Act No. XI of 1969 (which came into force on Ist October, 1969), incorporated Section 47-A in the Principal Act. Sub-section (1) of new Section 47-A provides that if the market value of any property (which is the subject of any instrument on which duty is chargeable on the market value of the property) as set forth in such instrument is less then even the minimum value determined in accordance with any Rules made under this Act, the Registering Officer appointed under the Indian Registration Act, 1908, shall refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon. Sub-section (2) provides that if the Registering Officer (while registering any instrument on which duty is chargeable on the market value of the property) has reason to believe that the market value of the property which is the subject of such instrument "has not been truly set forth' in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon. Under Sub-section (3) of this Section, Collector has been empowered to determine the market value of the property which is the subject matter of an "instrument' and the duty payable thereon. It further provides that the differences, if any, in the amount of duty disclosed in the instrument visa vis the amount determined under Section 47-A (3) read with Section 47A (1) shall be payable by the person liable to pay duty. Sub-section (4) of Section 47-A refers to a case and empowers "Collector' on reference being made by a Registering Authority under Section 47-A (2) of the Act to examine the instrument for the purpose of correctness of the market value of the property and after examination if he finds that the market value was not truly set forth, he may determine the market value and duty payable thereon in accordance with procedure provided in Sub-section (3).

Sub-sections (3) and (4), as they stood prior to U.P. Amendment Act 38 of 2001, made no reference to payment of "penalty'.

48. In the case of *Kaka Singh Vs. The Additional Collector and District Magistrate (Finance and Revenue), Bulandshahr and another*, AIR 1986 Allahabad 107 (DB) this Court considered scope of Section 47-A and its view was duly approved in Full Bench decision of this Court in the case of Girish Kumar Srivastava Vs. State of U.P. and others-1998 (1) Alld. Civil Journal, 199, decided

on 8-12-1997. Relevant paras 6, 9, 11, 12, 13 and 14 of the said decision are reproduced below:

"6. S. 47-A was inserted by means of an amendment. The scheme of S. 47-A of the Act is to deal with those cases where private parties by arrangement clandestinely or fraudulently undervalued the property which is the subject matter of transfer with a view to deprive the government of legitimate revenue by way of Stamp duty. Before addition of S. 47-A, there was no provision in the Stamp Act empowering the revenue authorities to make an enquiry of the value of the property conveyed for determining the duty chargeable. S. 27 of the Stamp Act laid down that the consideration if any and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein. In case a person did not set forth true amount for which the transaction had taken place, the revenue authorities had no power to proceed with the defaulter. Himalaya House Co. Ltd. Vs. the Chief Controlling Revenue Authority, AIR 1972 SC 899. The Supreme Court held that for the purpose of Art. 23, the value of consideration must be taken to be one as set forth in the conveyance deed. The question whether the purpose of determining the value of the consideration to revenue must have regard to what the parties to the instrument have elected to state the consideration to be.

9. From the above, we find that sub-secs. (1) and (2) of S. 47-A apply to two different situations. In the instant case, the Registering Officer was since of the opinion that the market value as set forth in the sale deed was less than even the minimum value determined in accordance with the rules, he referred the same to the Collector. Before the Collector, the petitioner had filed evidence but by applying the R. 341, the Additional Collector found that the market value set forth in the conveyance was less and, thereafter, by applying the rule of calculation or computation of the market value stated in Rule 341, he determined the market value of the two sale deeds and found the stamp duty payable thereon.

11. S. 75 of the Act empowers a State Government to make rules to carry out generally the purpose of the Act. The purpose of S. 47-A is only to avoid evasion of the stamp duty.

12. In sub-sec. (2) of S. 47-A the words important for consideration of its scope are "truly' and "set forth'. The word "truly' would empower the Collector to examine whether the market value stated in the document is not in conformity with the fact. If a party has agreed to pay more and mentions less in the conveyance of which one of the purposes could be evasion of stamp duty, the Collector would be entitled to find the real value for which the property had been sold in that case and after determining the correct value for which the property has been sold, to make a demand of the difference of the amount of duty payable as such.

13. In State of Tamil Nadu Vs. Chandrasekharan, AIR 1974 Mad 117, while dealing with the object of

S. 47-A, the Madras High Court held:

"We are inclined to think that the object of the Amending Act being to avoid large scale evasion of stamp duty, it is not meant to be applied in a matter of fact fashion and in a haphazard way. Market value itself as we already mentioned, is a changing factor and will depend on various circumstances and matters relevant to the consideration. No exactitude is in the nature of things possible. In working the Act, great caution should be taken in order that it may not work as an engine of oppression. Having regard to the object of the Act, we are inclined to think that normally the consideration stated as the market value in a given instrument brought for registration should be taken to be correct unless circumstances exist which suggest fraudulent evasion."

14. S. 47-A fills in the lacuna which was found by the Supreme Court in Himalaya House Co. Ltd. V. Chief Controlling Revenue Authority (AIR 1972 SC 899) (supra), it empowers the Collector to deal with those cases where the parties by arrangement deliberately undervalue the property with a view to defraud the Government of the legitimate revenue by way of stamp duty. It is not correct that the Collector is not empowered to determine on a case being referred to him by the Sub-Registrar under S. 47-A(1), that the market value is in fact less than the minimum value to be determined by R. 341 and to find on that basis whether the transaction sets forth the market value truly or not. Similarly, the hands and power of the Collector are not confined to the minimum value given in R. 341. It can hold it to be more if it is satisfied on the materials brought before him to that effect. R. 341 had been framed by the legislature only for the limited purpose of providing a guideline. It is not conclusive. That being so, under sub-sec. (1) of S. 47-A, if the Registering Officer is satisfied that the market value is less than even the minimum value, he may refer the document to the Collector for determination of the value of such property. This is the only function of R. 341. It is neither binding on the person who produces the instrument for registration nor on the State Government."

49. Section 47-A(1) of the Act is quoted above. Reading of Section 47-A(1) of the Act, as applicable in the State of U.P., prior to enforcement of U.P. Amendment Act No. 38 of 2001, had no provision for "imposition of penalty' as noted- by Full Bench in the case of Girish Kumar Srivastava (supra). Division Bench of this Court in its later decision vide judgment and order dated 27-5-1999 in the case of Smt. Har Pyari and others Vs. District Registrar, Aligarh and others, 1999(2) ACJ 1211 followed the above view.

Fourth point, out of Five Points noted by the Court, in this judgment, reads:

"Can penalty be imposed under Section 47-A?" and vide para-9 of the judgment, Court held:

".....No penalty can be imposed in proceedings under Section 47-A of the Act. This is so held by a full bench decision of this Court....."

50. In the case of *S.P. Padmavathi Vs.State of Tamil Nadu*, AIR 1997 Madras 296 (DB), the Court considered and interpreted Section 47-A(3) (as inserted by Tamil Nadu Amendment Act 24 of 1967). While considering the scope of Section 47-A (as in force in State of Madras), their Lordships referred to Section 47-A(1) of the said Act which is pari materia to Section 47-A(2) of the Indian Stamp Act (as in force in State of U.P.).

51. In para-9 and 12 of the said decision, while answering point no. 1 viz. ("what is scope of Section 47-A of the Act?'), their Lordships observed:

"Pr.9.....In working the Act, great caution should be taken in order that it may not work as an engine of oppression. Having regard to the object of the Act, we are inclined to think that normally the consideration stated as the market value in a given instrument brought for registration should be taken to be correct unless circumstances exist which suggest fraudulent evasion....."

"Pr. 12. Power under Section 47-A of the Act can only be exercised when the Registering Officer has reason to believe that the market value of the property, which is the subject of conveyance, has not been truly set forth, with a view to fraudulently evade payment of proper stamp duty. Mere lapse of time between the date of agreement and the execution of the document will not be the determining factor that the document is undervalued and such circumstance by itself is not sufficient to invoke the power under Section 47-A of the Act, unless there is lack of bona fides and fraudulent attempt on the part of the parties to the document to undervalue the subject of transfer with a view to evade payment of proper stamp duty..."

52. Interestingly, before U.P Act 38 of 2001 had come into force, Section 47-A as such in State of U.P.-did not deal differently with the two situations-(1) where property has been valued bona fide without intention to evade stamp duty and (2) when market value of the property in question has not been truly set forth in such instrument with a view to evade payment of proper stamp duty, in other words-instrument is deliberately undervalued for the purpose of deceitful gain.

53. It is, therefore, clear that in view of the aforesaid decision of this Court and to make the provisions more stringent, the State of U.P. enacted U.P. Act 38 of 2001 and vide Sub-section (4) of Section 47-A of the Stamp Act made provision for "penalty'. Sub-section (4) (as mended by U.P. Act 38 of 2001) provides that if on enquiry under sub-section (2) and examination under sub-section (3), the Collector finds that the market value of the property has been truly set forth and the instrument duly stamped, he shall certify by endorsement that it is duly stamped and return it to the person who made the reference. However, in case where market value is not truly set forth and the instrument not duly stamped, he shall require the payment of proper duty or the amount required to make up the deficiency in the same, together with a penalty of an amount not exceeding four times the amount of the proper duty.

54. It is interesting to note that vide Section (4-A) (as inserted by U.P. Act 38 of 2001), provision for payment of

"simple interest' has been made only in a case where "market value is not truly set forth' whereas "interest' accrues or payable in a case where market value is truly set forth. A conjoint reading of aforesaid provisions clearly indicates that Section 47-A has differently treated a case where market value has been truly set forth and, on the other hand, a case where market value is not truly set forth.

55. In this view of the matter, it is abundantly clear that imposition of "penalty' by the Assistant Commissioner (Stamps) is wholly uncalled for and without jurisdiction. Accordingly it is held that the order imposing penalty is arbitrary, without jurisdiction and no penalty can be imposed in the facts of the present case.

ANSWER

56. In view of the above discussion we answer the second question by holding that the relevant date for determining the market value of the property for being subject matter of the sale deed is the third i.e. January 3, 1985 when the Court executed the sale deed in question on behalf of the vendors.

57. The Registrar General is directed to send a copy of this judgment to the Chief Controlling Revenue Authority in accordance with Section 59 of the Stamp Act.

The reference is decided accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2006

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.48237 of 2005

Jafar Mian ...Petitioner
Versus
Smt. Qaisar Jahan Begum and others ...Respondent

Counsel for the Petitioner:
Sri M.A. Siddiqui
Sri Mohd. Shoeb Khan

Counsel for the Respondents:
Sri M. Islam
Sri Ahmad Saeed
Sri Shahroze Khan

Specific Relief Act, 1963-Section-22-Power of Execution Court-Suit for enforcement of Regd. Agreement to sale decreed-sale deed-executed by court-application for delivery of possession-objected by subsequent purchaser whether the possession can be delivered by the execution court even without such direction in Decree or the Decree holder to file separate suit for possession-held-relief for possession-being incidental could be granted by the execution Court itself.

Held: Para 7

In view of the aforesaid, in a suit for specific performance of the contract for sale, even though no relief for possession is claimed and subsequently, a decree is passed, the Court executing the decree is, nonetheless, competent to deliver possession where it is found that the contesting party was in exclusive possession of the property. Further, the order directing the delivery of the possession is incidental to the execution of the sale-deed in view of section 55 of

the Transfer of Property Act, which entitles a transferee to get the possession in pursuance of the sale-deed.

Case law discussed:
2005 (8) SCC-486
AIR 1982 SCC-818

(Delivered Hon'ble Tarun Agarawala, J.)

1. Smt. Farooq Zamani Begum, the owner of the property in dispute entered into an agreement of sale with Smt. Qaisar Jahan Begum, the plaintiff respondent no.1 for Rs.1,42,000/-. Part payment was made and the sale deed was required to be executed within one month of the conclusion of the pending litigation in respect of the property in dispute. Instead of executing a sale deed in favour of the plaintiff, Smt. Farooq Zamani Begum executed a sale deed in favour of the petitioner Jafar Mian selling 1/4th share of the house in question. Consequently, a suit No.159 of 1988 was filed for the specific performance of the agreement. The said suit was decreed by a judgment dated 14.7.1992. An execution Case No.9 of 1992 was filed and) in this execution proceeding, a sale-deed was executed by the Court on 4.1.1994, which was ultimately registered on 13.5.1997.

2. The decree holder, respondent no.1 filed a second execution application praying for the possession of the property in question. The petitioner, who is subsequent purchaser, filed an objection under section 47 of the Code of Civil Procedure, which was rejected by an order dated 18.1.2005 by the executing court. The petitioner preferred a revision which was also dismissed by a judgment dated 31.5.2002. Consequently, the writ petition.

3. Heard Sri M.A. Siddiqui, the learned counsel for the petitioner and Sri M.lslam, the learned counsel appearing for respondent no.1.

4. 'The sole point urged before this Court is, that the relief claimed by the decree holder was outside the framework of the relief claimed by the plaintiff and therefore, the prayer for the possession of the property could not be granted in view of Section 22 of the_Specific Relief Act, and that a separate suit for possession was required to be filed by the decree holder. It was urged that the executing Court acted in flagrant violation of the provisions of section 22 of the Specific relief Act in granting the relief for possession.

For facility, the provision of Section 22 of the Specific Relief Act, 1963 is quoted hereunder:

"**22. Power to grant relief for possession, partition, refund of earnest money, etc.-- [1]** Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908 [5 of 1908], any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for--

a] possession, or partition and separate possession, of the property, in addition to such performance; or

b] any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or [made by] him, in case his claim for specific performance is refused.

[2] No relief under clause [a] or clause [b] of sub-section [1] shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

[3] The power of the court to grant relief under clause [b] of subsection [1] shall be without prejudice to its powers to award compensation under Section 21.

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5. From a perusal of the aforesaid provision, it is clear that Section 22 of the Specific Relief Act, 1963, enacts a rule of pleading. This section was introduced to avoid multiplicity of proceedings and therefore, the plaintiff could also claim a decree for possession in a suit for specific performance, even though, the right to possession accrued only after the suit for specific performance was decreed.

6. The Supreme Court in **Babu Lal Vs. Hazari Lal Kishori Lal and others, AIR 1982 see 818** has explained the provisions of section 22 of the Specific Relief Act, and in particular the words "in an appropriate case" the Supreme Court held-

"13. The expression in sub-section (1) of Section 22 'in an appropriate case' is very significant. The plaintiff may ask for the relief of possession or partition or separate possession 'in an appropriate case'. As pointed out earlier, in view of Order 2, Rule 2 of Civil Procedure code some d9ubt was entertained whether the relief for specific performance and partition and possession could be combined in one suit; one view being that the cause of action for claiming relief for partition and possession could accrue to the plaintiff only after he acquired title to the property on the execution of a sale deed in his favour and since the relief for specific performance of the contract for sale was not based on the same cause of action as the relief for partition and possession, the two relief's could not be combined in one suit. Similarly, a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him, a decree for possession must be specifically claimed for such a person is not bound by the contract sought to be enforced. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter, without specifically providing for delivery of possession, may give complete relief to the decree holder. In order to satisfy the decree against him completely he is bound not only to execute the sale-deed but also to put the property in possession of the decree holder. This is in consonance with the provisions of Section 55[1] of the Transfer of Property Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs such possession of the property as its nature admits.

14.There may be circumstances in which a relief for possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession, viz., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession

over the share of the defendant. It is in such cases -that a relief for possession must be specifically pleaded."

The Supreme Court further held "that the expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of a contract for the transfer of the immovable property. That has to be done where the circumstances demanding the relief for specific performance of the contract of sale embraced within its ambit not only in the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale. Besides, the proviso to sub-section [2] of Section 22 provides for amendment of the plaint on such terms as may be just for including a claim for such relief 'at any stage of the proceedings."

7. In view of the aforesaid, in a suit for specific performance of the contract for sale, even though no relief for possession is claimed and subsequently, a decree is passed, the Court executing the decree is, nonetheless, competent to deliver possession where it is found that the contesting party was in exclusive possession of the property. Further, the order directing the delivery of the possession is incidental to the execution of the sale-deed in view of section 55 of the Transfer of Property Act, which entitles a transferee to get the possession in pursuance of the sale-deed.

8. Apart from the aforesaid, Section 28 of the Specific Relief Act provides a complete answer which reads as under:

"28. Rescission in certain circumstances of contracts for the sale or lease of immovable property, the specific performance of which has been decreed ..... [1] Where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and purchaser or-lessee does not, within the period allowed by the decree or such further period as the court may allow, pay the purchase money or other sum which the court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the court may, by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the ease -may require.

(2) Where a contract is rescinded under sub-section (l), the Court -

[a] shall direct the purchaser or lessee, if he has obtained possession of the property under the contract, to restore such possession to the vendor or lessor, and

[b] may direct payment to the vendor or lessor of all the rents and profits which have accrued in respect of the property from the date on which possession was so obtained by the purchaser or lessee until restoration of possession to the vendor or lessor, and, if the justice of the case so requires, the refund of any sum paid by the vendee or lessee as earnest

money or deposit in connection with the contract.

3] If the purchaser of lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in sub-section [1], the court may, on application made in the same suit, award the purchaser or lessee such further relief as he may be entitled to, including in appropriate case all or any of the following relief, namely-

a] the execution of a proper conveyance or lessee by the vendor or lessor;
b] the delivery of possession, or partition and separate possession, of the property on the execution of such conveyance or lease.

4] No separate suit in respect of any relief which may be claimed under this section shall lie at the instance of a vendor, purchaser, lessor or lessee, as the case may be.

5] The costs of any proceedings under this section shall be in the discretion of the court."

9. Section 28[3] of this Act contemplates that if the purchaser and lessee pays the money or other sum which is ordered to be paid under the decree, the Court may on the application made in the same suit award the purchaser, the delivery of possession. Sub clause [4] of section 28 of the Act, clearly indicates that a relief of possession cannot be claimed by a separate suit.

10. The judgment of the Supreme Court was again reiterated in another decision of the Supreme Court in **P.C. Varghese Vs. Devalki Amma Balambika Devi and others, [2005] 8 see 486** wherein the Supreme Court held-

"The said decree for partition, therefore, has attained finality. No decree for specific performance of contract, however, has been passed as against respondents 4 and 5. They are, however, otherwise bOtll1d by the decree passed by the learned trial Judge. Therefore, they are also proper parties, though not necessary parties.

Before parting with this case, however, we may observe that the manner in which the decree has been passed by the learned trial court is open to question inasmuch as a relief in terms of Section 22 of the Specific Relief Act being incidental or ancillary to the main relief of specific performance of contract and, furthermore, being in addition thereto, ordinarily, a proceeding for grant of a final decree for partition should be initiated after the sale deed in terms of the decree for specific performance of contract is executed and registered and not vice versa."

11. In the present case, the petitioner, who is a subsequent purchaser was also made a defendant in the suit and the decree was also passed against him. In the written statement filed by the petitioner it was categorically stated that he was in the possession of the property in question. Consequently, once the Court executed a sale deed in favour of the decree holder, the relief of possession, being incidental, could always be granted by the executing Court.

12. In view of the aforesaid, I do not find any error in the impugned order

passed by the executing Court. The writ petition fails and is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2006

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.25401 of 2002

Zamir Ahmad and others ...Petitioner
Versus
Additional District Judge, Court No.5, Bulandshahr and others...Respondents

Counsel for the Petitioners:
Sri R.B. Singhal

Counsel for the Respondents:
Sri Y.S. Bohra

U.P. Urban Building (Regulation of Letting Rent and Eviction) Act, 1972-Section 21 (1) (a)-Release application-bonafide need-during pendency of proceeding-tenant acquired alternative accommodation-consideration of bonafide need and comparative hardship not required.

Held: Para 3

The appellate Court failed to take into consideration the fact that the tenant has his own shop which is hardly 100 metres away from the shop, in dispute where he has established his son in business. The application of the petitioner was moved under Section 21 (1)(a) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'the Act). Once the tenant acquired an alternative accommodation in vacant possession and established his son in business, question of bona fide need and comparative hardship would not relevant on the analogy of Explanation (1) to Section 21(1)(a) of the Act. It was not open for the appellate Authority in the circumstances to take into consideration the question of comparative hardship due to facum of possession of one shop by the landlords in vacant position during pendency of suit proceedings.

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

1. Heard counsel for the parties.

2. Landlords had filed an application for release of the shop in dispute. Both the Courts below have recorded a finding of fact that the need of the landlords is genuine and bona fide. Though the Prescribed Authority has also gone into the question of comparative hardship, its finding on this issue, has been reversed by the Appellate Court on the ground that during the pendency of the appeal, one shop of the landlords became vacant, as such, need of the landlord stood extinguished.

3. The appellate Court failed to take into consideration the fact that the tenant has his own shop which is hardly 100 metres away from the shop, in dispute where he has established his son in business. The application of the petitioner was moved under Section 21 (1)(a) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'the Act). Once the tenant acquired an alternative accommodation in vacant possession and established his son in business, question of bona fide need and comparative hardship would not relevant on the analogy of Explanation (1) to Section 21(1)(a) of the Act. It was not open for the appellate Authority in the circumstances to take into consideration

the question of comparative hardship due to facum of possession of one shop by the landlords in vacant position during pendency of suit proceedings.

4. For the reasons stated above, the writ petition is allowed. Judgment and order dated 24.7.2001 passed by the respondent no. 1 (Annexure 7 to the writ petition) is quashed. The respondent will vacate the shop, in dispute, within a month from today. In case, the shop is not vacated by the respondent within the stipulated period of one month from today, the petitioner-landlord will be at liberty to evict him with the aid of local Police force. No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.08.2006

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 72443 of 2005
Connected with
Civil Misc. Writ Petition No. 39621 of 2006

The Committee of Management Vidya Bhawan Inter College, Araul, Kanpur Nagar and another ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri R.K. Ojha
Sri Satyanshu Ojha

Counsel for the Respondents:
Sri Ashok Khare
Sri S.K. Srivastava
S.C.

U.P. Intermediate Education Act 1921-Section 16 (g) (1) read with U.P. Act No. 5 of 1982-Section 21-Suspension pending enquiry-Charges of embezzlement-management send proposal for approval-in the meantime disciplinary proceeding concluded-punishment of dismissal-D.I.O.S. failed to refer the matter to the secondary Education Services selection Board-hence writ petition by management-held-after expiry of 60 days-suspension order became inoperative-hence entitled for salary during suspension period till the final decision of Board.

Held: Para 21 & 22

In the facts of the case, there is no order of District Inspector of Schools approving the suspension of the Principal of the institution. Consequently the order of suspension passed by the Committee of Management ceases to exist in the eyes of law after expiry of 60 days of its being communicated and therefore, the principal of the institution becomes entitled for full salar for the period subsequents to expiry of 60 days form the date he was placed under suspension. Accordingly it is provided that the principal of the institution shall be entitled to his full salary for the period the order of suspension was non-existent in the-eyes of law i.e. 28th August, 2005 till the conclusion of the proceedings by the U.P. Secondary Education Services Selection Board as directed herein above.

Till such decision by the U.P. Secondary Education Services Selection Board as aforesaid, the Principal of the institution shall be entitled to his full salary, it shall be open to the Committee of Management of the institution to take work or not to take work of the post of principal from the petitioner.

Case law discussed:
1995 (1) UPLBEC-460
1992 (2) UPLBEC-132
1994 (23) ALR-334

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

1. Heard learned counsel for the parties.

2. The suspension of the Principal of the recognised intermediate college on the charge of embezzlement etc., has been engaging the attention of this Court time and again and at present two writ petitions are pending in respect of the same.

3. Facts in short relevant for these petitions are: the Committee of Management vide resolution dated 29th June, 2005 resolved to suspend the Principal of the institution pending enquiry into charges of financial embezzlement etc. The District Inspector of Schools, Kanpur Nagar, in exercise of powers under Section 16 (g) (7) of the U.P. Intermediate Education Act, 1921 disapproved the said order of suspension vide order dated 2200 July, 2005. The order so passed by the District Inspector of Schools was challenged by the Committee of Management by means of Civil Misc. Writ Petition No. 52780 of 2005. The writ petition was allowed vide judgment and order dated 29th July, 2005 and this Court required the District Inspector of Schools to reconsider the matter in light of the observations made in the judgment.

4. The District Inspector of Schools, in compliance of the judgment and order of this Court, passed an order dated 18th November, 2005, wherein he again disapproved the order of suspension passed by the Committee of Management. The order so passed by the District Inspector of Schools has been challenged by means of first writ petition, (Civil Misc. Writ Petition No. 72443 of 2005), by the Committee of Management. In this petition after hearing the parties, the Hon'ble Single Judge of this Court was pleased to stay the operation of the order passed by the District Inspector of Schools dated 18th November, ZOOS and provided that the District Inspector of Schools may pass afresh order in accordance with law and in light of the directions issued by this Court under judgment and order dated 29th July, 2005 passed in Civil Misc. Writ Petition No. 52780 of 2005 after affording opportunity of hearing to the parties concerned.

5. While the aforesaid writ petition was still pending, the District Inspector of Schools by means of the order dated 15/17th July, 2006 has again disapproved the order of suspension passed by the Committee of Management referred to above. It is against this order of the District Inspector of Schools that the second writ petition (Civil Misc. Writ Petition No. 39621 of 2006) has been filed by the Committee of Management.

6. It has been further stated that the departmental proceedings initiated against the Principal of the institution have already been completed. A resolution has been passed proposing the punishment of dismissal of service by the Committee of Management, this resolution has been transmitted to the U.P. Secondary Education Services Selection Board, Allahabad, with all records, in view of the Section 21 of the U.P. Act No.5 of 1982 for approval of the punishment proposed as early as on 5th November, 2005 through the office of the District Inspector of Schools. An advance copy of the proposal was also submitted before the U. P. Secondary Education Services Selection Board for appropriate action.

7. On record, are the letters dated 15th February, 2006 and dated 3rd July, 2006 forwarded by the Secretary, U.P. Secondary Education Services Selection Board, Allahabad requiring the District Inspector of Schools to transmit the original documents, as have been submitted by the Committee of Management qua the punishment proposed along with other relevant documents, as required under U.P. Act No.5 of 1982.

8. Learned counsel for the petitioner states that because of lapse on the part of the District Inspector of Schools, the said documents have not been transmitted by the District Inspector of Schools to U.P. Secondary Education Services Selection Board, as a result whereof, no decision qua the punishment proposed, could be taken. Learned counsel for the petitioner further contends that the impugned order passed by the District Inspector of Schools is based on same grounds, as were subject matter of consideration in Civil Misc. Writ Petition No. 72443 of 2005, wherein an interim order has already been granted by this Court dated 25th November, 2005.

9. Even otherwise, it is submitted that the departmental proceedings against the Principal of the institution have already been completed and only approval of the U.P. Secondary Education Services Selection Board, Allahabad is wanted, it would not be fair to restore back the Principal of the institution in the office, inasmuch as the charges of embezzlement have been found proved in the departmental enquiry.

10. Sri Ashok Khare, Senior Advocate assisted by Sri Sunil Kumar Srivastava, on behalf of Principal of the institution, however, submits that the entire proceedings against the Principal are mala fide. At the first instance, the Committee of Management was not agreeable to the appointment of respondent (Principal), He was forced to file a writ petition for the same which resulted in his appointment as officiating principal. On after short period of his appointment, he has been placed under suspension and departmental proceedings have been initiated only to ensure that he is kept out of office.

11. Learned Counsel for the Principal further submits that the mala fide are apparent from the record of writ petitions. Violation of Regulation 36 (1) (g) and Regulation 40 (a) is established, inasmuch as the petitioner was placed under suspension under order dated 1st July, 2005, while a copy of the charges had admittedly been served upon the Principal only on 11th July, 2005 i.e. after expiry of the prescribed period of 7 days and therefore, no illegality can be attributed to the order passed by the District Inspector of Schools.

12. Lastly it is further contended on behalf of the principal of the institution that the charge-sheet as served upon the petitioner was vague and did not contain specific charges therefore, violation of Regulation 36 (1) (g), is also apparent.

13. I have heard counsel for the parties and have gone through the records of the writ petition.

14. There is serious disputes between the parties with regard to the proceedings, which have been taken against the Principal of the institution.

Issues are of fact as well as of law. It is apparent that the departmental proceedings, which have been initiated against the petitioner, have now reached their end and are engaging the attention of the U.P. Secondary Education Services Selection Board with regard to the grant of approval to the punishment proposed by the Committee of Management. There are charges of misappropriation of money etc. found proved in departmental enquiry against the Principal of the institution (this Court is not expressing any opinion on the merits of the allegations so made). It is further not in dispute that the Principal of the institution has continued under suspension since 2005, has been kept out of office of Principal since 29th June, 2005 (although according to the petitioner the same was contrary to law).

15. In these set of facts, this Court is not inclined to enter into the merits of the rival contentions qua the order revoking the suspension of the Principal of the institution, inasmuch as interest of justice would be served, if the U.P. Secondary Education Services Selection Board is required to take the final decision on proposed punishment of the Committee of Management, in a time bound manner after affording opportunity of hearing to the parties.

16. Accordingly, it is provided that the District Inspector of Schools shall transmit all relevant records received from the Committee of Management qua the proposed punishment against the Principal of the institution within ten days of the receipt of the certified copy of this order, to the U.P. Secondary Education Services Selection Board. Immediately after receipt of the papers, U.P. Secondary Education Services Selection Board shall fix a date for affording opportunity of hearing to the parties and for filing their respective representations/documents. He shall also permit the exchange of documents.

17. The U.P. Secondary Education Services Selection Board shall take final decision in the matter in accordance with law, by means of a reasoned speaking order. The entire exercise as aforesaid must be completed by the U.P. Secondary Education Services Selection Board on or before 3rd October, 2006. No unnecessary adjournment shall be granted to any of the parties and there should not be a cause for any complaint being made by any of the parties that the order passed today has not been complied with either by the District Inspector of Schools or by the U.P. Secondary Education Services Selection Board.

18. This leads us to the issue as to whether the Principal of the institution would be entitled to his full salary for the back period commencing from the date 60 days expired from the date the order of suspension was passed in the facts and circumstances of the case.

19. Section 16(g) (1) of the U.P. Intermediate Education Act provides that no order of suspension shall remain in operation after expiry of 60 days, except when approved in writing by the District Inspector of Schools. The aforesaid Section 16 (g) (1) has been subject matter of consideration in the Full Bench Judgement of this Court reported in **1995 (1) UPLBEC 460** in the case of Chandra Bhushan Mishra Vs. District Inspector of Schools & Others. The Full Bench of this Court has held that if the order of suspension has not~been approved within

60 days or refused approval in writing, it would mean that such order of suspension ceases to exist in eyes of law after expiry of 60 days. Full Bench of this Court further held that the power of the District Inspector of Schools to approve such suspension after 60 days is not lost. However, if approval is granted subsequently by the District Inspector of Schools, the suspension would revive from the date the approval is granted. Meaning thereby that for the interregnum i.e. the period between the date when 60 days expired and the date approval is granted in writing, it is presumed that the order of suspension was not existing in the eye of law. Accordingly for this interregnum period Principal or teacher cornered is entitled to payment of full salary as well as for being permitted to continue in the office.

20. The legal position in that regard has also been explained by the Court in the judgment reported in **1992 (2) UPLBEC 132 and 1994 (23) ALR 334**.

21. In the facts of the case, there is no order of District Inspector of Schools approving the suspension of the Principal of the institution. Consequently the order of suspension passed by the Committee of Management ceases to exist in the eyes of law after expiry of 60 days of its being communicated and therefore, the principal of the institution becomes entitled for full salar for the period subsequents to expiry of 60 days form the date he was placed under suspension. Accordingly it is provided that the principal of the institution shall be entitled to his full salary for the period the order of suspension was non-existent in the-eyes of law i.e. 28th August, 2005 till the conclusion of the proceedings by the U.P. Secondary Education Services Selection Board as directed herein above.

22. Till such decision by the U.P. Secondary Education Services Selection Board as aforesaid, the Principal of the institution shall be entitled to his full salary, it shall be open to the Committee of Management of the institution to take work or not to take work of the post of principal from the petitioner.

23. With the aforesaid directions/observations, both the writ petitions are disposed of finally.

Petition Disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2006

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal No. 851 of 1992

U.P. Avas Evam Vikas Parishad
...Opposite Party/Appellant
Versus
Shyam Sundar and others
...Opposite Party/Respondents

Counsel for the Appellant:
Sri P.K. Singhal
Sri V.K. Barman
Sri Pankaj Barman

Counsel for the Respondents:
Sri Faujdar Rai
Sri C.K. Rai

Land Acquisition Act, 1989, Section 23 (1)-Compensation-referance court awarded Rs.50,000/- towards damage-without discussion of evidence-held not proper-only after satisfactory proof incurred expences-on account of change

of residence or the place of Business Rs.10,000/- held proper.

Held: Para 16

From the earlier part of the judgment it is clear that the only evidence worth the name is own affidavit wherein he assessed the damages at Rs.75,000/-. The reference court was of the opinion that as the said affidavit is uncontroverted, therefore, reliance can be placed upon it. It is difficult to approve the above approach of the reference court. The reference court was not justified in awarding damages for rehabilitation being not admissible in law. At the most inciden1al expenses that too on production of satisfactory evidence could have allowed under Clause 5 of Section 23 (1). Interestingly it may be noted that the said affidavit has not been made part of the Paper Book. During course of the argument, the learned counsel for the claimant/respondent chosen not to place or refer even the said affidavit from record before the I Court. In this view of the matter there is practically no evidence to show that the claimant/respondent has incurred such a huge expenses on account of change of residence and place of busineses, which may be incidental to such change.

Case law discussed:

J.T. 2001 (10) SC-200
2005 (58) ALR-477
J.T. 2003 (5) SC-160
1998 (2) SCC-467
1996 (2) SCC-62

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

1. Present appeal arises out of Land Acquisition Reference No.8 of 1989 and is directed against the award of Civil Court dated 24th August, 1991, passed by the learned Addl. District Judge, Ballia, whereby he granted compensation of 0.09 acres of land at the rate of Rs.1,80,000/- per acre, out of which claimant/respondent no. 1 is entitled to 3/8 of it; the compensation for trees and construction at Rs.97,500/- and damages under Clauses (4) and (5) of Section 23 (1) of the Land Acquisition Act at Rs.50,000/- together with interest and solatium etc.

2. Feeling aggrieved against the aforesaid award, the acquiring body has preferred the above appeal under Section 54 of the Land Acquisition Act 1894.

3. The land was acquired for the benefit of the appellant by i~uing a notification dated 8th March, 1980 under Section 28 of the U.P. Avas Vikas Parishad Adhiniyam, read with Section 4 of the Land Acquisition Act. By means of the aforesaid notification 0.9 acres of land m village Madhavpur was acquired, which includes plot no. 195 area 0.09 acres. Claimant/respondent no. 1 is the Asami of the said plot no. 195. It is not in dispute that being Asami, he was entitled and has been rightly granted compensation at the rate of 3/8 of the total compensation awarded by the reference court. The possession of the said plot was taken on 25th March, 1980 and the award passed by the Land Acquisition Officer is dated 22nd September, 1986. It is common case of the parties that the aforesaid land was acquired for the scheme known as Harpur Q Bhumi Vikas Evam Grah Sthan Yojna. The reference court as noted above enhanced the compensation by the order under appeal,

4. Feeling aggrieved against the aforesaid enhancement made by the reference court the present appeal is at the instance of U.P.Avas Evam Vikas Parishad.

5. Sri V.K. Burman, learned Senior Counsel appearing for the Parishad has challenged the judgment of the reference court only on the following two points:-

6. Firstly, the rate of compensation granted to the claimant/respondent is towards higher side. In other words the reference court has granted compensation over and above the market value of the land thus acquired. Elaborating the argument it was submitted that there is no evidence on record to show the cost escalation of the land in the village. Elaborating the argument it was submitted that while determining the final compensation the reference court has made deduction at the rate of 25% on account of the bulk acquisition, while it should have been at the rate of 300/0. Secondly, he submitted that the compensation awarded to the tune of Rs.50,000/- under Clauses 4 and 5 of Section 23 (1) of the Land Acquisition Act, (para 13 of the judgment of the reference court) is unjustified and is not tenable in law. There being no reliable or cogent evidence that the claimant has suffered damages to the tune of Rs. 50,000/- by reason of the acquisition which injuriously affected the earnings and compelled the claimants to change their residence and place of business. In contra, the learned counsel for the claimant/respondent no. 1 placed reliance upon the judgment of the reference court in support of his submission.

7. The first point which falls for determination is with regard to the question of amount of compensation towards acquisition of plot no. 195, measuring 0.09 acres. The reference court under issue no. 1 has noted that as many as 41 sale deeds were produced m respect of the lands lying in village Madhavpur within a period of three years prior to the date of notification. It has treated the two sale deeds dated 10th May, 1977 and 14th February, 1978 as exemplars for determination of the compensation of the market value of the land in question. It has rightly taken into account the aforesaid two sale deeds in as much as the sale deeds are with respect to the land, which has been acquired under the notification. The learned Senior Counsel has not disputed for treating these two sales deeds as exemplars. His argument is that on the basis of the sale deed of 10th May, 1977, the market value of the land comes to Rs.1,54,000/- per acre and it comes to Rs. 1,84,000/- per acre on the basis of subsequent sale deed, dated 14th February, 1978. Elaborating the argument he submitted that there was no justification for the reference court to take into consideration any increase in the price of the land. The said argument is not correct on the facts and circumstances of the case. Undoubtedly the aforesaid two sale deeds are with respect to the land acquired under the notification and prior to three years of the relevant notification, which is dated 8th March, 1980. The reference court has rightly concluded on the basis of two sale deeds that the escalation in the price of the land is well established. In the present case even the Land Acquisition Officer did not doubt or dispute the genuineness and correctness of the aforesaid two sale deeds. He rejected the subsequent sale deed of the year 1978, which gives the market value of the land at Rs.1,84,000/- per acre on the ground of guess, conjectures and surmises as it is for higher price. The reference court having it found that the aforesaid two sale deeds depict true and honest sale transactions, in my view was

justified to draw an inference that there is price escalation of the land in the village and has rightly fixed the market value of the land at the rate ofRs. 2,40,000/- per acre as on the relevant date i.e. in the year 1980. It may be noted here that after fixation the aforesaid market value of the l~d at Rs.2,40,000/- per acre, it has reduced it by 25% on account of bulk acquisition and finally determined the market value at the rate of Rs. 1,80,000/- per acre. At this place, the argument of the learned counsel for the appellant that there should have been deduction of 30% or more is to be considered. He has placed reliance upon the following judgments of the Apex Court in support of his submission:-

8. **K.S. Shivadevamma and others Vs. Assistant Commissioner and Land Acquisition Officer and another (1996) 2 Supreme Court Cases 62**. In this case it was held that extent of deduction for development charges depends upon the development needed in each case. This case is distinguishable on the facts and has no application to the controversy involved in the present appeal. In this very case it was noted by the Apex Court in para 10 of the judgment that as a general rule for laying of the roads and other amenities 33.33% is required to be deducted. Where development has already taken place appropriate deduction needs to be made. It has been further noted that situation as existed on the date of notification and other relevant facts as on that day has to be taken into account. Considering these facts and also the situation of the land in question, it is evident in the case in hands the land acquired was Abadi of the claimant/respondent no.l. His residential house was indisputably existed on the land in question. The plot in question was already being used for residential purposes. The area in question was not an undeveloped area. The next case relied upon is **U.P. Avas Evam Vikas Parishad Vs. Jainul Islam and another (1998) 2 Supreme Court Cases 467,** wherein it was held that deduction of 1/3 of the value of land towards cost of development was justified on the ground for determining the market value of a large property on the basis of the sale transaction for small properties a deduction should be given. In this very case, the Apex Court has noted its other decision also, wherein the deduction of 25% was also justified. To the same effect is **Ravindra Narain and another Vs. Union of India IT 2003 (5) SC 160** wherein it was held that exemplars of small plots can not be said to be safe criteria, however, in appropriate cases in the absence of other material such instances may be used for determination of compensation after making reasonable deductions. To the same effect is **Hans Rai Sharma Vs. Collector Land Acquisition 2005 (58) ALR 477**.

9. Coming to the facts of the present case the total land kquired is itself is not a big area, but a small area measuring 0.90 acres. In other words it is less than one acre ad admitted by the learned counsel for the parties. Out of it the area of the land acquired of respondent no. 1 is 0.09 acres. It comes to 1/10 of the total area acquired. The exemplars which have been relied upon referred to above are also of the small areas, i.e. for 0.065 acres and 0.0475 acres, as mentioned in para 8 of the judgment. In this view of the matter there was no justification in making deduction of 25% on account of bulk acquisition. Taking into consideration the

entire facts and circumstances of the case, the fixation of the market value at Rs. 1,80,000/- by the reference court can not be said to be unjustified. It has taken into account the potentiality of the land acquired. A reference can be made to a judgment of Apex Court in Land Acquisition Officer Vs. Morisetty Satyanarayana and others IT 2001 (10) SC 200, wherein it has been held as follows:-

"It is true that normally while fixing the market price of the land under acquisition, when the sale instances are for small piece of land then appropriate reduction is required to be made while fixing the market price of the land under acquisition. However, in the present case, the land which is acquired is out of the same survey number. Various sale deeds produced on record reflect the increase in price of the portions of land of the same survey number. Other evidence on record indicates that in the village there is increase in market price of land during the relevant years. Therefore, considering the increasing trend of the market price and the fact that small pieces of land owned by different persons are acquired, this would not be a fit case for reducing the amount on the ground that relevant sale deed is for a small piece of land."

10. There is thus, no legal infirmity in the judgment of the reference court, so far as it relates to grant of compensation at the rate of Rs.1,80,000/- per acre, out of which the claimant has been held to be entitled being Asami at 3/8 of it. The fIrst point is decided accordingly.

11. The next point urged by the learned counsel for the appellant is with regard to the grant of compensation amounting to Rs.50,000/- under section 23 (1) Clause 4 and 5 towards damages, under issue no.2. The claimants claimed Rs. 75,000/as damages under the aforesaid clauses on the ground that the acquisition of the land has injuriously affected their earnings and they were compelled to shift their place of residence and business. It is established on the record that at the time of acquisition the claimants were residing in their house existing on the land which has been acquired. Obviously acquisition of land and the house compelled them to shift to other place. The question which arises whether under such circumstances any amount as compensation can be granted under Clause 4 and 5 of Section 23 (1) of the Land Acquisition Act. Clause 4 provides that while determining the compensation to be awarded for the land acquired under the Act. Court shall also take into account the damages if any sustained by the person interested at the time of the Collectors's taking possession of the land.

12. The said Clause reads as follows:-

"fourthly, the damages (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings."

13. Neither there is any evidence nor there is any pleading or fmding by the court below that by reason of taking possession of the land in question any other property of the claimants has been

affected in any manner, or his earning has been suffered.

14. Learned counsel for the claimant/respondent tried to justify the award of Rs.50,000/- as compensation under this head with reference to Clause 5 of the aforesaid Section 23 (1) of the Act.

15. The said Clause reads as follows:-

"fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business the reasonable expenses (if any) incidental to such change."

This clause refers to the payment of reasonable expenses, if any, incidental to change, if in consequence of acquisition of the land by the Collector, the person interested is compelled to change his residence and place of business. Words "incidentally to such change" are important. It means the only expenses of removal can be admissible under this Head. There is no evidence on record to show that the expenses, if any, borne by the claimants on account of the change of his residence or place of business. In the absence of material to show that the claimant has incurred expenses for taking his new residence for starting business at new place, the reference court was not justified in awarding a sum of Rs.50,000/- as compensation under the aforesaid provision. The judgment of th w lacks discussion of relevant facts on this issue without making any reference to the relevant facts and circumstances, in a cursory manner, it has awarded a sum of Rs.50,000/- The relevant portion from the judgment of the reference court is reproduced below:-

"Unfortunately, there is nothing on record to show as to what is the status of the claimants and other property owned by them. It is also not shown that the claimants were doing some other business ever prior to the acquisition. In fact, no cross version has been put about the damage caused to the claimants as envisaged in fifth clause of section 23. In the circwnstances I have no reason to reject the only evidence in this respect. The claimants have, however, claimed Rs.25000/- as damages for change of residence and Rs. 50,000/- as damages for rehabilitation. The damages on account of rehabilitation necessarily include change of residence. The damages for the same event can not be granted only because a circwnstances can be defmed in two separate words. I, therefore, hold that the claimants are entitled to Rs.50,000/- only as damages for rehabilitation and are not entitled to any additional damages for change of residence."

16. From the earlier part of the judgment it is clear that the only evidence worth the name is own affidavit wherein he assessed the damages at Rs.75,000/-. The reference court was of the opinion that as the said affidavit is uncontroverted, therefore, reliance can be placed upon it. It is difficult to approve the above approach of the reference court. The reference court was not justified in awarding damages for rehabilitation being not admissible in law. At the most inciden1al expenses that too on production of satisfactory evidence could have allowed under Clause 5 of Section 23 (1). Interestingly it may be noted that the said affidavit has not been made part

of the Paper Book. During course of the argument, the learned counsel for the claimant/respondent chosen not to place or refer even the said affidavit from record before the I Court. In this view of the matter there is practically no evidence to show that the claimant/respondent has incurred such a huge expenses on account of change of residence and place of busineses, which may be incidental to such change.

17. Looking to the facts and circunstances of the case, this Court is of the opinion that a sum of Rs.10,000/- by way of token should be awarded towards expenses which was incidental to change of residence and place of business. The judgment of the reference court is modified accordingly. In place of Rs.50,000/- granted under Section 23 (1) of the Act it is held that the claimants are entitled for a sum of Rs.10,000/- only.

18. In the result the appeal is allowed in part and the judgment of the court below is modified by reducing the amount of compensation awarded under Section 23 (1) Clause 4 and 5 to Rs. 10,000/- only. The remaining part of the judgment is confirmed. No order as to costs. Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 18340 of 2004

Rama Shankar Singh and others
...Petitioners
Versus
U.P. Rajya Vidhyut Utpadan Nigam Ltd., Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri Vinod Sinha
Sri S.P. Singh

Counsel for the Respondents:
Sri R.D. Khare
Sri Anil Kumar Mehrotra

U.P. Intermediate Education Act, 1921-Chapter III-Reg. 21-as amended by Notification 6.1.2005-Retirement age principal, teachers working in recognized Inter College-run by U.P.R.V.U. Nigam-whether their service conditions shall be governed by the provisions of Intermediate Education Act 1921 or by U.P. Rajya Vidyut Parishad Siksha Seva Niyamawali 1995? Held-provisions of Regulation 21 Chapter III shall govern the recognized educational Institutions also-teacher and the Head of the institution will retire at the age of 62 years as amended by Notification dated 6.1.2005.

Held: Para 21 & 23

In this view of the matter, I am clearly of the view that Regulation 21 Chapter III as amended by notification dated 6.1.2005 is applicable to Teachers, Principles and Head Masters of all recognized institutions whether aided or unaided and otherwise contention of the learned counsel for the respondents is, therefore rejected.

In the result the writ petition is allowed. The impugned notice dated 12.1.2004 communicating the petitioners regarding their retirement on attaining the age of 58 years is quashed and the respondents are directed to permit the petitioners to continue in service in accordance with Regulation 21 Chapter III of the Regulations framed under Intermediate Education Act. 1921 as amended by notification dated 6.1.2005.

Case law discussed:
AIR 1930 O.P.C.-120, AIR 1951 SC-41, AIR 1953 SC-58, AIR 1957 SC-121, AIR 1964 SC-1230, AIR 1969 SC-530, AIR 1988 SC-782, 4

MIA-170 (187) (P.C.), AIR 1960 SC-122, 1897 AC-22 (HL), AIR 1964 SC-1230, AIR 1969 SC-513, AIR 1970 SC-755, AIR 1975 SC-43, AIR 1989 SC-922, AIR 1991 SC-772, AIR 2002 SC-1351, AIR 1967 SC-997, 1960 (3) AFR-353, AIR 1978 SC-548

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

1. Six petitioners working as teachers at Obera Inter College, Obera, District Sonbhadra (hereinafter referred to as "College" in short) have approached this Court against the respondents complaining against their action of retiring the petitioners at the age of 58 years, through, as contended by the petitioners, they are entitled to continue in service till they attain the age of 62 years. Consequently, notice dated 12.1.2004 (Annexure-l to the writ petition) issued by the Deputy -General Manager, U.P. Rajya Vidyut Utpadan Nigam Ltd. (hereinafter referred to as "UPRVUNL" in short), working as Manager of the College informing the petitioners that they would retire on 30.6.2004 on attaining the age of 58 years has been challenged in this petition.

2. The facts in brief giving rise to the present writ petition are that the College was established as a government school by Irrigation Department of the State Government, but after establishment of Thermal Generation Units at Obera, the aforesaid institution was taken over by U.P. State Electricity Board (hereinafter referred to as "UPSEB" in short) sometimes in the year 1969 and since thereafter, is being run by the management, who are the officers of the Obera Thermal Power Station, which earlier was owned by UPSEB and since 14.1 .2004 by UPRVUNL. The college is a duly recognized educational institution by the Board of High School and Intermediate Education, UP., Allahabad under the provisions of U.P. Intermediate Education Act, 1921 (hereinafter referred to as the Act of 1921) and the petitioners are employed as teachers in the college having been appointed on 1.7.1969,1.7.1969,9.8.1972,25.6.1967,1.9.1971 and 1.8.1968 respectively. Though as per the petitioners, the conditions of service of the teachers of the College are governed by the Regulations framed under the Act of 1921, wherein the age of retirement was earlier 60 years and now 62 years, but the College management, are acting under the impression that the petitioner are governed by the provisions applicable to the employees of erstwhile UPSEB framed under Section 79(C) of Electricity Supply Act, 1948 (herein after referred to as Act of 1948), wherein the age of retirement is 58 years and, therefore, have proceeded to retire them on attaining the age of 58 years, which, according to the petitioners is illegal, since, they arc governed by the Regulations framed under the Act of 1921 and are entitled to continue till they attain the age of 62 years.

3. On behalf of the respondents; counter affidavit has been filed stating that earlier the College was being managed by the UPSEB and now by UPRVUNL .The employees of the college are governed by the U.P. Rajya Vidyut Parishad Shiksha Seva Nimavali. 1995 framed by erstwhile UPSEB under Section 79(C) of Act of 1948, wherein the age of retirement is 58 years and, therefore, the petitioners have rightly been sought to retire on attaining the age of 58 years. It has also been stated that the Board for its employees had statutory power to frame regulations with respect to

recruitment conditions of service, which includes the teachers and other staff of an educational institution of the UPSEB and statutory provisions having been made under section 79(C) of the Act of 1948, the same cannot be made subservient to the provisions of the State Act like Act of 1921, or the regulations framed there under and, therefore, the reliance placed by the learned counsel for the petitioners upon Regulation 21 of Chapter III of the Regulations, under the Act of 1921 is clearly misplaced and provisions made under the Act of 1948 would override the provisions of Act of 1921.

4. The petitioners have also filed a supplementary affidavit as well as rejoinder affidavit wherein besides reiterating the stand taken in the writ petition, it has also been stressed that the college in question is receiving grant-in-aid under the Uttar Pradesh High Schools and Intermediate Col1eges (Payment of Salaries of Teachers and others Employees) Act, 1971 (hereinafter referred to as "Act of 1971" in short), as is apparent from the letter dated 30.1.2006 issued by the finance controller, Directorate of Education, U.P., Allahabad addressed to District Inspector of Schools, Varanasi and Sonbhadra communicating sanction of grant of Rs.48,20,830/- for the College under the Act of 1971. Further, a copy of the amendment notification dated 6.1.2005 has been appended, whereby Regulation 21 Chapter III of the Regulations framed under the Act of 1921 has been amended by substitution altering the age of retirement from 60 to 62 years.

5. Heard Sri Vinod Sinha, learned counsel for the petitioner and Sri Anil Kumar Mehrotra for the respondents.

Though the respondents have taken a general stand that the Regulations framed under the Act of 1921 are not at all applicable to the petitioners and they are governed by the statutory provisions framed by the erstwhile UPSEB in exercise of its power under Section 79(C) of the Act of 1948, but it is not disputed by the learned counsel for the parties that this question has already been decided in a number of cases, wherein UPSEB and UPRVUNL were also parties, holding that the conditions of service of the teachers working in the recognized institution managed by the UPSEB or UPRVUNL would be governed by the Regulations framed under Act of 1921 and not under the Regulations framed under Act of 1948. Some of the judgments are also on record, namely, Writ Petition No. 24222 of 1999 (Daroga Singh and others Vs. UPSEB and others) decided on 4.10.2002, Writ Petition No.35792 of 1996 (Smt. Shaila Garg Vs. UPSEB and another) and other connected matter decided on 30.5.1997 and Writ Petition No.9244 of 1995 (Ravindra Nath Pandey Vs, Secretary, UPSEB and others) decided on 10.9.1999. Of course, all the judgments have been rendered by Hon'ble Single Judges and it is informed by Sri Mehrotra, learned counsel for the respondents that in many matters, Special Appeals have been filed, which arc pending before this Court, but the judgments of the Hon'ble Single Judges holding that the Regulations framed under the Act of 1921 are applicable to the teachers of the recognized college of erstwhile UPSEB have not been stayed in the pending Special Appeals. The nature of the interim orders passed in Special Appeal are that the beneficiaries in case loose the matters in Special Appeals will have to refund the entire salary to the employers for the

period subsequent to the date, when they attain the age of 58 yeas. Thus, the situation, as it stands today, is that all the judgments of the Hon'ble Single Judges have presidential value and are binding on all the coordinate benches. I also do not find any reason to take a different view and, therefore, have no hesitation in holding that for the purpose of age of retirement, the provisions under Regulation 21 of Chapter III of the Regulations framed under the Act of 1921 will govern the age of retirement of the petitioners.

6. However, the matter does not rest here, since the present case has a further complication, which has arises on account of amendment of Regulation 21 Chapter III of the Regulations framed under the Act of 1921 enhancing the age of retirement from 60 to 62 years. Ordinarily, since the amendment made by the notification dated 6.1.2005 substituting existing Regulation 21 of Chapter III by a new one, also would have governed by the same- principle as declared in the various judgments of this Court holding the aforesaid Regulation to be applicable to the employees of the recognized college of the respondents, but the learned counsel for the respondents have tried to persuade this Court not to follow the aforesaid principle for the purpose of amended Regulation. 21 in the case in hand.

7. Sri Mehrotra, learned counsel for the respondents, drew attention of the Court to the Government order dated 4.2.2004 (Annexure-7 to the writ petition) issued by the Principal Secretary, U.P. Government addressed to the Director of Education (Secondary) U.P. Allahabad and Lucknow communicating its decision to extend the age of retirement of the teachers working on the post created by the State Government in non government-aided institutions and, therefore, conveyed its approval for amendment of the Regulation increasing the age of retirement from 60 to 62 years for such teachers. He further drew attention of the Court to the letter dated 6.1.2005 appended to the notification amending Regulation 21 which also provides that it pertains to the alternation in age of retirement of the teachers working in non government aided secondary institutions. Relying upon the aforesaid government order and letter, Sri Mehrotra proceeded to contend that the approval of the Government to amend regulation pertaining to age of retirement of teachers was restricted to the category of only such teachers, who were working against the posts created by the State Government in non government aided institutions and therefore, the aforesaid amendment is not applicable to all the recognized institutions whether aided or unaided. He further submitted that the College in question managed by the UPSEB and now UPRVUNI is a non-government unaided institution and, therefore the aforesaid amendment would have no application to the College of the respondents. To buttress his submission, Sri Mehrotra relied upon the principles statutory interpretation permitting external aid, i.e. statement of objects and reasons, notings, attending circumstances preceding the amendments etc. and placed reliance on the following law laid down by the Hon'ble Apex Court.

(1) Henrietta Muir Edwards and others Vs. Attorney General of Canada and others **(AIR 1930 PC 120),**

(2) Charanjit Lal Chowdhury Vs. The Union of' India and others **(AIR 1951 SC41),**
(3) D.N. Banerji Vs. P.R. Mukherjee and others **(AIR 1953 SC 58),**
(4) Hariprasad Shivshanker Shukla and another Vs. A.D. Divelkar and others **(AIR 1957 SC 121)**,
(5) R.L. Arora Vs. State of Uttar Pradesh and others **(AIR1964 SC 1230),**
(6) M/s Sanghvi Jeevraj Ghewar Chand and others Vs. Secretary, Madras Chillies, Grains and Kirana Merchants Workers Union and another **(AIR 1969 SC 530)** &
(7) M/s Doypack Systems Pvt. Ltd. Vs. Union of India and others **(AIR 1988 SC 782).**

8. On the contrary, Sri Vinod Sinha disputing the aforesaid submission vehemently contended that the amendment of Regulation 21 is nothing but a substitution of the existing provision by a new one. A bare reading of amended Regulation21 does not show that it is applicable to a limited category of the teachers Therefore; he submits that the petitioners are entitled to be governed by the amended Regulation 21of Chapter III of' the Regulations framed under the Act to 1921.

9. The short controversy, therefore, involved in the case as is whether Regulation 21 Chapter III as amended by notification dated 6. 1 .2005 is applicable to all the categories of recognized institution or not including the college run by the respondents.

Before adverting to the rival submissions, it would be appropriate to reproduce Regulation 21 Chapter III of the Regulations as it was prior to its amendment vide notification dated 6.1.2005.

"21*. Superannuation age of Principal, Headmaster, Teacher and other employees, would be 60 years. If above said superannuation age of any Principal, Headmaster and Teacher falls on any date in between 2nd July and 30th June, except in the conditions when he himself, before two months of the date of superannuation, furnishes in writing the information for not seeking extension of service, extension of service up to 30th June shall be deemed to be conferred on him so that after summer vacation, substitute can be arranged in the month of July. In additions to this, extension of service could be granted only in such special cases, which may be decided by the Stale Government.*

If date of superannuation of any clerk of fourth-class employee falls in the middle of any month, his extension of service would be deemed to be given up to the last date of that month. But if the date of appointment of any employee falls on the first date of any month, he shall he retired on the last date of the preceding month."

10. The State Government issued order-dated 4.2.2004communicating its approval for amendment of the Regulation permitting enhancement in the age of retirement of teachers from 60 to 62 years, but in the aforesaid Government Order, it clearly mentions that the said decision has been taken in respect to the teachers working on the post created by the State Government in non government aided secondary educational institutions. It also direct that all Government Orders issued in the past shall be deemed to be amended to the extent as provided in the aforesaid Government Order and also

directed the Director of Education to. take action for amendment of Regulation 21 under Intermediate Education Act, 1921 within 30 days from the date of issuance of the aforesaid Government Order. It would be appropriate to reproduce the relevant extract of the Government Order:

"शासन द्वारा सम्यक विचारोपरान्त यह निर्णय लिया गया है कि अशासकीय सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों में शासन द्वारा सृजित पदों पर नियमानुसार कार्यरत अध्यापकों की वर्तमान अधिवर्षता आयु में वृद्धि कर दी जायें।

अतः श्री राज्यपाल महोदय तात्कालिक प्रभाव से अशासकीय सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों में शासन द्वारा सृजित पदों पर नियमानुसार कार्यरत अध्यापकों की वर्तमान अतधिवर्षता आयु को 60 वर्ष से बढा कर 62 वर्ष किये जाने की सहर्ष स्वीकृति प्रदान करते हैं। फलस्वरूप 58 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा निवृत्ति लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवा निवृत्ति लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होंगे।

श्री राज्यपाल महोदय यह भी आदेश प्रदान करते हैं कि उसे शिक्षा 01 जुलाई 2003 के पश्चात् अधिवर्षता आयु पूर्ण कर सत्रांत लाभ पर चल रहे हैं उन्हें भी अधिवर्षता आयु संबंधी लाभ प्रदान किया जायेगा।

इस संबंध में पूर्व में निर्गत समस्त शासनादेश उक्त सीमा तक संशोधित समझे जायेंगे तथा उनकी शेष शर्तें यथावत रहेंगी।

उ०प्र० इण्टरमीडियट एजूकेशन एक्ट के संगत नियमों में आवश्यक संशोधन की कार्यवाही शासनादेश जारी होने के 30 दिन के अन्दर सुनिश्चित कर ली जायेगी।"

11. It appears that subsequently there was some further correspondence between the Government and Education Department where after vide notification dated 6.1.2005,though in the subject it mentions about amendment in the age of retirement of teachers of non government aided institution, but in the contents part of the notification, it states that the Hon'ble Governor has approved the amendment of Regulation 21,Chapter III framed under U.P. intermediate Education Act, 1921 in the manner as contained in the Annexure to the said notification and the amended Regulation 21 reads as under:

"आचार्य, प्रधानाध्यापक, अध्यापकों का अधिवर्ष वय 62 वर्ष होगा। फलस्वरूप 58 वर्ष की अधिवर्षता पर मिलने वाले सेवानिवृत्तिक लाभ अब 60 वर्ष की अधिवर्षता आयु पर तथा 60 वर्ष की अधिवर्षता आयु पर मिलने वाले सेवानिवृत्तिक लाभ 62 वर्ष की अधिवर्षता आयु पर अनुमन्य होंगे। यदि किसी आचार्य, प्रधानाध्यापक का उपर्युक्त अधिवर्ष वय 2 जुलाई और 30 जून के मध्य में किसी तिथि को पडता है तो उसे, उस दशा को छोडकर जबकि वह स्वयं सेवा विस्तरण न लेने हेतु लिखित सूचना अपने अधिवर्ष वय की तिथि से 2 माह पूर्व दे दें, 30 जून तक सेवा विस्तरण स्वयमेव प्रदान किया गया समझा जायेगा ताकि ग्रीष्मावकाश के उपरान्त जुलाई में प्रतिस्थानी की व्यवस्था हो सके। इसके अतिरिक्त सेवा-विस्तरण केवल उन्हीं विशिष्ट दशाओं में प्रदान किया जा सकेगा, जो राज्य सरकार द्वारा निर्धारित की जाय। अन्य कर्मचारियों के विषय में अधिनियम में दिये गये प्राविधान यथावत रहेंगें।"

12. A bare perusal of Regulation 21 as amended vide notification dated 6.1.2005 does not warrant any restricted application to the category of teachers. A plain reading of Regulation 21 as amended would show that all the teachers and principals, who were liable to retire at the age of 58 years would now retire at the age of 60 years and those who were to retire at the age of 60 years would now retire at the age of 62 years and would be entitled for all the retiral benefits, accordingly. It also provides that if the teachers and principals retire on a date between 2nd July to 30th June and have not expressed their desire against extension, would continue till 30th June i.e. end of the Session. Regulation 21 amended by the notification-dated 6.1.2005substituted the existing Regulation 21. It is not disputed that Regulation 21 as it stood prior to notification-dated 6.1.2005 was applicable to all teachers and principles of recognized institutions whether aided or unaided. After substitution of Regulation 21 vide notification-dated 6.1.2005, there is no other provision in respect to

superannuation age of principles, head masters and teachers of the recognized institutions whether aided or unaided. The very first obstacle in accepting the contention of the learned counsel for the respondents is that if the interpretation as suggested by him is followed, it would result as if now, on and after 6.1.2005, there is no provision or Regulation framed under Intermediate Education Act, 1921 providing age of superannuation of Principles, Head Masters, Teachers and other employees of recognized unaided institutions. In do not find any reason, therefore, to accept a construction, which not only restrict the plain and simple application of the statute but also create vacuum leaving no provision in respect to age of retirement of teachers of recognized, unaided non-government institutions relegating them to the mercy of the management, particularly, when there is no compulsion to take such a view from a bare reading of statute itself.

The Cardinal rule of construction is to find out the intention of the legislature in the words used by the legislature itself. The Court, in order to find out the intention of the statute framing authority must look into the statute itself without any assistance from any other external factor unless there is some doubt or ambiguity in the construction of the statute itself. It would be appropriate to remind in the words of Lord Brougham in ***Robert Wigram Crawford V.Richard Spooner [4 MIA 179 (187) (PC)]***- "If the Legislature did intend that which it has not expressed clearly, much more, if the I.egislature intended some thing very different, if the I.egislature intended pretty nearly the opposite of what is said, it is not for judges to invent something, which they do not meet within the words of the text (aiding their construction of the text always, of course, by the contest).

13. The Apex Court in ***S. Gurmej Singh Vs.. Sardar Pratap Singh Kairon [AIR 1960 SC 122 (128)]*** also held that "the Courts are not to busy themselves with 'supposed intention' or with 'the policy underlying the statute'. But must construe the statute from plain meaning of the words used therein. In ***Aron Soloman Vs A.Soloman & Co. Ltd. [(1897) AC 22 (38) (HL)]***, Lord Watson observed- "In a court of law or equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." The aforesaid passage has been quoted with approval by the Apex Court in ***R.L. Arora Vs. State of Uttar Pradesh [AIR 1964 SC 1230 (1244)], Shahdara (Delhi) Saharanpur Light Railway Co. Ltd. Vs. Workers Union [AIR 1969 SC 513 (759)], Hansraj Gordhandas Vs H.H. Dave [AIR 1970 SC 755 (759)], Sri Umed Vs. Raj Singh [AIR, 1975 SC 43 (63/64)], Commissioner of Sales Tax, U. P, Vs. Super Cotton Bowl Refilling Works [AIR 1989 SC 922 (930)]. State of Madhya Pradesh Vs. G.S. Ball and Flour Mills [AIR 1991 SC 772 (785)] and Harbhajan Singh Vs. Press Council of India [AIR 2002 SC 1351 (1356)].***

14. No doubt, in case of any doubt, if it arises from a bare reading of statute about the correct intention of the legislature or if the plain meaning of the statute results in some such consequences, which the legislature could not have intended or for any other similar reason, it is permissible to look for external aid, namely, statement of objects and reason,

attending circumstances before enactment of the statute and other- relevant materials, but where there is no ambiguity at all whatsoever and the meaning of the statue is clear and simple there is no requirement of any such assistance. In my opinion, it would not be appropriate to restrict the normal extent and application of the statute by referring to attending circumstances or notings or executive letters which are claimed to be the reason for such enactment

15. The rules of interpretation are not rules of laws and are not to be followed like the rules enacted by legislature in an Interpretation Act as observed by the Apex Court in ***Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Corporation of Calcutta [AIR 1967 SC 997]***. The principles for interpretation serve only as a guide.

16. In all the cases relied by learned counsel for the respondents, the Courts have clearly said that in case of doubt or ambiguity, the external aid may be looked into and the intention of the legislature may be discern there from However, in none of the case, it has been stated that if the statue is otherwise clear from a plain and simple reading thereof, still by taking recourse to external material, its extent and application should be or can be narrowed down.

17. Regulations 21 Chapter III as it enacted provided the age of superannuation of the teachers and staff of a recognized institution whether aided or unaided. Earlier the age of retirement was 58 years, which was subsequently enhanced to 60 years. By notification- dated 6.1.2005, the entire Regulation 21 Chapter III has been amended by substitution and the age of superannuation has been increased to 62 years. It may be that for increasing the age of superannuation, the State Government might have impelled to increase the age by taking in to account the case of recognized aided non government institutions, but in the actual amendment made in the Regulation, it has not restricted the amended provision to a particular set of teachers or staff, but the entire provision has been amended without using any word suggesting restricted application.

18. As noticed above, the amendment by substitution has the effect of wiping out the earlier Regulation 21 Chapter III from statute and adding a new provision. Admittedly, the earlier provision prescribed age of retirement for teachers and other staff of all recognized institution whether aided or unaided. If the manner in which learned counsel for the respondents has suggested the interpretation of amended Regulation 21 of Chapter III is accepted, it would result as if there is no age of retirement for the teachers and staff of recognized unaided institutions meaning thereby either they would continue to serve irrespective of any restriction of age of retirement or their continuance in service would depend upon the sweet will of the management. Reason for omitting statutory provision providing age of retirement of recognized unaided institution is also not understandable. The Court has no reason to believe that the State Government intended not to provide any age of retirement for the staff of recognized unaided non-government institutions. It is well settled that a *casus omtissus* cannot be supplied by the Court. There is no

presumption that a *casus omissus* exists and language permitting the Court should avoid creating a *casus omissus* where there is none. It would be appropriate to recollect the observations of Devlin, L.J. in ***Gladstone Vs. Bower [(1960) 3 All ER 353(CA)]***-"The court will always allow the intention of a statute to override the defects of wording but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for *casus omissus*.

19. Apex Court in ***Bangalore Water Supply Vs.. Rajappa [AIR 1978 SC 548 (561)]*** quoted with approval the following observation of Lord Simonds in the case of ***Magor & St.. Mellons R.D.C Vs. Newport Corporation [(1951) 2 All ER 839 (841)]-***

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited."

20. It would be appropriate at this stage to remind another principle that a Court cannot supply a real *casus omissus*, it is equally evident that it should not so interpret a statue as to create *casus omissus* when there is really none. Therefore, the general proposition laid down in the various judgments sought to be relied by the learned counsel for the respondents admits no doubt but, in my view, the said principles have no application in the case in hand, since, the Regulation 21 Chapter III as amended by notification dated 6.1.2005 admits no ambiguity, doubt etc and, therefore, it does not require any external aid for interpretation for the extent of its application to the concerned persons.

21. In this view of the matter, I am clearly of the view that Regulation 21 Chapter III as amended by notification dated 6.1.2005 is applicable to Teachers, Principles and Head Masters of all recognized institutions whether aided or unaided and otherwise contention of the learned counsel for the respondents is, therefore rejected.

22. Once it is found that Regulation 21 Chapter III as amended by notification-dated 6.1.2005 is applicable to a recognized unaided non-government institution rest of the matter is already covered by the various earlier judgments of this Court providing that the teachers of recognized educational institutions of the respondents are also governed by the Regulations framed under Intermediate Education Act, 1921 including provision regarding age of retirement, subject of course, to the decisions of the Court in the pending Special Appeals

23. In the result the writ petition is allowed. The impugned notice dated 12.1.2004 communicating the petitioners regarding their retirement on attaining the age of 58 years is quashed and the respondents are directed to permit the petitioners to continue in service in accordance with Regulation 21 Chapter III of the Regulations framed under Intermediate Education Act. 1921 as amended by notification dated 6.1.2005.

There shall he no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2006

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 30697 of 2006

Smt. Savitri Devi and others ...Tenant/ Petitioners
Versus
Chandra Dhar Mishra ...Landlord/ Respondents

Counsel for the Petitioners:
Sri O.P. Singh

Counsel for the Respondent:
Sri A.K. Mehrotra

U.P. Urban Building (Regulation of letting Rent & Eviction) Act, 1972- Section 21 (1) release application-bonafide need established-during pendancy of release application-No effort made by tenant for searching alternate accommodation-concurrent finding of facts recorded by courts blow-No illegality or infirmity shown-can not be interfered by writ court.

Held: Para 16 & 20

Thus, it is evident that the Prescribed Authority as well as the appellate Court have recorded concurrent findings of fact, which are neither perverse nor irrational. The Courts below have considered each and every aspect of the case while releasing the accommodation, in dispute, in favour of the respondent-landlord.

The concurrent findings of facts recorded by the Court below do not suffer from any illegality or infirmity requiring interference by this Court under Article 226 of the Constitution.

Case law discussed:
UPRJ-208?, 1983 ARC-416, 1979 ARC-212, 1989 UPRJ-485, AIR 1984 (1) 347, 1984 ARC (1)-239, 1978 ARC-314, 1976 ARC-328, 2003 (6) SCC-675, 2004 (1) ARC-613, 1999 (1) ARC-324, 2006 (1) ARC-588

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

1. The petitioners have challenged the validity and correctness of judgments and orders dated 17..2.2004 and 4.5.2006 (appended as Annexures 3 and 4 respectively to the writ petition) passed by Prescribed Authority/Additional Civil Judge (Senior Division) Court no. 2 and Additional District Judge/Special Judge (S.C./S.T. Act) Kanpur Nagar respectively.

2. The dispute giving rise to the instant writ petition relates to accommodation under the tenancy of the petitioners on a monthly rent of Rs.100/-, consisting of five rooms, kitchen, varandah, court-yard, laterine/bathroom situated on the first floor of premises no. 108/27-A, Lenin Park, P. Road, Kanpur Nagar.

3. Respondent-landlord moved release application under Section 21(1)(a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "the Act'), which was registered as case no. 45 of 1997. It was alleged in the release application that Sri Allu Mal and Sri Daya Ram were joint tenants of the premises, in dispute since 1960. On the death of Sri Allu Mal, who had shifted to Gauhati in 1960, Sri Ganga Ram son of Late Sri Daya Ram, predecessor-in-interest of the petitioners inherited the tenancy.

Respondent-landlord was living in the second floor of premises no. 106/261-B two rooms, kitchen and latrine/bathroom. On the basis of oral family settlement, house no. 106/261-B, Gandhi Nagar, Kanpur Nagar came to the share of Dr. Kala Dhar Mihsra and the premises, in dispute, i.e., House no. 108/27-A Lenin Park, P. Road, Kanpur Nagar fell in the share of the respondent-landlord. Sri Kela Dhar Mishra, brother of the respondent-landlord served the tenant with a notice dated 30.8.1995 to vacate as the premises-in-dispute was urgently required by him.

4. Release application was contested by the petitioners by filing joint written statement denying the allegations contained therein, inter alia, that the landlord has no genuine or bona fide need of the accommodation-in- dispute as he was co-owner of premises no. 106/261-B Gandhi Nagar, Kanpur Nagar where he he together with his family members was comfortably residing; that separate no. 167 dated 24.8.1992 was allotted to the landlord in the property at Gandhi Nagar, which was concealed by him; that the oral family settlement dated 2.2.1981 was not only collusive but was made with a ulterior motive to oust the petitioners from the premises-in-dispute; and three rooms and a varandah were got vacated from one tenant M/s Vineet Printing Press by the landlord, who is in possession of 8 rooms, five of them remain unused.

5. Release Application was allowed by the Prescribed Authority/Additional Civil Judge (Senior Division) Court No. 2, Kanur Nagar vide judgment and decree dated 17.2.2004 with a direction to the petitioners to vacate the accommodation-in-dispute within three months from the date of decree.

Gandhi Nagar, Kanpur Nagar consiting

6. Aggrieved, the petitioners preferred Rent Appeal No. 28 of 2004 before the District Judge, Kanpur Nagar, which was transferred to the Court of Additional District Judge/Special Judge (S.C./S.T Act), Kanpur Nagar. After hearing the parties and considering the material available on record, the appeal was ultimately dismissed vide judgment and order dated 4.5.2006 and hence this writ petition.

7. Counsel for the petitioners contended that the finding recorded by the learned lower appellate Court that written statement of the petitioners was barred by explanation (i) of Section 21(1)(a) of the Act is perverse as the Courts below have not recorded any finding on the specific plea of the petitioners that S/Sri Teju Mal Singhani, Kishan Lal Singhani and Arjun Das Singhani were not dependents of the petitioners and late Ganga Ram as while considering the parallel provision of Section 12(3) of the Act, Hon'ble the Supreme Court has held that the alternate accommodation acquired by any other member of the family cannot be taken into consideration until and unless it is found that such family members were dependent upon the sitting tenant. He submitted that there was sufficient evidence on record that the alleged family settlement of the respondent-landlord was nothing but a device to eject the petitioners in its garb. He also argued that the Courts below have neither considered the bona fide and genuine need of the petitioners nor considered the question of comparative hardship of the petitioners, as such, the impugned judgments are not sustainable in the eye of law and are liable

to be quashed. He urged that the Courts below totally ignored the report and map of Vakil Commissioner in respect of three houses of the respondent-landlord which clarifies that the landlord has got eight rooms in the basement-cum-ground floor of the premises-in-dispute.

8. He further urged that on the one hand, the Prescribed Authority held that explanation (i) of Section 21(1)(a) of the Act is not applicable to the present case and case has to be decided on the basis of bona fide need and hardship, and on the other, it has not recorded any specific finding about the comparative hardship. He lastly urged that the Courts below have neither decided comparative hardship nor the bona fide need and have completely ignored the report of the Advocate Commission about the accommodation of the landlord. It is submitted that the Courts below have not considered the factum of non-availability of any other accommodation to the petitioners in Kanpur Nagar and the fact that the respondent-landlord has other properties in Kanpur Nagar.

9. In support of his contentions, counsel for the petitioners placed reliance upon the decisions in ***Ratan Lal and another V. Prescribed Authority-cum-Munsif Saharanur and others***-U.P.R.J-208; ***Ram Babu and others V. Additional District Judge and others***-1983(II)ARC-416; ***Ram Nath V. District Judge Varanasi***- ARC 1979-212; ***Alok Brothers (Tea)Pvt. Ltd. Kanpur Vs. VIIIth Additional District Judge, Kanpur Nagar and others***-1989 U.P.R.J-485; ***Rajeshwari Prasad V. Fateh Bahadur Chaturvedi and others*** ARC 1984(1)-347; ***Ved Prakash and others V. VIth Additional District Judge Bulandshahr and others***- ARC 1984(I)-239 and ***Tilak Ram Vs. The District Judge, Meerut and others***- 1978 ARC - 314.

10. Per contra, counsel for the respondent-landlord raised a preliminary objection that the writ petition is liable to be dismissed for non-joinder of necessary parties. He submitted that the persons who inherited the tenancy of the accommodation-in-dispute on the death of late Sri Ganga Ram were residing together at the time of death of late Sri Ganga Ram in the property-in-dispute have not been impleaded. Admittedly, Sri Nari was residing as tenant in the accommodation, in dispute, but he has not filed the writ petition. He urged that Sri Prakash, petitioner no. 5 has acquired another accommodation during the pendency of the release application, in the same city, the petitioners being joint tenants, can easily shift to the alternate accommodation, acquired by petitioner no. 5 and they have no legal right to oppose the release application. He vehemently urged that both the Courts below have recorded clear finding of fact on the question of bona fide need and comparative hardship in favour of the landlord, there is no illegality or infirmity in the impugned judgments and the writ petition deserves to be dismissed.

Conclusions:

11. I have given thoughtful considerations to the respective arguments advanced by counsels for the parties and perused the record.

Adverting to the case laws cited by counsel for the petitioners, case of ***Ratan Lal and another*** (supra) is on the issue of comparative hardship wherein this Court has held that Rule 16(2)(b) of the U.P.

Urban Buildings (Regulation of Letting, Rent and Eviction) Rules 1972 clearly prescribes that one of such factors is whether the tenant has available with him suitable accommodation to which he could shift his business without substantial loss, there shall be greater justification for allowing the application. In the instant case, both the Courts below have recorded concurrent finding of fact that the tenants have alternate accommodation available with them, as such, this decision does not help the petitioners.

12. In ***Ram Babu and others*** (supra) this Court, on the facts and in the circumstances of that case, held that under Section 21(1)(a) of the Act. The question of hardship is consequential finding. In that case the finding in regard to bona fide need was found to be vitiated in law and that the finding of fact by passing the on relevant consideration or material is not a finding of fact. In the instant case, after discussing the entire evidence, available on record, both the Courts below have arrived to the conclusion that the need of the landlord is bona fide and his comparative hardship is greater than the petitioners, this decision also does not support the case of the petitioners. So far as the decision in ***Ram Nath*** (supra) is concerned, the Court on the own peculiar facts and circumstances of that case, held that the question of bona fide and relative hardship were without ascertaining the actual accommodation available to the landlady. This decision is also of no help to the petitioners as the Courts below have ascertained the actual accommodation available to the landlord and it does not lay down any general rule of law. As regards the decision in ***Alok Brothers (Tea)Pvt. Ltd. Kanpur*** (supra), counsel for the petitioners has placed implicit reliance in paragraph 4 of the said decision, wherein relying upon decision of Full Bench of this Court in ***Chandra Kumar Sha V. The District Judge***-A.I.R. 1976 Allahabad-328, it was held that :-

""Bona fide' means genuinely or in good faith with no intention to deceive. Thus, if the landlord comes to the Court without being actuated by an ulterior motive or if his need is not based on a fanciful whim, it may be deemed to be bona fide. On an ultimate analysis of the case law on the point, therefore, bona fide requirement of the landlord must be considered on the above broad principles subject, however, to special circumstances of each case. The court must invariably consider the nature of the need set up by the landlord in the light of the surrounding circumstances whether the landlord really needs the accommodation for the required purpose having regard to the suitability of that accommodation for the said purpose."

13. In the instant case, petitioners have not proved that the case of bona-fide need has been set up by the respondent-landlord with mal intention to deceive, as such, this decision also does not apply to the facts and circumstances of the instant case. In so far as decision ***Rajeshwari Prasad*** (supra) is concerned, on the peculiar facts and circumstances of that case, this Court directed the Courts below to re-determine the question of greater hardship, which will happen to the parties on account of rejection or allowing of the application. It was further held that the question of genuineness of the need of the landlord will not be re-heard. In the case on hand, the Courts below have already considered and decided question of

hardship, as such, the petitioners are not benefited by this decision as well. In ***Ved Prakash and others*** (supra), this Court considered the words "bona fide and comparative hardship' and held that if finding on bona fide need and comparative hardship is given on the basis of wrong approach, ignoring the evidence on record and without considering the suitability of suggested alternative accommodation, it cannot be sustained and in ***Tilak Ram*** (supra), it was held by this Court that comparison of hardships of landlord and tenant is necessary under amendment of Rule 16 of the Rules framed under the Act by U.P. Act No. 28 of 1976. As already stated above, the concurrent finding of fact on the issue of bona fide need and comparative hardship recorded by the Courts below being just, apt and proper, these decisions do not support the case of the petitioners.

14. The Courts below have arrived at a conclusion on the basis of evidence on record that all family members of late Sri Ganga Ram were residing together at the time of his death and opposite party no. 8 had acquired alternate accommodation in Kanpur Nagar itself during the pendency of release application. The relevant finding, in this regard, recorded by the Prescribed Authority, is as under:-

" प्रार्थी व्दारा लिये गये आधार के अनुसार श्री गंगाराम की मृत्यु के बाद विपक्षीगण बतौर वारिस प्रश्नगत भाग के किरायेदार हुए । प्रार्थी को विपक्षीगण के किरायेदारी वाले भाग की सदभाविक तीव्र एवं उचित आवश्यकता है । विपक्षी संख्या २ श्री अर्जुनदास सिंघानी प्रश्नगत मकान में निवास नहीं करता है बल्कि वह अपने मकान नं० ८७/१६८ आचार्य नगर कानपुर में निवास करता है । विपक्षी सं० ४ श्री किशनलाल सिंहानी भी अपने मकान नं० १२७/डब्ल्यू १/२६६ साकेत नगर कानपुर में निवास करता है । अतएंव प्रश्नगत मुकदमें में रेन्ट कन्ट्रोल एक्ट सं० १३ सन १६७२ की धारा २१;१ध्द का प्रथम स्पष्टीकरण का प्राविधान प्रभावी है जिसके कारण विपक्षीगण मुकदमें में अपने एतराज प्रस्तुत करनें से अवरोधित है । विपक्षी सं० १, ३, ५, ६, ७, ८ व्दारा अर्जुनदास सिंघानी को परिसर नं० ८७/१६८ आचार्य नगर कानपुर में निवास करना अस्वीकार किया गया है लेकिन कथन किया गया है कि वह प्रश्नगत मकान में नहीं रह रहे हैं बल्कि अलग रह रहे हैं । किशलाला सिंघानी का परिसर नं० १२७/डब्ल्यू १/२६६ साकेत नगर कानपुर में निवास करना स्वीकार किया गया है तथा अग्रिम कथन किया गया है कि उनके प्रश्नगत मकान में निवास न करने व अपना निजी मकान अधिग्रहित किये जाने से अन्य विपक्षीगण पर इसका कोई प्रभाव नहीं पडता है और प्रस्तुत प्रकरण में स्पष्टीकरण नं० १ लागू नहीं होता है ।"

The further finding, recorded by the appellate Court, in this regard, is as under:-

".....;हॉ पर यह उल्लेखनीय है कि विपक्षी सं० १ सावित्री देवी गंगाराम की पत्नी है विपक्षी सं० २ अर्जुनदास सिंधानी विपक्षी सं० ३ रमेश एवं विपक्षी संख्या ४ लगायत विपक्षी सं० ८ गंगाराम के पुत्र हैं । यह भी प्रतीत होता है कि बाद में किशनलाल सिंधानी की भी मृत्यु हो गयी । यहॉ पर यह उल्लेख करना भी उचित होगा कि इन्हीं कारणों से विपक्षी सं० २ अर्जुनदास सिंधानी सं० ४ किशनलाल सिंधानी अपीलार्थीगण व्दारा अपनी अपील में अपने साथ अपीलार्थी के रुप में पक्षकार नहीं बनाया गया है और उन्हें रेस्पान्डेन्ट नं० ३ व ४ के रुप में सम्मिलित किया गया है । अतः यह मान्य तथ्य है कि गंगाराम के लडकों अर्जुनदास एवं किशनलाल सिंधानी विवादित किरायेदारी वाले मकान से अलग अपने लिये मकानों में रह रहे हैं । श्रीमती सावित्री देवी अपीलार्थी नं.१ विपक्षी सं० १ जो गंगाराम की विधवा हैं, के साथ-साथ गंगाराम के उपरोक्तानुसार सात लडके भी वारिसान हुये जो गंगाराम के मृत्यु के समय विवादित मकान में रह रहे थे जिनमें से अर्जुनदास सिंधानी एवं किशनलाल सिंधानी अपने अपने अलग अलग मकान लेकर रह रहे हैं ।"

On the question of bona fide need and comparative hardship, the Prescribed Authority, after consideration of entire material available on record, has recorded that:-

" इस प्रकार उक्त विवेचना से यह स्पष्ट है कि प्रार्थी विभाजन में अपने भाई को प्राप्त भवन संख्या १०६/२६१ बी में उसकी दया में रह रहा है और प्रार्थी के पास विभाजन में प्राप्त प्रश्नगत भवन में शिफट करने के अलावा अन्य कोई विकल्प नहीं है । प्रश्नगत भवन के भूमितल पर प्रार्थी का आर्युवेदिक दवाओं की फार्मेशी, क्लीनिक आदि स्थित है और

आवासीय हेतु कोई रिक्त स्थान नहीं है इसलिए विपक्षीगण को किरायेदारी वाले भाग को प्रार्थी को सदभाविक वास्तविक एवं तीव्रतम आवश्यकता को अस्वीकार नहीं किया जा सकता है । विपक्षी सं० २, ४ व ८ व्दारा अन्य आवास प्राप्त कर लिया गया है इसलिए उन्हें अब कोई कठिनाई नहीं है और विपक्षी नं० ८ की आपत्ति ग्रहण किये जाने योग्य नहीं है । पत्रावली पर ऐसा कोई साक्ष्य उपलब्ध नहीं है जिससे यह प्रतीत हो कि अन्य विपक्षीगण व्दारा दौरान मुकदमा अन्य आवास आवंटन कराने या प्राप्त करने हेतु प्रंयास किया गया है । प्रार्थी के पास अपना निजी मकान होने के कारण उसे अन्य मकान आवंटित नहीं हो सकता है जबकि विपक्षीगण को अन्य मकान आवंटित हो सकता है इसलिये तुलनात्मक कठिनाई भी प्रार्थी के प्क्ष में है । अतः विपक्षीगण के किरायेदारी वाला भाग प्रार्थी के प्क्ष में निर्मुक्त किये जाने का आधार पर्याप्त है A"

Likewise, the appellate Court concurring with the finding of fact recorded by the Prescribed Authority has held that :-

"---- अतःमैं नहीं सकझता हूँ कि जब चन्द्र पूर्ण मिश्रा के पक्ष में बालकृष्ण की किरायेदारी वाला भाग निर्मुक्त किया गया है जब उसका संबंध चन्द्रधर मिश्रा के हिस्से में आये मकान से कहॉ हो जाता है और उसका लाभ अपीलार्थी को कैसे मिलता । यह स्पष्ट नहीं होता । अतः अपीलार्थी के विव्दान अधिवक्ता का यह कहना कि बालकृष्ण की किरायेदारी वाला भाग जो रिक्त हुआ वह प्रार्थी के कब्जे में है सही नहीं लगता । अतः प्रार्थी के व्यवसाय पारिवारिक प्ृष्ठीाूमि परिवार के सदस्यों एवं विवेचित परिस्थितियों में उसकी बोनाफाईड नीड भलीभॉति परिलक्षित होती है ।

१६- अब यह देखना है कि तुलनात्मक परेशानी ; कम्परेटिव हार्डशिप च्च किसे ज्यादा है । इस संबंध में प्रार्थी के परिवार में मान्यरुप में १० सदस्य हैं जिन पर कोई विवाद किसी प्रकार का प्रतीत नहीं होता । इनमें चन्द्रधर मिश्रा स्वंय उनकी पत्नी, उनका एक लडका अश्वनी कुमार एवक उसकी पत्नी व उसके दो बच्चे, प्रार्थी का दूसरा पुत्रा अरबिन्द कुमार उसकी पत्नी एवं उसके दो बच्चे कुल दस सदस्य बताये गये हैं । ----

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--- पूर्व विवेचना से भलीभॉति स्पष्ट है कि अपीलार्थीगण जो गंगाराम के वारिसान के रुप में किरायेदार हैं, में से विपक्षी सं० , ४ व ८ अलग अलग आवासों में रह रहे हैं । अपीलार्थीगण के प्रथम सेट में सावित्राी देवी, नरेश कुमार व नारी सिंधानी बताये गये हैं । नारी सिंधानी की मृत्यु हो चुकी है । व्दितीय सेट में रमेश उसकी पत्नी आशा देवी उसके दो लडके, तृतीय सेट में प्रकाश, उसकी पत्नी एवं उसका एक लडका बताया गया है । पूर्व विवेचना के अनुसार यह प्रकाश याचिका में विपक्षी सं० ८ है, जो विवादित मकान से अलग रहता है । इस संबंध में कागज नं० ५६/२ उसके नाम का टेलीफोन बिल मकान नं० १०६/२७ गॉधीनगर कानपुर का दिखिल है । अतः इस संबंध में अपीलार्थीगण के विरुद्ध पहले ही विवेचना की जा चुकी है, जिसका उन्हें लाभ नहीं मिलता । चौथे सेट में हरीश कुमार सिधानी एवं उसके पत्नी को बताया गया है । यहॉ यह उल्लेख करना भी उचित है कि नरेश कुमार सिंधानी एवं नारी सिंधानी अविवाहित हैं उनकी उम्र काफी है । नारी की मृत्यु हो चुकी है रमेश कुमकार एवं हरीश कुमार भी व्यस्क हैं । अतः वह अपनी मॉ श्रीमती सावित्राी देवी जो स्वंय ७० वर्ष से अधिक की है पर कितने पर निर्भर होंगे, इसका अंदाजा आसानी से लगाया जा सकता है । --- अतः तुलनात्मक परेशानी का जहॉ तक प्रश्न है वह प्रार्थी/ रेस्पान्डेन्ट नं० १ के ही पक्ष में प्रतीत होता है ।"

16. Thus, it is evident that the Prescribed Authority as well as the appellate Court have recorded concurrent findings of fact, which are neither perverse nor irrational. The Courts below have considered each and every aspect of the case while releasing the accommodation, in dispute, in favour of the respondent-landlord.

17. Relying upon its earlier decision in ***Surya Dev Rai V. Ram Chander Rai and others*** -(2003) 6 SCC-675, Hon'ble the Apex Court has held in ***Ranjeet Singh v. Ravi Prakash***- 2004(1) ARC-613 that:-

"... to be amenable to correction in certiorari jurisdiction, the error committed by the Court or Authority on whose judgment the High Court was exercising jurisdiction, should be an error which is self evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long-drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of

supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in ***Surya Dev Rai*** (supra) that the jurisdiction was not available to be exercised for indulging into re-appreciation or evaluation of evidence or correcting the errors in drawing inferences like a Court of appeal. The High Court has itself recorded in its judgment that "considering the evidence on the record carefully' it was inclined not to sustain the judgment of the Appellate Court. On its own showing, the High Court has acted like an appellate Court which was not permissible for it to do under Article 226 or Article 227 of the Constitution."

18. To the same effect is the decision of this Court in ***Smt. Dharamati and others V.Special Judge/Additional District Judge, Ghaziabad and others***- 1999(1) ARC-324, wherein it has been held that findings on bonafide need recorded by the Courts below cannot be interfered with under supervisory jurisdiction of writ by High Court unless found irrational or unreasonable.

19. There is yet another aspect of the case. Even if it is assumed that the need of the tenants is pressing, the fact cannot be overlooked that the release application was filed by the landlord way back in 1997. Almost a decade has passed by the petitioners have made no effort to search out alternate accommodation. Recently, this Court in ***Salim Khan V. IVth Adl. District Judge, Jhansi and others***- 2006(1) ARC-588 relying upon the decision of Hon'ble the Apex Court in ***Bhutada V. G.R. Mundada***- A.I.R. 2003 SC-2713 held that the fact that tenants did not show what efforts they made to search alternate accommodation after filing of release application was sufficient to tilt the balance of hardship against them.

20. The concurrent findings of facts recorded by the Court below do not suffer from any illegality or infirmity requiring interference by this Court under Article 226 of the Constitution.

21. For the reasons stated above, the writ petition fails and is dismissed. The petitioners shall vacate the accommodation, in dispute, within two months from today, failing which, they shall be evicted from the accommodation, in dispute, by coercive process, in accordance with law with the aid of local Police. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2006

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.54684 of 2005

Ayodhya Rai and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri M.P. Gupta

Counsel for the Respondents:
Sri D.P. Singh
Sri N. Misra
C.S.C.

(A) U.P. Primary Agriculture Credit Cooperative Societies Centralized Service Regulations-1976-Regulation 59 (f) suspension of secretary working with Primary Societies-order passed by District Magistrate working as Administrator-whether the suspension

order by the officer other than District Administrative Committee is bad in law? Held: Para 22

In view of the law laid down by the Full Bench in Ram Chandra Pandey (Supra), it cannot be held that the District Administrative Committee is not competent to suspend a member of centralized service without prior approval of the Assistant Registrar. On the contrary the law is that the District Administrative Committee is fully competent to suspend a member of centralized service under the provision of Rule 59(f). All the judgments, which lay down any law contrary have been over ruled in Ram Chandra Pandey (Supra). Therefore, the first submission of the learned counsel for the petitioner is rejected.

(B) U.P. Primary Agriculture Credit Cooperative Societies Centralized Service Rules 1976-Rule-13 read with U.P. Primary Agriculture Credit Cooperative Societies Centralized Service Regulation 1978-Regu.-59 (f)-Prior approval-suspension of secretary of Primary Cooperative Societies-by the Assistant Administrative Committee on by the officer authorized-without prior approval of the Asstt. Registrar-whether can be ground to challenge the validity of it? held-'No'.

Held: Para 16

A cumulative reading of Rule I3 of 1976 Rules and Regulations 59 (1) (f) of 1978, Regulations, makes it clear that the power of suspension is to be exercised by District Committee itself or any officer authorised for the purpose. There is no requirement of seeking prior approval from the Assistant Registrar.

Case law discussed:

1991 (2) UPLBEC 1306, 1991 (2) UPLBEC-1166, 1982 UPLBEC-611, 1997 (3) UPLBEC-1747, 2001 (3) UPLBEC-2057, 1997 (3) ESC-1833, 2004 (3) UPLBEC-2934, 2003 (1) UPLBEC-780

Held-'No'.

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

1. The petitioners eight in numbers have approached this Court by means of the present writ petition under Article 226 of the Constitution of India, assailing the orders dated 13.1.2005 and 23.2.2005 placing the petitioners under suspension in a contemplated enquiry.

2. All the petitioners are working as Secretaries in various Primary Agriculture Credit Cooperative Societies. Their service conditions are governed by the U.P. Primary Agriculture Credit Cooperative Societies, Centralized Service Rules, 1976 (hereinafter referred to as 1976 Rules) and U.P. Primary Agriculture Credit Cooperative Societies Centralized Service Regulations, 1978 (hereinafter referred to as 1978 Regulations). The petitioners claim that they were not paid salary since November 2002 causing serious financial crisis and difficulty to them for managing their affairs and family liabilities. They approached the higher authorities time and again, but the same was not attended at all. Thereafter, the Union of Secretaries of Primary Agriculture Credit Cooperative Societies resolved to proceed on strike w.e.f. 7th January 2005 to press their demand including' payment of salary and ultimately they went on strike. All the petitioners claimed to be the office bearers of their Union and it is averred that the higher authorities got annoyed from the petitioners strike which they had resorted to press their demand with respect to payment of salary, and in furtherance of annoyance, the respondent

No. 4 issued a circular dated 11.1.2005 notifying that since the elections of Cooperative Societies are to be held on 16th and 17th of January 2005, therefore, all the Secretaries, In-charge, Directors, and other employees of various Cooperative Societies are to ensure their presence for smooth conduct of election and ensure working of the office on 15t\ 16th and 17th January 2005.

3. The Government declared strike illegal under Section 3 (]) of Maintenance of Essential Service Act, 1966. The Assistant District Registrar Cooperative Societies, Ghazipur, also issued notice dated 11.1.2005 to the petitioners stating that they have withdrawn salary directly from Cash book in the month of October and November 2004, although the salary could have been received from the Management's Expense Account after sanction of salary bill by the Chairman, but in an illegal manner it was withdrawn from the funds of the Cooperative Societies. Consequently, the petitioners were directed to refund and deposit the entire amount in bank within a period of three days from the date of the receipt of letter dated 11.1.2005 and to ensure receipt of salary only from the management's Expense Account. It also said that in case of non-deposit of the amount, illegally withdrawn by the petitioners, action in accordance with Rules shall be taken against the petitioners

4. It is, further stated by the petitioners that they had drawn salary after preparing pay bills and after having resolutions passed by the concerned Committee of Management. There was no irregularity on the part of the petitioners in withdrawal of the aforesaid amount towards their salary and hence there was no occasion for the petitioners to refund the aforesaid amount. The petitioners submitted their reply vide representation dated 25.1.2005 explaining the aforesaid facts to the District Assistant Registrar, Cooperative Societies, Ghazipur.

5. However, by means of the impugned orders dated 13.1.2005 and 23.2.2005 all the petitioners have been placed under suspension therefore, the present writ petition has been filed.

6. A counter affidavit has been filed on behalf of respondent Nos. 2 and 3 wherein it has been stated that prior to the 11th Amendment of 1976 Rules, published on 4th June 2003, the Secretary of the Primary Agriculture Credit Cooperative Society was entitled to draw salary from the bank but under the aforesaid amendment, it was provided that the salary shall be paid by the Society where such Secretary is posted. By 12th Amendment of 1976 Rules, published on 30th June 2004, it has also been provided that the post of Secretary of Primary Agriculture Cooperative Credit Societies is not transferable. In order to make provision for payment of salary to the Secretary each Primary Society has to maintain a separate account under the head of "Prabandh Evam Vikas Nidhi" in each District Cooperative Bank and a prescribed amount would be deposited by the concerned Society in the aforesaid account towards margin money for managerial expenditure. The Secretary of the said Society is liable to be paid his salary from the aforesaid account only and that too by depositing his salary cheque in the concerned branch of the District Cooperative Bank. Under no circumstance a Secretary is entitled or

permitted to withdraw salary directly from the funds of the society and to adjust the same towards his wages. In the present case, all the petitioners resorted to this illegal and unauthorized procedure by withdrawing their salary in cash directly from the funds of the Society itself, which was not permissible, and therefore, they were required to deposit the aforesaid amount. Since the petitioners defied and disobeyed the orders of the superior authority and also were guilty of wrongful withdrawal and retention of Society funds, hence, in contemplation of disciplinary enquiry, the petitioners have been placed under suspension by the District Administrative Committee i.e. District Magistrate, Ghazipur, who was holding the office of the Administrator of the Society and therefore, was entitled to discharge functions of the committee of the Management of the Society.

7. It is also stated that since the State Government declared strike illegal, the petitioners were bound to report for duty and since they did not submit their joining, the District Administrative Committee resolved on 19.2.2005 (Annexure No. CA-2), to place the petitioners under suspension and pursuant thereto, the suspension order has been communicated to the petitioners by the Secretary of the Committee. The order of suspension was issued after approval of the District Magistrate who is the Administrator of the Society and therefore, there is no error in the order impugned in the writ petition.

8. The respondents have also stated that under Regulations 59 (g) of 1978 Regulations, the petitioners have a statutory remedy of appeal, which has not been availed by them; therefore, this writ petition is liable to be dismissed. It is, also stated that in respect to the petitioners Nos. 3 and 7, charge sheet has already been issued and in respect to other petitioners, it is in process.

9. No rejoinder affidavit has been filed by the petitioners nor any request was made for time to file rejoinder affidavit. The learned counsel for the petitioners urged that since the matter is pending since long and the petitioners are under suspension, the Hon'ble Court may hear the matter finally at the time of admission itself. The learned counsel for the respondents has no objection to the aforesaid request, and therefore, with the consent of the parties, the writ petition is finally heard and is being decided under the Rules of the Court at the admission stage.

10. The learned counsel for the petitioners advanced the following submissions:-

(i) Under Rule 14 (V), the Member Secretary of the District Administrative Committee has power to place a Member of Centralized Service under suspension with the prior concurrence of Assistant Registrar. It is, submitted that the impugned order of suspension having been issued by the Member Secretary of the District Committee but there is no prior concurrence of Assistant Registrar before issuance of the impugned order of suspension, and therefore, the same is illegal and without jurisdiction.

(ii) The orders of suspension nowhere mentions that the same has been issued either in a contemplated disciplinary enquiry or in a pending

enquiry, and therefore, the order of suspension is vitiated in law. Unless there is a disciplinary enquiry contemplated or pending, the petitioners could not have been suspended. Reliance has been placed on the judgments of this Court in **Mewa Ram Bharti Vs. District Administrative Committee and ors 1991 (2) UPLBEC 1306, and Abdul Rauf Vs. District Administrative Committee and ors 1991 (2) UPLBEC 1166;**

(iii) The orders of suspension have been passed on 13.1.2005 and 23.1.2005 but except the petitioner Nos. 3 and 7, in respect to other petitioners, no charge sheet has been issued and this shows that the impugned orders of suspension are arbitrary and penal in nature;

(iv) The disciplinary enquiry is required to be completed within a period of six months under law but since even charge sheet has not been issued, there is no occasion to complete the disciplinary enquiry within six months itself by respect to the petitioner Nos. 3 and 7 also, the disciplinary proceedings have not been completed so far, therefore, the continuance of suspension for such a long time is illegal and arbitrary.

11. The learned counsel for the respondents however refuted all these contentions and submitted that suspension of the petitioners needs no interference.

12. Heard learned counsel for the parties and perused the record.

Rule 13 of 1976 Rules confers power upon the District Committee to exercise control and supervision over the members of the district and to perform such other duties and functions, as may be entrusted by the Authority or Regional Committee.

13. In the present case, the power of suspension has been exercised by the District Magistrate in his capacity as Administrator of the Society and therefore, he was entitled to discharge all functions which the Society or Committee of Management could have performed, and the Secretary has only communicated the said decision to the petitioners. The contention of the petitioners that the Secretary has suspended them is therefore incorrect and contrary to the record. This is evident from the suspension order itself. The relevant extract showing that the Member Secretary has only communicated the order of the District Magistrate of placing the petitioners under suspension is reproduced from one of the suspension order as under: -

"यतः जिला सहायक निबन्धक सह०स०उ०प्र० गाजीपुर की प्रथम दृष्टया रिपोर्ट दिनांक १२-१-२००५ के आधार पर श्री अयोध्या राय सचिव, सा० सहकारी समिति हुसेनपुर वि०ख० सदर द्वारा दिनांक ६-१-२००५ की समिति के निर्वाचन हेतु मतदाता सूची न दिये जाने के कारण नामांकन कार्य सम्पन्न न होने का तथ्य प्रकाश में आया है जिसे उ०प्र० सहकारी समिति नियमावली १९६८ के नियम सं० ३६८ (६) के अन्तर्गत मतदाता सूची तैयार करने में विफल रहने को अपराध मानते हुये जिलाधिकारी/महोदय के गाजीपुर के पत्रांक १४५५/६-सह०/अधि०/०४-०५ दिनांक १२-१-२००५ द्वारा श्री अयोध्या राय उक्त को सेवा से निलम्बित करने का निर्देश प्राप्त है।"

14. Regulations, 1978 have been framed by the State Cadre Authority under Rule 7 of 1976, Rules with the prior approval of the Registrar.

15. Regulations 59 (f) confers power upon the District Committee or any other Officer authorized for the purpose to place a member of Centralized Service other than one who is on deputation, to

place him under suspension, in certain circumstances, prescribed thereunder: Regulations 59 1(a) and (f) is produced as under:-

59. <u>Disciplinary proceedings</u>:--

(1) (a). "The disciplinary proceedings against a member shall be conducted by the Inquiring Officer referred to in clause (b) below with due observance of the principles of natural justice for which it shall be necessary that;

.....

(f). A member other than one referred to in clause (e) above may be placed under suspension by the District Committee or any other officer authorized for the purpose in the following circumstances;
(i) then the said authority is satisfied that a prima facie case exists, which is likely to result in the removal, dismissal or reduction in rank of the member.
(ii). when an Inquiry into his conduct is immediately contemplated or is pending and his further continuance on his post is considered detrimental to the interest of the society or the authority;
(iii). when a complaint against him of any criminal offence is under police investigation for which he has been arrested or he is undergoing trial in a court of law for an offence under the Indian Penal Code, U.P. Co-operative Societies Act, 1965 or any other Act or charges have been proved against him by a Criminal Court:

Provided that during suspension the member shall be entitled to a subsistence allowance equal to one third of his pay:

Provided further that a member who is under suspension on the date of coming into force of these regulations shall continue to draw such proportion of his pay and such allowance as he was allowed to draw for the period of suspension:

Provided also that no payment of the subsistence allowance shall he made unless the member has furnished a certificate and the authority passing the order of suspension is satisfied that the member was not engaged in any other employment, business, profession or vocation and had not earned remuneration therefore during the period of his suspension;
(iv). If the period of suspension extends beyond six months for no fault of the member concerned, the subsistence allowance shall be increased to half of his pay.
(v) when a member is reinstated the authority competent to order the reinstatement shall make specific order regarding pay and allowances to he paid for the period of suspension and whether or not the said period shall be treated as a period spent on duty:

Provided that where the authority passing the order of reinstatement is of the opinion that the member has been fully exonerated or the suspension was wholly unjustified, the member shall be given the full pay and allowance to which he would have been entitled, had he not been suspended."

16. A cumulative reading of Rule I3 of 1976 Rules and Regulations 59 (1) (f) of 1978, Regulations, makes it clear that the power of suspension is to be exercised by District Committee itself or any officer authorised for the purpose. There is no requirement of seeking prior approval from the Assistant Registrar.

17. The learned counsel for the petitioners has placed reliance in support

of his submission that the District Administrative Committee could not have exercised the power of suspension without prior concurrence of the Assistant Registrar upon a Division Bench judgment of this Court in the case of **Giriwar Prasad Tripathi Vs. District Assistant Registrar Cooperative Societies and ors, 1982 UPLBEC 611**. Rule 13 (3) of 1997 Rules empowers a Chairman to suspend a member of centralized service with prior concurrence of Assistant Registrar. Rule 14 empowers the Member Secretary of the District Administrative Committee to suspend a member of centralized service. However, Regulation 59 of 1978 Regulations empowers the District Administrative Committee or any other officer authorized for the purpose to suspend a member in certain circumstance. Exfacie all the provisions travel on different fields. In Giriwar Prasad Tripathi (supra), this Court noticed the aforesaid position as apparent from the following observations in para 3 of the judgment:

"Such different intention will be clearly inferred from the specific provision.,· contained in Rules 13 and 14 where he power of suspension in one case has been given to the Chairman to be exercised with the prior concurrence of the Assistant Registrar and in the other case, the Member Secretary will also exercise the power subject to the same condition of concurrence of the Assistant Registrar. All these provision; indicate a different intention and therefore, it cannot be said that the appointing authority could still exercise the powers of suspension even in the face of specific provisions in different terms in the same rules, namely, rules 13 and 14." (emphasis added).

18. Again this Court noticed difference In power of District Administrative Committee under Regulation 59 (f) in para 4 of the judgment:-

"Moreover, the power under regulation 59 (f) is to be exercised by the District Committee only in certain circumstances, one of them being where the authority is satisfied that a prima facie case exists which is likely to result in the removal, dismissal or reduction in rank of member, and secondly, whether an enquiry into the conduct is immediately contemplated or is pending."

19. Case of **Giriwar Prasad Tripathi (supra)** was decided on the basis of the language of suspension order showing that the circumstances contemplated under Regulation 59(f) were not satisfied and therefore, the suspension order could not have been justified under Regulation 59 (f).

20. However, the matter does not rest here. It appears that the aforesaid provisions were interpreted by this Court in different manner in various cases resulting In conflicting decisions. Noticing this situation the matter was referred by a Division Bench in **Ram Chandra Pandey Vs. District Administrative Committee and others-(I997) 3 UPLBEC 1747**, to consider the entire issue by a larger bench in order to resolve the issue of power of suspension and the procedure of suspension under the aforesaid provisions. Consequently, the Full Bench considered the following questions in **Ram Chandra Pandey (Supra).**

(i) "whether prior concurrence of the Assistant Registrar is a condition precedent for suspending a member of the centralized service even if the order of suspension has been passed by a Member Secretary of the District Committee, who himself is the Assistant Registrar?

(ii) whether the District Committee can suspend a member of the centralized service?

(iii) whether Member Secretary of District Committee, while suspending a member of the centralized service, can appoint an inquiry officer to hold inquiry into the conduct the Member and to .submit his report?

(iv) Whether the impugned orders of suspension are illegal and without jurisdiction? "

21. After analyzing the relevant provisions and relevant case laws, the Full Bench answered the aforesaid questions in para 16 of the judgment in **Ram Chandra Pandey (Supra),** which is reproduced as under-

"Our answer to the questions referred to the before are as under

(i) "The Member Secretary can suspend a member of the centralized service under Regulation 59 (1)(f)(i) in the absence of a decision of he District Committee. Similarly, he can suspend a member under Regulation 59 (1)(f)(iii) without any decision of the District Committee. But a member of the service cannot be suspended by the Member Secretary under Regulation 59 (1)(f)(ii) in the absence of a decision by the District Committee contemplating or initiating disciplinary inquiry. The decisions of this Court taking the view contrary to what is contained in this judgment stand over-ruled.

(ii) When the District Assistant Registrar is himself a Member Secretary of the District Committee, he can suspend a member of the centralized service without any concurrence of Assistant Registrar. In such a case the provisions requiring the prior concurrence of the Assistant Registrar stand dispensed with.

(iii) The District Committee is fully competent to suspend a member of the centralized service.

(iv) The Member Secretary cannot appoint an inquiry officer to conduct the disciplinary proceedings in the absence of decision of the District Committee initiating or contemplating the disciplinary proceedings.

(v) The impugned orders of suspension are illegal and cannot he sustained "

22. In view of the law laid down by the Full Bench in **Ram Chandra Pandey (Supra),** it cannot be held that the District Administrative Committee is not competent to suspend a member of centralized service without prior approval of the Assistant Registrar. On the contrary the law is that the District Administrative Committee is fully competent to suspend a member of centralized service under the provision of Rule 59(f). All the judgments, which lay down any law

contrary have been over ruled in **Ram Chandra Pandey (Supra).** Therefore, the first submission of the learned counsel for the petitioner is rejected.

23. The next contention of learned counsel for the petitioner is that the impugned suspension is vitiated in law since it does not mention either the factum of contemplation of disciplinary proceeding or its pendency. In support of the above submission, reliance has also been placed on a Division Bench judgment in **Mira Tiwari Vs The Chief Medical Officer & others- 2001 (3) UPLBEC 2057**. After careful consideration of the aforesaid submission, I do not find any force in the said contention.

A perusal of suspension orders show that the Assistant District Cooperative Officer, Ghazipur, has been appointed as Enquiry Officer and he has been directed to complete enquiry and submit his report within thirty days. Therefore, a reading of the entire order makes it clear that the suspension of the petitioners has been resorted to in contemplation of a departmental enquiry. There is no requirement of law that in a particular manner the competent authority should mention in the order of suspension that an employee is being suspended in a contemplated enquiry or pending enquiry. If the reading of the entire order discloses that a disciplinary enquiry is contemplated or pending that would be a sufficient-compliance of law and there is no charm in having the order of suspension worded in a particular manner. It cannot be argued if the suspension order does not mention specifically in so may words that the employee is being placed under suspension in contemplation of disciplinary enquiry or pendency thereof, it would be bad. The Court does not subscribe to idea that unless the order of suspension clearly mention about contemplation or pendency of inquiry, the same would be vitiated in law. In my opinion if it is possible to infer from the perusal of the entire order of suspension that the same has been passed either in contemplation of the inquiry or its pendency it would not be vitiated. It is only in a case where by no means the order of suspension discloses as to whether it has been passed in contemplation of inquiry or pendency thereof, only in such limited cases, it may be argued that the suspension order is bad. The Division Bench in **Meera Tiwari (Supra)** found that the order of suspension does not refer to any contemplated inquiry or pendency of inquiry. In this view of the matter it is held that the suspension order is vitiated in law. However, in the case in hand, the recital in the order of suspension directing. the Inquiry officer to complete disciplinary proceeding show that it has been issued in contemplation of disciplinary proceeding. In this view of the matter I am clearly of the view that the impugned order suspension is not assailable on the aforesaid ground. The judgments of this Court in **Mewa Ram Bharti (Supra)** and **Abdul Rauf (Supra)** also lend no support to the petitioner having of no assistance on the aforesaid question. The controversy involved and the issues decided in the those cases are different. On the other hand, in **Hari Nath Sharma Vs. State of U.P. & others-1997 (3) ESC 1833**, this Court while considering a similar question observed:-

"The close look to the order does not specify that even impliedly it is indicated that the inquiry is contemplated The order of suspension can only be issued when an inquiry is contemplated and it is to be so indicated in the order itself either expressly or by necessary implication."

Therefore, the second submission in view of the aforesaid discussion has no force and rejected.

The third and fourth issues can be dealt with together. The questions deal with the prolonged agony and mental torture of an employee under suspension where inquiry either has not commened or proceeding with snail pace. This is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment but is resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or by prolonging the enquiry is unreasonable and is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse adverse effect in respect of his status, life style and reputation in Society. A person under suspension is looked with suspicion in the
Society by the persons with whom he meets in his normal discharge of function.

A Division Bench of this Court in **Gajendra Singh Vs. High Court of Judicature at Allahabad- 2004 (3) UPLBEC 2934** also observed as under..

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

Disapproving unreasonable prolonged suspension, the Apex Court has also observed in **Public Service Tribunal Bar Association Vs. State of U.P. & others- 2003 (1) UPLBEC 780 (S.C.) as under**

"if a suspension continues for indefinite period or the order of suspension passed is malafide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution... ... ... (Para 26).

The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplation or pending disciplinary

enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided and absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreason8bly, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

In the case, in hand, counter affidavit has been filed by the respondents on 25-9-2005 wherein it is admitted that charge sheet has been issued only in respect to the petitioner Nos. 3 and 7 on 17.5.2005 and 5.9.2005 respectively, but in respect to all other petitioners even the charge sheet has not been issued till the date of swearing of the counter affidavit, although all the petitioners were already under suspension for the last 6-7 months till that time. The learned counsel for the petitioners has stated that there is no further progress in the matter, and it could not be controverted by the counsel for the respondents. In these circumstances, since more than a year has already elapsed, it cannot be said that continuance of petitioners under suspension is reasonable and valid. Even the allegations contained in the order of suspension prima facie: do not construe such serious misconduct which if proved may attract a major penalty. However, without expressing any final opinion on this aspect, I am of the considered opinion that the impugned order of suspension cannot be allowed to continue indefinitely, and therefore is liable to be set aside. In the result the writ petition is allowed. The impugned orders of suspension dated 13.1.2005 and 23.2.2005 are quashed. The petitioner is entitled for reinstatement in service. However, the question of arrears of salary for the period of suspension shall be decided by the competent authority after conclusion of inquiry and in accordance with relevant rules.

It is, however, provided that the respondents are at liberty to continue with the disciplinary proceedings, if any, against the petitioners and this order will not come in their way to conclude disciplinary proceedings and to pass such final orders as permissible in law. It is also made clear that any observation made hereinabove shall not be treated to be an expression of opinion on the merit of the charges or in respect to the disciplinary proceedings, if any, pending against the petitioners.

No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2006

BEFORE
THE HON'BLE S.RAFAT ALAM, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 25849 of 2006

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

Counsel for the Petitioner:
Sri D.K. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226-Service Law-Ad-hoc appointment-as Lecturer in

Economic-in Degree College on fixed term-after expiry of said period-No right to claim appointment-plea ad-hoc appointee can not be replaced by another ad-hoc appointment not available.

Held: Para 6 & 10

In this case also, admittedly, the appointment of the petitioner is for fixed tenure and in case the contention of the petitioner is accepted it will amount to giving an appointment by this Court for the period subsequent to 30.6.2006 substituting itself to the position of appointing authority. This is neither permissible in law nor should be done. When a procedure is prescribed to do a thing in a particular manner, it should not be done otherwise.

It is not disputed that as per the conditions of the said Government order as a whole, the appointment of the petitioner on honorarium basis was made and in the said G.O. the condition was that the petitioner's appointment will be for one session only whereafter a fresh selection has to be made for the next session. Therefore, the petitioner has no legal right to continue after 30.6.2006 since the appointment letter is time bound. The relief sought by the petitioner, thus, cannot be granted.

Case law discussed:
2002 (2) UPLBEC-1373
1992 (9) SCC-33
W.P. No.20871/06 decided on 25.4.06
J.T. 2006 (4) SC-420

(Delivered by Hon'ble S. Rafat Alam, J.)

1. Heard learned counsel for the petitioner.

In the instant petition the petitioner has come up for issuance of a writ of mandamus commanding the respondents not to interfere in his functioning as lecturer of Economic in Janta Mahavidyalaya Ranipur, Mau till regular selection is made on the recommendation of the U.P. Higher Education Service Commission against the post held by him.

2. It appears that the petitioner was appointed as lecturer in Economics on ad hoc basis in the aforesaid College vide letter of appointment dated 2.1.2006 on honourarium basis with clear stipulation that he shall be allowed to contunue till 30.6.2006 or till regularly selected teacher is available, whichever is earlier. The term of appoinmtne mentioned in the letter dated 2.1.2006 is extracted hereinafter:-

"राजाज्ञा संख्या : ४६७१ /१ सत्तर २-६६-३ (६)/ ६३ टी०सी० दिनांक ०७ अप्रैल १६६८ में निहित प्राविधानों के अन्तर्गत जनता पी०जी०कालेज रानीपुर म ध महाविद्यालय के अर्थशास्त्र विभाग में इस आशय का शपथ पत्र उपलब्ध कराने पर कि आप मानदेय के आधार पर अध्यापन खर्च करने की एवज में नियमित नियुक्ति प्रदान करने की मांग नहीं करेगें, निश्चित मानदेय के आधार पर दिनांक ३० जून २००६ अथवा नियमित शिक्षक उपलब्ध होने की दशा में, जो भी पहले हो, शिक्षा निदेशक उच्च शिक्षा की अनुमति से अध्यापन कार्य हेतु अनुमति प्रदान की जाती है।
दिनांक ०२.०१.०६ ह० अपठनीय
प्रबन्धक / सचिव के हस्ताक्षर"

3. Learned counsel for the petitioner submits that the College is contemplating to make fresh appointment for the post held by the petitioner by ad hoc appointment as per Government Order dated 7.4.98 contained in Annexure-1 to the writ petition. It is submitted that Clause (2) of the aforesaid G.O. is arbitrary and cannot sustain as an ad hoc appointee cannot be replaced by another ad hoc appointee. It is further submitted that in a similar circumstances another Bench in the case of Pankaj Singh Vs. State of U.P. and others, (Writ Petition No.23381 of 2002), vide order dated 5.6.2002 issued notice and by interim

order restrained fresh appointment on ad hoc basis.

4. We have considered the submissions made by the learned counsel for the petitioner and perused the material on record.

5. The appointment of the petitioner being for a fixed tenure. He has no right to continue beyond the period indicated in the letter of appointment, from a perusal thereof it is evident that the appointment was made time bound upto 30.6.2006 or till regularly selected teacher is available whichever is earlier. Extension of the appointment by judicial order, therefore, is not permissible. Similar controversy came up for consideration before a Division Bench of this Court in the case of **Alok Kumar Singh (Dr.) & 15 others Vs. State of U.P. & others, (2002) 2 UPLBEC 1373** wherein it has been held that the petitioners cannot claim any right to continue in service beyond the period of appointment provided in the letter of appointment. Since the matter is already concluded by a Division Bench judgment of this Court, interim order sought to be relied by the petitioners is of no help, as this Court is bound by the law laid down in the final judgment of this Court since interim order do not lay down any binding precedent.

6. Besides, the appointment of the petitioner is for a fixed term i.e. till 30.6.2006 or till the regularly selected candidates join, whichever is earlier. In case no candidate selected by the commission is available before 30.6.2006, the appointment of the petitioner shall come to an end by 30.6.2006 automatically by efflux of time. The appointment, being a fixed term appointment, in case the contention of the petitioner is accepted, it would amount to re-writing the appointment letter allowing the petitioner to continue without there being any letter of appointment issued by the competent authority for a period subsequent to 30.6.2006. In the case of ***Director, Institute of Management Development, U.P. vs. Pushpa Srivastava (Smt.), 1992 (4) SCC 33*** the Hon'ble Apex Court held that the appointment, which is made for fixed tenure comes to an end on the expiry of the period of appointment provided in the letter of appointment and the incumbent need not be terminated as the termination of employment comes automatically by efflux of time. In this case also, admittedly, the appointment of the petitioner is for fixed tenure and in case the contention of the petitioner is accepted it will amount to giving an appointment by this Court for the period subsequent to 30.6.2006 substituting itself to the position of appointing authority. This is neither permissible in law nor should be done. When a procedure is prescribed to do a thing in a particular manner, it should not be done otherwise.

7. Similar view has been taken by this Court also in Writ Petition No. 20871 of 2006 **Dr Vijay Kumar Singh & others vs. State of U.P. & others**, decided on 254.2006.

8. Further a Constitution Bench of the Apex Court in **Secretary, State of Karnataka & others Vs. Umadevi & others-JT 2006 (4) SC 420**, in para 34 of the judgment has observed as under-

"If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an

engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued."

9. Learned counsel for the petitioner further submits that on account of unemployment and lack of bargaining position, the petitioner cannot negotiate with the respondents on equal terms and therefore, the condition of engagement on contractual and honorarium basis for one session is exploitative and is arbitrary. We are afraid that even this submission cannot be accepted. Rejecting similar argument in **Umadevi (Supra),** the Apex Court in para 36 of the judgment has observed as under-

"It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain-not at arms length- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term."

10. Learned counsel for the petitioner attempted to argue that clauses No. 2 and 3 of the Government Order dated 7.4.98 are arbitrary and discriminatory. However, in absence of such relief or prayer made in the writ petition, the aforesaid argument of the learned counsel for the petitioner cannot accepted. Even otherwise, it is not disputed that the appointment of the petitioner is in pursuance of the Government order dated 7.4.98 and having availed the benefit of the said Government order it is not open to the petitioner to advance submission against a part of the Government order which does not suits to him now. Either he can take advantage of the Government order as it is or the entire order could have been challenged but it is not permissible to the petitioner to avail the benefit under the Government order and also challenge some of the condition of the said Government order. It is not disputed that as per the conditions of the said

Government order as a whole, the appointment of the petitioner on honorarium basis was made and in the said G.O. the condition was that the petitioner's appointment will be for one session only whereafter a fresh selection has to be made for the next session. Therefore, the petitioner has no legal right to continue after 30.6.2006 since the appointment letter is time bound. The relief sought by the petitioner, thus, cannot be granted.

11. In the result this writ petition is dismissed. Petition Dismissed.
