REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.06.2007

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No. 324 of 2007

Dr. Harvir Singh ...Applicant
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Applicant:
Sri V.P. Srivastava
Sri Akhilesh Srivastava

Counsel for the Opposite Parties:
Sri Dharmendra Singhal
Sri Rahul Bhargava
A.G.A.

(A) Code of Criminal Procedure-Section 202-Right of an alien-in complaint case-the Magistrate has sole power to direct the method of investigation-for third party No scope to intervene and compel the court to accept the application and affidavit on record-neither the witness nor complainant were summoned by the Court-No right to participate.

Held: Para 11

There is yet another bizarre aspect of the matter and that is how a third person can challenge an order passed by a Magistrate when he has no right to participate in the proceedings. If an alien to a proceeding does not have any right to participate in any proceeding, he also does not possess the right to challenge any order passed in the said proceeding. The law does not confer any such right on any body. R. K. Savita, respondent no. 2, being an alien to the proceeding had no right to maintain the revision before the lower revisional court, which was wrongly entertained by it and has been illegally allowed.

(B) Code of Criminal Procedure-Section 397 (2)-Revision by an alien-against the order of rejection of his application-in complaint ase-neither summoned by the court-nor is witness of prosecution-held-apart from inter locutary order the revision on behalf of alien-not maintainable-being barred by section 397 (2) of the Code.

Held: Para 10

The lower revisional court did not address itself at all to the statutory provision under section 397 (2) Cr.P.C. and cogitated on the fact that the order passed by the Judicial Magistrate Court No. 3 Aligarh dated 17.11.2006, which as impugned before it, was purely an interlocutory order and no revision against the said order was maintainable before it being barred by section 397 (2) Cr.P.C.

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

1. The applicant Dr. Harvir Singh has filed this revision challenging the order dated 22.01.2007 passed by Additional Sessions Judge, Court No. 11, Aligarh in Criminal Revision No. 541 of 2006 Ravi Kant Savita vs. State of Uttar Pradesh.

2. The short question which is involved in this application is as to whether in a complaint case filed by the complainant Dr. Harvir Singh can a third person (Ravi Kant Savita) be allowed to get his statement recorded at the stage of inquiry under section 202 Cr.P.C. against the wishes of the complainant and also without being summoned by the Magistrate for giving evidence.

3. The short facts of the case are that a complaint was filed by Dr. Harvir Singh against Dr. R.N. Singh for offences under

section 406, 409, 420, 468 and 471 I.P.C. Police Station Gandhi Park, district A1igarh. In the aforesaid complaint case complainant Dr. Harvir Singh examined himself under section 200 Cr.P.C. and his witness Laxmi Chandra under section 202 Cr.P.C. Trial Magistrate heard the complainant's counsel on the question of summoning of the accused under section 204 Cr.P.C. at this stage an application was filed by Ravi Kant Savita, an alien to the proceedings, that his application supported by an affidavit be kept on record under section 202 Cr.P.C. The trial Magistrate was of the opinion that an alien to a proceeding has got no right to be heard and that Ravi Kant Savita was not a witness of complainant nor the Court has given him a direction to lead evidence and, therefore, he can not be heard at all. It opined that the responsibility to prosecute the accused in a complaint case lies with the complainant. By such an opinion, which was just, legal and in accordance with the scheme of the Code of Criminal Procedure, the Judicial Magistrate, Court No.3, Aligarh, who was inquiring in to the complaint filed by the complainant, Dr. Harvir Singh, rejected the application filed by Ravi Kant Savita on 17.11.2006 and fixed 28.11.2006 for hearing the arguments on the question of summoning the accused.

4. The aforesaid order dated 17.11.2006 passed by the Magistrate was challenged by Ravi Kant Savita by filing Criminal Revision No. 541 of 2006 before the Sessions Judge, Aligarh, which was heard and allowed by Additional Sessions Judge, Court No. 11, Aligarh by passing the impugned order dated 22.01.2007, which order passed by the lower revisional court is under challenge in this revision.

5. I have heard Sri V.P. Srivastava assisted by Sri Akhilesh Srivastava, learned counsel for the revisionist and the learned A.G.A. on behalf of respondent no. 1 as well as Sri Dharmendra Singhal and Rahul Raghav on behalf of Ravi Kant Savita, respondent no. 2.

6. The short question that arises for consideration is as to whether an alien to a proceeding can file an application and affidavit before the trial Magistrate while he is conducting an inquiry under section 202 Cr.P.C. and can he compel the Court to hear him. The ancillary question is as to whether an alien to a proceeding can participate in the inquiry against the wishes of the complainant or the Court. For a better understanding of the said question section 202 Cr.P.C. is quoted below:

"202.Postponement of Issue of process: (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under section 200.

(2) In an inquiry under sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath;
Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

7. From a perusal of the aforesaid section it is clear that if a complaint is filed before a Magistrate under section 190(1) (a) Cr.P.C., of which the Magistrate is authorized to take cognizance or which complaint has been transferred to him under section 192 Cr.P.C., the Magistrate may postpone issue of process against the accused and either inquiry in to the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit, for the purposes of finding out as to whether there is sufficient ground for proceeding or not. The proviso attached to this Section provides that if the offence complained of is triable by court of session or where the complaint has not been made by a court, unless the complainant and his witnesses have been examined by the Magistrate, no direction for investigation could be made under section 202 (1) of the Code. Sub section (2) provides that in an inquiry under subsection (1) Magistrate may take evidence of witnesses on oath. The proviso attached to sub-section (2) provides that if the offence is triable by Court of Session, he shall take the evidence of all the witnesses of the complainant and examine them on oath.

8. Under such a procedure prescribed by the law, under Chapter XV there is no scope for a third party to intervene into the matter as of right and participate in the proceedings and compel the Court to take his application and affidavit on record or to record his statement. The right of inquiry is vested in the Magistrate. It is for the Magistrate to decide in what manner he is going to conduct an inquiry under section 202 Cr.P.C. Under the aforesaid section it is for the complainant to bring his witnesses before the Court, examine them on oath to substantiate the charge levelled by him. If some body is not a witness of the complainant, he is not obliged to examine him as a witness in the said inquiry, as he is not a witness in the case at all. It is the choice of the complainant to chose the witness and to examine them on oath. This choice of the complainant can not be curtailed or modified in any manner whatsoever. The complainant is the best person to watch his interest. It should be left alone to him to decide in what manner and by what evidence he is going to establish the charge levelled by him against the malefactors.

9. In the present case Ravi Kant Savita was not a witness of the complainant. He was not summoned by the Court also which was conducting an inquiry to give evidence. Ravi Kant Sa vita was an alien to the proceedings. He

has no right to file an application and jump into the arena of litigation on his own. If such a venture is allowed, the inquiry to be conducted by the Magistrates will never come to an end and Magistrates will be saddled unfathomably to go on recording the statements of unaccountable number of persons, which can never be a law nor is the law. An alien to the proceedings cannot be allowed to interject in the inquiry conducted by the Magistrate. The law does not confer any such power on any body. The procedure prescribed under Chapter XV of the Code of Criminal procedure is well defined and the inquiry should be conducted within the purview and scope of such provisions as is provided under section 202 Cr.P.C. It is not for the Court to jumble down the law and enlarge its scope to an extent which leads to an absurdity.

10. Further in the present case the lower revisional court, without caring to look in to the various rulings cited by it in the impugned order has allowed the revision filed by an alien to a proceeding. How the revision by an alien to the proceeding was maintainable before the lower revisional court against the statutory bar provided under section 397 (2) Cr.P.C. is not understandable. The lower revisional court did not address itself at all to the statutory provision under section 397 (2) Cr.P.C. and cogitated on the fact that the order passed by the Judicial Magistrate Court No. 3 Aligarh dated 17.11.2006, which as impugned before it, was purely an interlocutory order and no revision against the said order was maintainable before it being barred by section 397 (2) Cr.P.C. The Additional Sessions Judge, Court No. 11, Aligarh Sri N.A. Zaidi, therefore, passed a wholly illegal order by usurping the power of the revisional court under section 397 (2) Cr.P.C. Such type of interference by the lower revisional court in the proceeding pending before the Magistrates not only delays the trial but creates utter confusion, saddling the Magistrates with unmanageable load of work which must be curbed. Section 397 (2) Cr.P.C. has been ingrafted in the Statute (Code) for being observed and not to be ignored. No revision against an interlocutory order, therefore, was maintainable before the lower revisional Court, specially when it was conceded before me that the order passed by the Magistrate, which was challenged in revision before the lower revisional court was pure and simple interlocutory order at the stage of an inquiry under section 202 Cr.P.C. Thus the impugned order passed by the Additional Sessions Judge, Court No. 11, Aligarh in criminal revision no. 541 of 2006 dated 22.1.2007 is wholly an illegal order and cannot be sustained at all.

11. There is yet another bizarre aspect of the matter and that is how a third person can challenge an order passed by a Magistrate when he has no right to participate in the proceedings. If an alien to a proceeding does not have any right to participate in any proceeding, he also does not possess the right to challenge any order passed in the said proceeding. The law does not confer any such right on any body. R. K. Savita, respondent no. 2, being an alien to the proceeding had no right to maintain the revision before the lower revisional court, which was wrongly entertained by it and has been illegally allowed.

12. On the aforesaid reasons this Criminal Revision is allowed. The impugned order dated 22.1.2007 passed by the Additional Sessions Judge, Court No. 11, Aligarh in Criminal Revision No. 541 of 2006 is hereby set aside and the order dated 17.11.2006 passed by the Judicial Magistrate, Court No.3, Aligarh in Complaint Case No. 2945 of 2005 Dr. Harvir Singh vs. R.N. Singh is hereby restored.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.06.2007

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Revision No.6149 of 2006

Smt. Pushpa ...Revisionist
Versus
State of U.P. and others Opp. Parties

Counsel for the Revisionist:
Sri Amit Kumar Chaudhary

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

Code of Criminal Procedure-Section-156 (3)-application duly supported with affidavit-disclosed the offence order 376 IPC-rejection by Magistrate-highly condemnable-filing complaint is a right of victim-court can not start the litigation by converting the application u/s156 (3) as complaint-impugned order held-passed most flagrant miscarriage of justice-can not sustain.

Held: Para 7

Further the application under Section 156(3) Cr.P.C. can be treated to be a compliant only when the victim wants the court to treat it like so. Filing of a complaint is a right of the victim. Court cannot start the litigation by converting an application under Section 156(3) Cr.P.C. into a complaint on its own.

Case law discussed:
AIR 2006 SC-1322

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

1. The revisionist Smt. Pushpa has challenged the order dated 26.10.2006 passed by Upper Mukhya Nyayik Magistrate, Hapur Ghazibad in Criminal Miscellaneous case no.2189 of 2006 (Pushpa Vs. Subodh Tyagi and others) by which her application under Section 156(3) Cr.P.C. was ordered to be registered as a complaint case instead of directing her F.I.R. to be registered.

2. The narration of facts are that an application under Section 156(3) Cr.P.C. was filed by Smt. Pushpa against Subodh Tyagi, Om Prakash Tyagi, Jagdish Tyagi and Sri Chandra in the court of A.C.J.M., Hapur on 3.10.2006 with the allegations that she is a *pardanashin* lady and the alleged accused persons were resident of her own village and they are criminals and history sheeters, who indulge into abduction murder etc. Because of their illegal activity there is terror of the accused persons in the area.

3. On 19.9.2006 at 6.00 p.m. the revisionist applicant Smt. Pushpa was preparing food of her small children in her house. Her husband had gone out with some work. At that time the alleged malefactors accompanied by two other unknown persons entered into the house of the revisionist applicant Smt. Pushpa hurling filthily abuses and thereafter Subodh, one of the accused, caught hold of her by breast, two other accused Jagdish Tyagi and Sri Chandra threw her on the ground and Subodh attempted to

commit rape on her. Her children raised hue and cry on which the husband of the victim and one Uttam Singh along with co-neighbors collected on the spot. The accused persons failing in their attempt to commit rape on the victim bet her with kicks and fists and then left the house.

4. The victim went to lodged the F.I.R. but her F.I.R. was not registered by the police. Thereafter the victim got herself medically examined in UPHC, Hapur, District Ghaziabad on 20.9.2006 vide annexure no.2 to the affidavit filed in support of this application, in which the injures has been found on her breast right upper arm and forearm.

5. With such allegations the revisionist had approached the Magistrate for getting her F.I.R. registered. The Magistrate refused to direct registration of a F.I.R. and treated her application as a complaint and directed her to lead evidence under Section 200 Cr.P.C. by passing the impugned order, which has been assailed in the present revision.

Heard learned counsel for the revisionist and the learned A.G.A.

6. In this case the application of the revisionist made out a case for an attempt to rape under Section 376/511 I.P.C. In any case she was molested by the accused persons in view of her own children. If such a matter was not fit for investigation it is not understandable what matters will be referred to by the ACJM concerned to get the offence investigated. How a helpless lady will fight a compliant case against accused persons who were so daring as to entered into her house and commit rape on her is also not understandable. A.C.J.M. concerned has not given any reason why the F.I.R. of the victim should not be registered. Treating her application for registration of F.I.R. as a complaint was a subsidiary issue. The primary concerned was why the F.I.R. should be refused to be ordered to be registered when the cognizable offence was disclosed. A.C.J.M. concerned was required to consider the prayer for registration of F.I.R. first. He was nobody to refuse to order for registration of F.I.R. once the cognizable offence was disclosed. The conduct of A.C.J.M. concerned shows that he is not concerned at all with the chastity the women folk. He is so unmindful that he did not realizeat all that the accused persons attempted to commit rape on a lady. His impugned order is wholly illegal absolutely unjust and say the least is total miscarriage of justice.

7. Further the application under Section 156(3) Cr.P.C. can be treated to be a compliant only when the victim wants the court to treat it like so. Filing of a complaint is a right of the victim. Court can not start the litigation be converting an application under Section 156(3) Cr.P.C. into a complaint on its own. It was not the court, which was to prosecute the accused in a complaint case. It was the victim who was to prosecute the accused in a complaint case. The procedure of complaint case is such that in the absence of complainant her complaint can even be dismissed. Further the magistrate concerned did not addressed himself to the question that the victim never wanted to prosecuted the accused persons in a complaint case because she was a poor and helpless lady. The unmindful attitude of A.C.J.M. concerned is condemnable. The Apex Court has also dealt with such type of attitude in the case of Ramesh

Kumari Vs. State (NCT Delhi) AIR 2006 SC 1322 and has held as follows:-

3. "Mr. Vikas Singh, learned Additional Solicitor General, at the outset, invites our attention to the counter-affidavit filed by the respondent and submits that pursuant to the aforesaid observation of the High Court the complaint/representation has been subsequently examined by the respondent and found no genuine case was established. We are not convinced by this submission because the sale grievance of the appellant is that no case has been registered in terms of the mandatory provisions of Section 154 (1) of the Criminal Procedure Code. Genuineness or otherwise of the information can only be considered after registration of the case. Genuineness or credibility of the information is not a condition precedent for registration of a case. We are also clearly of the view that the High-court erred in law in dismissing the petition solely on the ground that the contempt petition was pending and the appellant had an alternative remedy. The ground of alternative remedy nor pending of the contempt petition would be no substitute in law not to register a case when a citizen makes a complaint of a cognizable offence against the Police Officer.

5. The views expressed by this Court in paragraphs 31, 32 and 33 as quoted above leave no manners of doubt that the provision of Section 154 of the Code is mandatory and the concerned officer is duty bound to register the case on the basis of such an information disclosing cognizable offence.

6. Undisputedly, in the present case no case was registered pursuant to the complaint dated 9-9-1997 and 13-9-1997 filed by the appellant. It is also not disputed that the Contempt Petition CCP No. 307/1997 filed by the appellant is also pending disposal before the High Court. It is, however, stated by the respondent that the non-disposal of the contempt petition is due to the non-prosecution by the appellant. Be that as it may, we are of the view that the contempt petition has been pending since 1997 and as such petition should be disposed of with a sense of urgency otherwise the petition itself will lose all its force and the purpose for which the contempt is initiated would be defeat."

8. I do not want to say further regarding the manner in which the Magistrate has disposed off the application of the revisionist but only observe this much that A.C.J.M. concerned has done most flagrant miscarriage of justice. Chastity of a lady is not redeemable.

9. With the aforesaid observations, this revision is allowed. The impugned order dated 26.10.2006 passed by Upper Mukhya Nyayik Magistrate, Hapur Ghazibad in Criminal Miscellaneous case no. 2189 of 2006 (Pushpa Vs. Subodh Tyagi and others) under Section 156(3) Cr.P.C. is hereby set aside. The matter is remanded back to A.C.J.M. concerned to pass appropriate order in accordance with law within a period two weeks positively

from the date of receipt of certified copy of this order by him. Revision allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2007

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

Civil Misc. Writ Petition No.12112 of 2000

Chandan Kumar ...Petitioner
Versus
Registrar, B.H.U., Varanasi and another Respondents

Counsel for the Petitioner:
Sri Akhileshwar Mishra
Sri R.K. Pandey
Sri Devendra Pandey
Sri Bimal Prasad

Counsel for the Respondents:
Sri V.K. Upadhyaya
Sri pankaj Naqvi

Constitution of India, Art. 226-Compassionate Appointment-claim rejected on ground his mother is working with Nagar Palika-petitioner's father died in harness-as Sweeper in Physics Department, Banaras Hindu University-No finding recorded regarding dependency of petitioner upon his father-held-order refusing appointment-suffer from error apparent on the face of record.

Held: Para 6

Considering the materials on record, it is clear that Opp. Party did not record any finding on relevant points whether petitioner was dependent of deceased employed. Refusal to appoint petitioner regularly under the Dying in Harness Rules was passed only on the ground that mother of petitioner was in employment in Nagar Nigam, Varanasi without making any enquiry whether petitioner was dependent on deceased employee, i.e. father or mother. The impugned order passed by the Banaras Hindu University suffers from error of law apparent on the face of record. It is also well settled that the appointment under the Dying in Harness Rules could only be made on regular basis and not on Daily Wage or Adhoc basis.

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

1. The matter relates to appointment of petitioner under the Dying in Harness Rules as Sweeper in Banaras Hindu University. Pl3titioner's father-Ram Sewak was working as Safaiwala in Physics Department. He died in harness. Petitioner being the son has applied for appointment under the Dying in Harness Rules after death of his father. He was given temporary appointment on Daily Wage basis. He moved an application for substantive appointment by regularising his services, but his claim for regular appointment was denied and his application was rejected by the impugned order dated 23rd /24th August, 1994 on the ground that petitioner's mother is in employment of Nagar Nigam, Varanasi.

Heard learned counsel for the parties.

2. Learned counsel for the petitioner urged that petitioner's father died in 'harness on 20.5.1994. He was appointed on 14.6.1994 on Daily Wage basis whereas he was entitled to get regular appointment under the Dying in Harness Rules. His claim for appointment under the Dying in Harness Rules was rejected on the ground that petitioner's mother was in employment at that time. He further urged that petitioner was dependent on his father and his mother was residing

separately, but this aspect was not at all considered by the University while rejecting his claim for regular appointment under the Dying in Harness Rules. It is further urged that impugned order otherwise also suffers from error of law apparent on the face of record as it was passed without application of mind without considering that the petitioner was dependent of father.

3. In reply to the arguments of learned counse1 for the petitioner, Sri Pankaj Naqvi, learned counsel appearing on behalf of Banaras Hindu University, urged that application of petitioner for regular appointment under the Dying in Harness Rules was rejected on 23rd August, 1994 and petitioner has approached this Court after six years. He further urged that the material on record does not show that petitioner was dependent on his father and as such the petitioner was refused regular appointment under the Dying in Harness Rules. He ed the impugned order passed by the Opp. Party rejecting petitioner's application for regular appointment under the Dying in Harness Rules.

4. Considered arguments of learned counsel for the parties and carefully gone through the record.

5. From perusal of the impugned order, it is clear that there is no finding recorded by the Banaras Hindu University whether petitioner was dependent of his father on date of death of his father. One of the relevant question of fact required to be considered for appointment under the Dying in Harness Rul8S is that the applicant was dependent of the deceased employee, if it is so, he may be appointed under the Dying in Harness Rules. Annexure-4 to the writ petition is the Application of petitioner to the University in which he had clearly stated that his mother was separately residing and the petitioner did not receive any financial assistance from his mother. In Paragraph-4 of the Supplementary Affidavit also petitioner's dependency on his father was stated. It is important to notice here that University has already appointed petitioner as back an on 14.6.1994 on Daily Wage basis and his application for substantive appointment was rejected by the impugned order, but he was allowed to work. Petitioner rightly filed present writ f petition only after stopping petitioner finally to work even on Daily Wage in 2000.

6. Considering the materials on record, it is clear that Opp. Party did not record any finding on relevant points whether petitioner was dependent of deceased employed. Refusal to appoint petitioner regularly under the Dying in Harness Rules was passed only on the ground that mother of petitioner was in employment in Nagar Nigam, Varanasi without making any enquiry whether petitioner was dependent on deceased employee, i.e. father or mother. The impugned order passed by the Banaras Hindu University suffers from error of law apparent on the face of record. It is also well settled that the appointment under the Dying in Harness Rules could only be made on regular basis and not on Daily Wage or Adhoc basis.

7. In view of the facts of the case, the impugned order dated 23rd/24th August, 1994 (Annexure-2 to the writ petition) passed by the Banaras Hindu University is liable to be quashed.

8. In the result, writ petition succeeds and is allowed. The impugned order dated 23rd /24th August, 1994, passed by the Baharas Hindu University is quashed and the Banaras Hindu University is directed to consider petitioner's case for regular appointment under the Dying in Harness Rules afresh in accordance with law. Petitioner is also permitted to make a fresh representation supplementing his earlier representations annexing therewith all relevant materials. University will pass appropriate orders on petitioner's representation in accordance with law within two months from the date of production of a certified copy of this order.

No order as to cost.Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.01.2007

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

Civil Misc. Review Application No. 200478 of 2005
In
Civil Misc. Writ Petition No. 13174 of 1986

Anand Singh ...Petitioner
Versus
The Presiding Officer, Labour Court, Agra and another Respondents

Counsel for the Petitioner:
Sri Mohd. Asif Khan

Counsel for the Opposite Parties:
Sri K.N. Misra
S.C.

Constitution of India, Art. 226-Cancellation appointment-on the post of clerk/Cashier-11 persons including the petitioner-who related with Asstt. Registrar-in view of G.O. 27.7.79 participation of the nominee of Registrar is must-non participation of Assistant Registrar-held-committee not properly constituted-Labour Court award as well as the earlier judgment of High Court-perfectly justified.

Held: Para 8

It has been mentioned in the award that the petitioner was brother-in-law of the then Secretary of the Bank i.e. Sri Girraj Singh. The Secretary is ex-officio member of the Selection Committee consisting of Chairman, Assistant Registrar or his nominee and the Secretary. Petitioner's brother-in-law, Girraj Singh, was the member of the Selection Committee, which selected the 11 persons including the petitioner. Appointment letter was also issued by the Secretary Sri Girraj Singh, the brother-in-law of the petitioner. The appointment of the petitioner was, therefore, illegal only and only on this ground.

Case law discussed:
AIR 1970 SC-150 relied on.

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

1. Heard learned counsel for the parties.

2. Trough this review petition filed on 5.10.2005 review of judgement dated 31.3.1999 has been sought. The review petition is accompanied by delay condonation application. The ground taken in the said application is that the petitioner was not aware of the decision of writ petition and even after dismissal of the writ petition he had filed the supplementary affidavit through another counsel under the assumption that the writ petition was pending. The writ petition

was decided after hearing learned counsel for the petitioner.

3. In the counter affidavit to the review application It has been stated that the of the learned counsel engaged by the petitioner i.e. Sri D.P. Singh did not appear when the matter was earlier heard and decided even though his name was also printed in the cause list.

4. The facts of the ease· are that 11 persons, including the petitioner, were appointed through letter dated 28.4.1980 on temporary basis on the post of Clerk/Cashier from the date of their joining by respondent no. 2 Agra Zila Sahkari Bank Limited. Before any one could join through another letter dated 21.5.1980 the appointment letter dated 28.4.1980 was cancelled. All the 11 persons concerned challenged the said order through writ petition in which initially stay order was granted on 23.5.1980. However, later on writ petition was dismissed on 15.12.1980 on the ground of alternative remedy available under U.P. Industrial Disputes Act thereafter the concerned persons approached state Government for making reference to the Labour Court. The State Government made the references and Labour Court decided the matter. In view of the interim order petitioner and other persons were permitted to join. However, after dismissal of the earlier writ petition on 15.12.1980 services were terminated. In the case of the petitioner the matter was registered before the Labour Court in the form of Adjudication Case No. 142 of 1982. Presiding Officer, Labour Court, Agra through award dated 24.1.1986 held that the selection committee, which selected the petitioner, was not constituted in accordance with the, relevant rules, hence appointment was illegal. Ultimately Labour Court held the cancellation of appointment order to be valid. The said award of the Labour Court was challenged through the writ petition-giving rise to the present review petition. This Court held that Assistant Registrar Cooperative Societies was necessary member of Selection Committee and as he did not participate in the deliberations of the Selection Committee, hence appointment was illegal. Same view had been taken by the Labour Court. The writ petition was therefore dismissed on 31.3.1999. The said judgment is sought to be reviewed through this review petition:

5. It appears that the Labour Court in the case of some other similarly situated persons (who were included in the list of 11 persons appointed through letter dated 28.4.1980 and who had also raised the industrial dispute) decided the matter in favour of the workmen-employees and held that they were selected by duly appointed Selection Committee. Against one such award respondent No.2, Agra Zila Sahkari Bank Limited filed Writ Petition No.2271 of 1997. The said writ petition was dismissed on 10.3.1998. Copy of the said judgment has been supplied by the learned counsel for the applicant. Against the said judgment respondent no. 2 filed S.L.P. before the Supreme Court which was later on converted in to Civil Appeal No.3466 of 1998 and was dismissed on 27.2.2001. Copy of the said judgement has also been supplied.

6. In respect of non-participation of Assistant Registrar in the selection process the High Court as well as the Supreme Court held that by virtue of Government order issued on 27.7.1979

Assistant Registrar was entitled to nominate a person to participate in the selection Committee on his behalf and as in the Selection Committee in question a nominee of Assistant Registrar had participated, hence there was no deficiency in the Selection Committee.

7. Accordingly the mail basis of the judgement sought to be reviewed through this review petition is not legally correct. Unfortunately the judgement in Writ Petition No.2271 of 1997 even through delivered about a year before (i.e. on 10.3.1998) was not brought to the notice of the Hon'ble Judge who dismissed this writ petition on 31.3.1999. The said judgment of the High Court has been approved by the Supreme Court.

However, the matter does not end completely here.

8. It has been mentioned in the award that the petitioner was brother-in-law of the then Secretary of the Bank i.e. Sri Girraj Singh. The Secretary is ex-officio member of the Selection Committee consisting of Chairman, Assistant Registrar or his nominee and the Secretary. Petitioner's brother-in-law, Girraj Singh, was the member of the Selection Committee, which selected the 11 persons including the petitioner. Appointment letter was also issued by the Secretary Sri Girraj Singh, the brother-in-law of the petitioner. The appointment of the petitioner was, therefore, illegal only and only on this ground.

9. The above being additional ground for the cancellation of the appointment of the petitioner, writ petition cannot be allowed and order setting aside the appointment of the petitioner can not be quashed on the ground that absence of Assistant Registrar did not invalidate the Selection Committee. In this regard reference may be made to the Constitution Bench decision of the Supreme Court in case of **A.K. Kraipak vs. Union of India** (A.I.R. 1970 S.C.150). In the said case also close relation of a selected candidate was one of the members of the Selection Committee. Even though it was found that he did not participate in the deliberations of the Selection Committee when the case of the concerned appointee was considered, still the Supreme Court held that mere presence of a relation in the Selection Committee was sufficient to vitiate the selection process in the case of the related appointee.

10. Accordingly I do not find any error in the impugned award.

12. Accordingly review petition is allowed. Order dated 31.3.1999 dismissing the writ petition is set aside for the reason that the point is squarely covered by the judgment of the Supreme court in Civil Appeal No. 3466 of 1998 Agra District Cooperative Bank Limited vs. Presiding Officer, Labour Court, Agra dated 27.2.2001. However, writ petition is again dismissed on the ground that selection of petitioner was illegal as petitioner's brother-in-law was one of the three members of the Section Committee.

Review petition allowed

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.

Civil Misc. Writ Petition No.4800 of 1985

Suresh Prasad Tripathi ...Petitioner
Versus
The Labour Court, Gorakhpur and others Respondents

Counsel for the Petitioner:
Sri A.K. Tripathi
Sri R.S. Misra
Sri H.S.N. Tripathi
Sri T.N. Tiwari
Sri Sudhanshu Pandey
Sri S.K. Pandey

Counsel for the Respondents:
Sri B.D. Mandhyan
S.C.

U.P. Industrial Dispute Act 1947-Section 4 k-Industry-whether the U.P. Krishi Utpadan Mandi Samiti an Industry-Held-'Yes'.

Held: Para 4

Learned counsel for the petitioner-workman submitted that the view taken by the labour Court that U.P. ,Krishi Utpadan Mandi Samiti constituted under the provisions U.P. Krishi Utpadan Mandi Samiti Adhiniyam, 1964 is not an industry, is :not correct. In support of his contention, learned counsel for the petitioner relied upon the decisions of this Court reported in 2002 (2) A.W.C., 1637-Rajya Krishi Utpadan Mandi Parishad and another Vs. Prescribed Authority, Industrial Tribunal (V), U.P., Meerut and another and 1997 (2) U.P.L.B.E.C., 830 - Krishi Utpadan Mandi Samiti, Anand Nagar, District Gorakhpur Vs. Industrial Tribunal (II). U.P. at Lucknow and another wherein this Court has held that Krishi Utpadan Mandi Samiti constituted under the provisions of U.P. Krishi Utpadan Mandi samiti Adhiniyam, 1964 is an industry and therefore the petitioner working with the employer is covered by the definition of the workman.

Case law discussed:
2002 (2) AWC-1637
1997 (2) UPLBEC-830

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

1. By means of present writ petition under Article 226 of the Constitution of India, the petitioner Suresh Prasad Tripathi has challenged the award of the Labour Court, Gorakhpur passed in adjudication case no. 134 of 1982 dated 23rd November, 1984.

2. The following dispute was referred to by the State Government in exercise of power under Section 4-K of the U.P. Industrial Dispute Act, 1947 (In short '**the Act**') to the labour Court for adjudication.

"Whether the action of the employer in terminating the services of the workman Suresh Prasad Tripathi with effect from 16th July, 1981 is legal and justified? If not, to what relief the workmen concerned is entitled and with what details?"

3. The Iabour Court issued notices to both the workman as well as the employer. Both the workman and the employer exchanged their pleadings and adduced evidence. Before the labour Court, the employer raised an objection that since U.P. Krishi Utpadan Mandi Samiti, Barhaj, Deoria is not an industry, therefore the reference referring the matter to the labour Court is not covered

by the definition of industrial dispute and the reference should be answered against the workman. The labour court after considering the material on record and the evidence adduced before it has arrived at the conclusion that employer U.P. Krishi Utpadan Mandi Samiti is not covered by the definition of an industry and therefore Suresh Prasad Tripathi is not a workman, it therefore decided the preliminary objection raised by the employer in favour of the employer and held that the reference is not maintainable. Against this award, the petitioner-workman filed present writ petition.

Heard learned counsel appearing on behalf of the parties.

4. Learned counsel for the petitioner-workman submitted that the view taken by the labour Court that U.P. ,Krishi Utpadan Mandi Samiti constituted under the provisions U.P. Krishi Utpadan Mandi Samiti Adhiniyam, 1964 is not an industry, is :not correct. In support of his contention, learned counsel for the petitioner relied upon the decisions of this Court reported in **2002 (2) A.W.C., 1637- Rajya Krishi Utpadan Mandi Parishad and another Vs. Prescribed Authority, Industrial Tribunal (V), U.P., Meerut and another and 1997 (2) U.P.L.B.E.C., 830 - Krishi Utpadan Mandi Samiti, Anand Nagar, District Gorakhpur Vs. Industrial Tribunal (II). U.P. at Lucknow and another** wherein this Court has held that Krishi Utpadan Mandi Samiti constituted under the provisions of U.P. Krishi Utpadan Mandi samiti Adhiniyam, 1964 is an industry and therefore the petitioner working with the employer is covered by the definition of the workman. In view of the legal preposition laid down by this Court in the cases, referred to above, this writ petition deserves to be allowed.

5. In view of what has been stated above, this writ petition succeeds and is allowed. The award of the labour Court dated 23rd November, 1984 is quashed. The matter is remanded back to the labour Court with the direction to decide afresh on merits in accordance with law and in the light of the observations made in this judgement within a period of six months' from the date of presentation of a certified copy ·of this order before it.

Petition allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.04.2007

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

Criminal Revision No. 22 of 2006

Rajua alias Raju **Revisionist**
Versus
State of U.P. and others **Opp. Parties**

Counsel for the Revisionist:
Sri I.K. Chaturvedi

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

Criminal Revision-Maintainability-Revisionist neither complainant-nor witnesses-but the real daughter of the deceased-Additional Session Judge rightly set-a-side the judgment and directed the Trail Court for fresh Trail-held-even if the revision filed by stranger-Revisional Court can suo-moto exercise power of Revision-direction issued by Session Judge warrant no interference.

Held: Para 8

It is true that the opposite party no. 2 and 3 according to the charge sheet filed are neither the complainant of the case, nor the eye witnesses, they are daughters of Mata Prasad who died in the occurrence. Hon'ble Supreme Court in the case of Fad Regan Vs. S.S.R. Beluswami 2003 Dand Nirnay Sangrah 908 has observed that the revisional court suo motto can exercise the power of revision and if the revision has been filed by the stranger to the case, it would make no difference.

Case law discussed:

AIR 1962 SC-1788

SSRB-2003 Dand Niray Sangrah 908

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

1. Present Criminal Revision has been filed against the judgement and order dated·30.8.2005, passed by learned Additional Sessions Judge (Fast Track) Court III. Court No. 8, Banda in criminal revision no. 9 of 2005, Km. Gudiya and another Vs. Rajua @ Raju and another whereby the learned Sessions Judge set aside the judgement and order dated 19.10.2005 passed by learned I ACJM Banda in criminal case no. 3358/1X/03, State Vs. Rajua @ Raju under Section 279, 337, 338 and 304 A I.P.C. and remanded the case for fresh trail after summoning the injured witness Angad and other prosecution witnesses.

2. I have heard learned counsel for the revisionist Sri I.K. Chaturvedi and the learned AGA. None appeared for opposite party no.2 and 3.

3. Learned counsel for the revisionist has contended that opposite party no. 2 and 3 had no locus standi to file criminal revision before the Sessions Judge against the judgment and order of acquittal passed by the learned I Add!. Chief Judicial Magistrate, Banda. The opposite party no. 2 and 3 were neither complainant in the case, nor they were the witnesses of the occurrence for which the revisionist has faced trial The learned counsel further contended that no revision lies against the order of acquittal before the Sessions Judge.

4. The learned AGA submitted that the learned I ACJM, vide judgement and order dated 19.10.2004 passed in criminal case no. 3358/IX/2003 on the date of appearance of the accused i.e.18.10.2004 after recalling the bailable warrant of the accused recorded the statement accused and without giving any further opportunity to the prosecution to adduce evidence recorded the statement of PW 1 Daya Ram and the counsel for the accused dispensed with the formal proof of the documents of the prosecution. PW 1 Daya Ram was declared hostile as he did not support the prosecution story, thus he passed judgement and order dated 19.10.2004 in a most cryptic manner and the learned Sessions Judge committed no illegality in remanding the case to the learned Magistrate for fresh trial after summoning the witnesses.

I have given my thoughtful consideration to the respective submissions of the learned counsel for the parties.

5. It is revealed from the perusal of the record that the learned ACJM on the date of appearance of the accused recalled his warrant, thereafter recorded the statement of the accused and after the learned counsel for the accused dispensed with the formal proof of the documents of the prosecution, recorded the statement of accused under Section 313 Cr.P.C. and

passed the judgement and order dated 19.10.2004. Thus, the learned ACJM did not give opportunity to the prosecution to summon the remaining witnesses. From perusal of the FIR of the case, it appears that one Angad was also injured in the occurrence. Chandra Shekhar had also witnessed the occurrence but no opportunity was given by the learned Magistrate to the prosecution to summon these two witnesses.

6. It is also revealed that the opposite party no. 1 and 2 are the daughters of Mata Prasad, who died in the occurrence.

7. In the case of Chaina Swami Vs. State of Andhra Pradesh AIR 1962 S.C. 1788, the Apex Court has observed that the revisional court shall not ordinarily interfere against the judgement of acquittal but if the judgement of acquittal has been recorded without examination of the important witness and no effort was made to obtain their presence, the revisional court shall be justified to interfere while exercising its revisional jurisdiction against an order of acquittal.

8. It is true that the opposite party no. 2 and 3 according to the charge sheet filed are neither the complainant of the case, nor the eye witnesses, they are daughters of Mata Prasad who died in the occurrence. Hon'ble Supreme Court in the case of Fad Regan Vs. S.S.R. Beluswami 2003 Dand Nirnay Sangrah 908 has observed that the revisional court suo motto can exercise the power of revision and if the revision has been filed by the stranger to the case, it would make no difference.

9. Keeping in view the law laid down by Hon'ble Supreme court I am of the opinion that revision filed by opposite party no. 2 and 3, who are daughters of deceased Mata Prasad was maintainable. It is also clear from the foregoing discussions that the learned Magistrate committed illegality in not affording any opportunity to the prosecution to produce injured witness Angad and other witnesses and in concluding trial on the date of appearance of the accused. I, therefore, find that this revision is devoid of merit and is dismissed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2007

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 37482 of 2006

Sushil Kumar Sharma ...Petitioner
Versus
State of U.P. & Others Respondents

Counsel for the Petitioner:
Sri Kamlesh Shukla

Counsel for the Respondents:
Sri Rajeev Gupta
Sri Manoj Kumar
Sri K.R. Sirohi
S.C.

U.P. Subordinate Civil Court Inferior Establishment Rules 1955-Section 4 (a)Discretionary Power of District Judge has to be exercised with conformity of Article 14 and 16 of the constitution-appointment made without advertisement-amount to denied of fair and equal chance to all other eligible candidates-held-illegal can not sustained.

Held: Para 25

In the present case, the appointments of private respondent nos. 3, 4 and 5 had been made without issuing any advertisement. They, therefore, have no right to continue on the said post. It has been pointed out by the Supreme Court in the above mentioned cases that where all the eligible candidates are not given a fair chance of competing in the matter relating to appointment, Article 16 of the Constitution is violated and that rule of equality in public employment is a basic feature of the Constitution. The appointments of respondent nos. 3, 4 and 5 are, therefore, liable to be set aside as the District Judge has not followed the procedure.

Case law discussed:

1991 (4) SCC-54
1983 (4) SCC-339
2004 (2) SCC-590
J.T. 2006 (2) SC-137
J.T. 2006 (4) 420
1994 (3) UPLBEC-1551

(Delivered by Hon'ble Dilip Gupta, J.)

1. This petition has been filed for quashing the order dated 26th May, 2006 passed by the learned District Judge, Aligarh whereby the waiting list of the candidates declared on 21st July, 2005 for Class IV employees in the Aligarh District Judgeship was cancelled. The petitioner has also sought the quashing of the appointment orders of respondent nos. 3, 4 and 5 as Chowkidars in Aligarh District Judgeship. The relief for appointing the petitioner as a Class IV employee on the vacant post has also been sought.

2. An advertisement was issued in the Newspaper "Amar Ujala' on 18th June, 2005 inviting applications for the two posts of Class IV employees in the District Court, Aligarh. It was mentioned that the number of posts can be increased or reduced. The petitioner applied for being considered for appointment against the said post and on the basis of the written examination and the interview, a list of seven candidates was declared on 21st July, 2005 in which the petitioner was placed as Serial No.4. It was mentioned in the said list that the candidates at Serial Nos. 1 to 3 had been selected for appointment while the rest were kept in the waiting list which would be in existence for a period of two years.

3. The petitioner claims that he was subsequently appointed as a peon in the Court of Civil Judge (LD), Atrauli as one Avnesh Kumar Sharma took leave from 25th July, 2005 up to 25th October, 2005. This appointment of the petitioner which lasted till 25th October, 2005 was made as he was at Serial No.1 in the waiting list declared on 21st July, 2005. The petitioner thereafter submitted an application before the District Judge, Aligarh on 24th April, 2006 mentioning therein that as two posts had fallen vacant in Class IV category on account of the promotion of Sri Anil Rai and Sri Srikant he may be appointed. This application was rejected by the District Judge in view of the report submitted by the In-charge, Nazarat. Subsequently, the District Judge by his order dated 26th May, 2006 also cancelled the waiting list of four persons declared on 21st July, 2005 in view of the Inspection Note made by the learned Administrative Judge on 12th May, 2006 and the circular dated 20th February, 1999 issued by this Court. Soon thereafter, the District Judge, Aligarh appointed respondent nos. 3, 4 and 5 as Chowkidars.

4. The contention of the petitioner is that he was at Serial No.1 in the waiting

list prepared on 21st July, 2005 which list was valid for a period of two years but without any rhyme or reason the said list was cancelled by the District Judge by the order dated 26th May, 2006 and immediately thereafter respondent nos. 3, 4 and 5 were appointed as Class IV employees in an arbitrary manner without even advertising the said posts.

5. It needs to be mentioned that the appointment to Class IV post in District Judgeship is provided under Rule 4 of the U.P. Subordinate Civil Courts Inferior Establishment Rules, 1955 (hereinafter referred to as the 'Rules') and the same is as follows:-

"4. Method of recruitment: Recruitment to the following posts in the establishment shall be made.

(1) Daftaries and bundle lifters- By promotion strictly on merits from amongst process servers, orderlies, office peons and farrashes who have put in at least five years service as such:

Provided that no person shall be promoted to these posts unless he is able to read and write Hindi in Devnagri Script with correctness and fluency and can discharge the duties of the office satisfactorily and in the case of the post of daftari unless he also knows book binding.

(2) Process servers, orderly, peons, Office peons and farrashes-(a) by appointment of candidates on the waiting list prepared under Rule 12 or
(b) by transfer from one post to another according to suitability.

(3) Chaukidars, Malis, Waterman and sweepers- By direct recruitment on the discretion of District Judge."

6. A counter affidavit has been filed on behalf of the District Judge, Aligarh respondent no.2 pointing out that the appointments of the private respondent nos. 3, 4 and 5 had been made under Rule 4(3) of the Rules. It has also been stated that the select list/waiting list declared on 21st July, 2005 would not be applicable to the Chowkidars and, therefore, even if the said list had not been cancelled by the order dated 26th May, 2006, the appointments of three persons as Chowkidars could not have been made on the basis of the said list.

7. A counter affidavit has also been filed on behalf of the private respondent nos. 3, 4 and 5. It has been stated that the post of Class IV employees referred to in the advertisement dated 18th June, 2005 was in respect of the categories mentioned in Rule 4(2) relating to Process Servers etc. and not to Chowkidars and, therefore, the petitioner had no claim to be appointed as Chowkidar merely because his name was at Serial No.1 in the waiting list declared on 21st July, 2005. It has further been stated that respondent nos. 3, 4 and 5 had been appointed under Rule 4(3) of the Rules on the discretion of the District Judge.

8. I have heard Sri Kamlesh Shukla, learned counsel for the petitioner, learned Standing Counsel for respondent no.1, Sri Rajeev Gupta, learned counsel for respondent no.2 and Sri Manoj Kumar, learned counsel for respondent nos. 3, 4 and 5.

9. The advertisement published on 18th June, 2005 invited applications for filling up two posts of Class IV employees in District Court, Aligarh. It also mentioned that the number of posts could increase or decrease. A perusal of the list declared on 21st July, 2005 (Annexure-4 to the writ petition) indicates that it contains the names of seven candidates and while the candidates at Serial Nos. 1, 2 and 3 were appointed, the name of the petitioner is at Serial No.4. It has also been mentioned in the list that the remaining candidates shall be placed in the waiting list which shall be effective for a period of two years.

10. Learned counsel for the petitioner submitted that in the absence of any material on record to indicate that the advertisement that had been issued on 18th June, 2005 related to the post of Process Server mentioned in Rule 4(2), the waiting list should not be confined to the posts mentioned in Rule 4(2) of the Rules and, therefore, if the waiting list had not been cancelled by the order dated 26th May, 2006, the appointments of Chowkidars that had been made in July, 2006 should have been made from the persons whose names figured in the waiting list and respondent nos. 3, 4 and 5 could not have been appointed. He further contended that even if it be assumed that the earlier advertisement did not relate to the post of Chowkidars then too the appointment of respondent nos. 3, 4 and 5 as Chowkidars was liable to be cancelled as it had been made without issuing any advertisement for filling up the said posts.

11. Though there is nothing on the record to indicate that the advertisement that had been issued on 18th June, 2005 was confined to the posts mentioned in Rule 4(2) of the Rules and nor has any document been brought on record to indicate that the three candidates from the list had been appointed on any post mentioned in Rule 4(2) of the Rules but a perusal of Rule 4(2) and Rule 12 of the Rules clearly shows that the waiting list of the candidates is to be prepared for each Judgeship for the posts of Process Servers, Orderlies, Office Peons and Farrsashes and no waiting list shall be maintained for Chowkidars, Malies, Sweepers and Watermen. Such being the position, the contention of the learned counsel for the respondents that the waiting list declared on 21st July, 2005 related to the posts mentioned in Rule 4(2) and the appointments of Chowkidars could not have been made from the said waiting list deserves to be accepted. It is, therefore, not necessary to examine the contention advanced by the learned counsel for the petitioner that the waiting list dated 21st July, 2005 had been cancelled in an arbitrary manner by the District Judge by his order dated 26th May, 2006 as learned counsel for the the petitioner did not place any material to show that any vacancy to the posts enumerated in Rule 4(2) came into existence during this period.

12. The question that now remains to be determined is whether the appointment of private respondent nos. 3, 4 and 5 to the post of Chowkidars is valid. Learned counsel for the petitioner submitted that the said orders are liable to be set aside as these persons had been appointed in an arbitrary manner in clear violation of the provisions of Article 14 and 16 of the Constitution of India since no advertisement had been issued for filling up these posts.

13. Sri Rajeev Gupta, learned counsel appearing for the District Judge, Aligarh and Sri Manoj Kumar, learned counsel appearing for respondent nos. 3, 4 and 5 vehemently urged that it was not necessary to issue any advertisement as under Rule 4(3) of the Rules, the appointments were required to be made on the discretion of the District Judge.

Learned counsel have placed much emphasis on the discretionary power of the District Judge to make appointments under Rule 4(3) of the Rules. It is, therefore, necessary to examine the scope of this power. The Supreme Court has repeatedly observed that even in a situation where an authority is vested with a discretionary power, such power can be exercised by adopting that mode which best serves the interest and even if the Statute is silent as to how the discretion should be exercised, then too the authority cannot act whimsically or arbitrarily and its action should be guided by reasonableness and fairness because the legislature can never intend that its authorities could abuse the laws or use it unfairly. Any action which results in unfairness and arbitrariness results in violation of Article 14 of the Constitution. It has also been emphasised that an authority cannot assume to itself an absolute power to adopt any procedure and the discretion must always be exercised according to law.

14. In Websters' Third New International Dictionary "discretion' means "power of free decision or choice within certain legal bounds: ability to make decisions which represent a responsible choice and for which an understanding of what is lawful, right, or wise may be presupposed."

15. In Black's Law Dictionary, Sixth Edition, "discretion' means: "As applied to public officers connotes action taken in light of reason as applied to all facts and with view to rights of all parties to action while having regard for what is right and equitable under all circumstances and law."

16. In this connection reference may also be made to the decision of the Supreme Court in ***Bangalore Medical Trust Vs. B. S. Muddappa & Ors., (1991) 4 SCC 54*** wherein the scope of discretionary power has been dealt with:-

"..... Discretion is an effective tool in administration. But wrong notions about it results in ill-conceived consequences. In law it provides an option to the authority concerned to adopt one or the other alternative. ***But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better****. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it.* ***Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness****. The legislature never intends its authorities to abuse the law or use it unfairly. ....." (emphasis supplied).*

In ***Suman Gupta & Ors. Vs. State of J. & K. & Ors., (1983) 4 SCC 339*** the Supreme Court observed :-

"..... After considering the matter carefully, we confess, we are

unable to subscribe to the view to that the selection of candidates for that purpose must remain in the unlimited discretion and the uncontrolled choice of the State Government. ***We think it beyond dispute that the exercise of all administrative power vested in public authority must be structured within a system of controls informed by both relevance and reason*** *- relevance in relation to the object which it seeks to serve, and reason in regard to the manner in which it attempts to do so. Wherever the exercise of such power affects individual rights, there can be no greater assurance protecting its valid exercise than its governance by these twin tests.* ***A stream of case law radiating from the now well known decision in this Court in Maneka Gandhi v. Union of India has laid down in clear terms that Article 14 of the Constitution is violated by powers and procedures which in themselves result in unfairness and arbitrariness. It must be remembered that our entire constitutional system is founded in the rule of law, and in any system so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason.*** *To contend that the choice of a candidate selected on the basis of his ability to project the culture and ethos of his home State must necessarily be left to the unfettered discretion of executive authority is to deny a fundamental principle of our constitutional life. We do not doubt that in the realm of administrative power the element of discretion may properly find place, where the statute or the nature of the power intends so. But there is a well recognised distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether." (emphasis supplied)*

In ***Union of India Vs. Kuldeep Singh, (2004) 2 SCC 590*** the Supreme Court observed :-

"When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin's Law Dictionary.) In its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment. ***But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law.*** *(See Tomin's Law Dictionary.)*

Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, the discernment which enables a person to judge critically of what is correct and proper united with caution; nice soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between

equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. *When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour.* ***It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office ought to confine himself*** *(per Lord Halsbury, L.C., in Sharp v. Wakefield). (Also see S.G. Jaisinghani v. Union of India.)*

The word "discretion" standing single and unsupported by circumstances ***signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility."*** *(emphasis supplied)*

17. There is, therefore, no doubt that while exercising his "discretion' under Rule 4(3) of the Rules in making appointments, the District Judge has to ensure that the procedure adopted by him is in conformity with the provisions of Articles 14 and 16 of the Constitution and that he cannot act in an unfair or arbitrary manner.

18. Having examined this aspect it has now to be seen whether the District Judge could make appointments under Rule 4(3) of the Rules without causing any advertisement for the posts.

19. The Supreme Court has emphasized that appointment to any post can be made only after proper advertisement has been made inviting applications from eligible candidates and any appointment without holding the proper selection where all eligible candidates get a fair chance to compete would be violative of Article 16 of the Constitution of India and, therefore, illegal. It has also been observed that there has to be equality of opportunities in matters of public employment and this principle would also govern the instrumentalities that come within the purview of Article 12 of the Constitution of India.

20. In this connection reference may be made to the decision of the Supreme Court in ***Union Public Service Commission Vs. Girish Jayanti Lal Baghela & Ors., JT 2006 (2) SC 137*** wherein it was observed:-

".....The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made."

21. Reference may also be made to the Constitution Bench decision of the Supreme Court in Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors.,

JT 2006 (4) SC 420, in which it was observed:-

".....Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules.....

In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment..... In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution.....

.....

Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee....."

22. A Full Bench of this Court in ***Radha Raizada & Ors. Vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors., (1994) 3 UPLBEC 1551*** also examined whether even temporary appointment could be made without causing any advertisement and it was observed :-

"The advertisement of short term vacancy on the notice board of the institution according to me, in fact no notice to the prospective eligible candidates as no prospective candidate is expected to visit each institution to see the notice board for finding out whether any short term vacancy has been advertised. Since the payment of salary to the teachers appointed against the short term vacancy is the liability of the State Government, the advertisement of short term vacancy must conform to the requirement of Article 16(1) of the Constitution which prohibit the State from doing anything whether by making rule or by executive order which would deny equal opportunity to all the citizens. The provision contained in sub-paragraph (3) of Paragraph 2 of the Second Removal of Difficulties Order which provides that the short term vacancy shall be notified on the notice board of the institution, does not give equal opportunity to all the eligible candidates of the District, Region

or the State to apply for consideration for the appointment against the said short term vacancy. Such kind of notice is an eye wash for the requirement of Article 16 of the Constitution. This aspect can be examined from another angle. If the notice of short term vacancy, through the notice board of the institution is accepted, it will throw open the doors for manipulation and nepotism. A management of an institution may or may not notify the short term vacancy on the notice board of the institution and yet may show to the authority that such vacancy has been notified on the notice board of the institution against the short term vacancy. I am, therefore, of the view that the procedure for notifying the short term vacancy should be the same as it is for the ad hoc appointment by direct recruitment under the First Removal of Difficulties Order. The management after intimating such vacancy to the District Inspector of Schools advertise such short term vacancy at least in two News Papers having adequate circulation in Uttar Pradesh in addition to notifying the said vacancy on the notice board of the institution and further the application may also be invited from the local employment exchange. ....."

23. The aforesaid decision of the Full Bench was approved by the Supreme Court in ***Prabhat Kumar Sharma Vs. State of U.P. & Ors., (1996) 10 SCC 62.***

In ***Writ Petition No. 37482 of 2006 (S.K. Sharma Vs. State of U.P. & Ors.) decided on 25th May, 2007*** I had dealt with a similar controversy and had observed :-

"Learned counsel for the petitioners, however, urged that there was no requirement in law for issuing any advertisement as the appointment to the post of Chaukidar had to be made on the discretion of the District Judge. This contention cannot be accepted as even if it is to be made on the discretion of the District Judge then too the District Judge cannot make appointments in an arbitrary manner dehorse the provisions of Articles 14 and 16 of the Constitution."

24. A similar controversy was also examined by this Court in ***Writ Petition No. 24665 of 2003 (Sachin Kumar & Ors. Vs. State of U.P. & Ors.) decided on 22nd August, 2005*** and it was observed :-

"The discretion given by the District Judge under Rule 4(3) of the Rules of 195, for appointment of Chowkidar, Malies, Waterman, and Sweepers, is not to be exercised on his whims. The appointing authority exercising statutory powers of appointment in public service under statutory rules can not use his discretion for oblique purposes. The submission that there are no guidelines provided in the rules for exercising the discretion is not correct. The appointment on a civil post, even if made at the sole discretion of the appointing authority, has to be made by giving wide publicity inviting all the eligible persons, and thereafter by following a selection procedure which should be fair, transparent, and reasonable and should conform to the tests of equality non-arbitrariness guaranteed to all the citizens, under Article 14 and 16 of the Constitution of India. The Rules of reservation under Rule 6 of the Rules of 1955 are required to be followed by the District Judge. He must ensure that the persons appointed are not below the minimum and above the maximum age and are in a good mental

and bodily health, free from any physical defect and bear good character duly verified for public employment.

There is no substance in the submission of learned counsel for the petitioner that the discretion of District Judge cannot be questioned unless there is any allegation of malafide which has been put to test after an enquiry. Where the District Judge does not advertise the vacancy and follow any procedure, muchless a fair and reasonable procedure for selection, having due regard to the eligibility and follow the rules of reservation, the appointments cannot be sustained.

.....

The discretion given to the District Judges to make appointments on the post of Chowkidar, Malies, waterman and sweeper is by way of a trust and must therefore, be exercised in accordance with settled principle of fairness transparency and reasonableness. The District Judge must adhere to the settled norms of selections by the vacancies even if they fall on the posts mentioned in Rule 4 (3), advertising hold selections in making such appointments, and follow the rules of reservation. ....."

25. In the present case, the appointments of private respondent nos. 3, 4 and 5 had been made without issuing any advertisement. They, therefore, have no right to continue on the said post. It has been pointed out by the Supreme Court in the above mentioned cases that where all the eligible candidates are not given a fair chance of competing in the matter relating to appointment, Article 16 of the Constitution is violated and that rule of equality in public employment is a basic feature of the Constitution. The appointments of respondent nos. 3, 4 and 5 are, therefore, liable to be set aside as the District Judge has not followed the procedure. In ***Binod Kumar Gupta & Ors. Vs. Ram Ashray Mahoto & Ors., (2005) 4 SCC 209*** the Supreme Court observed:-

"The District Judge, who was ultimately responsible for the appointment of Class IV staff violated all norms in making the appointments. It is regrettable that the instructions of High Court were disregarded with impunity and a procedure evolved for appointment which cannot be said to be in any way fair or above board. The submission of the appellants that they had been validly appointed is in the circumstances unacceptable. Nor can we accede to their prayer to continue in service. No doubt, at the time of issuance of the notice on the special leave petition, this Court had restrained the termination of services of the appellants. However, having regard to the facts of the case as have emerged, we are of the opinion that this Court cannot be called upon to sustain such an obvious disregard of the law and principles of conduct according to which every judge and anyone connected with the judicial system are required to function. It we allow the appellants to continue in service merely because they have been working in the posts for the last 15 years we would be guilty of condoning a gross irregularity in their initial appointment. The High Court has been more than generous in allowing the appellants to participate in any fresh selection procedure as may be held and in granting a relaxation of the age limit."

26. The Supreme Court very recently in ***State of Manipur & Ors. Vs. Y. Token Singh & Ors., 2007 AIR SCW***

1995 while upholding the orders of cancellation of appointment of field staffs of the Revenue Department on certain grounds including the ground that appointments had been made without any advertisement or without notifying the vacancies to the employment exchange observed:-

"The State while offering appointments, having regard to the constitutional scheme adumbrated in Articles 14 and 16 of the Constitution of India, must comply with its constitutional duty, subject to just and proper exceptions, to give an opportunity of being considered for appointment to all persons eligible therefore.

The posts of field staffs of the Revenue Department of the State of Manipur were, thus, required to be filled up having regard to the said constitutional scheme. We would proceed on the assumption that the State had not framed any recruitment rules in terms of the proviso appended to Article 309 of the Constitution of India but the same by itself would not clothe the Commissioner of Revenue to make recruitment in violation of the provisions contained in Articles 14 and 16 of the Constitution of India."

27. Thus, for all the reasons stated above, the appointments of respondent nos. 3, 4 and 5 on the post of Chowkidar in District Judgeship, Aligarh cannot be sustained and are hereby set aside.

28. The writ petition, therefore, succeeds and is allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 8825 of 2000

Ram Deo Lal Srivastava ...Petitioner
Versus
The Commissioner/Secretary, Food & Civil Supplies Department of U.P. Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri Gulrez Khan

Counsel for the Respondents:
S.C.

Constitution of India, Art. 226-Pension-delay in payment-only reason disclosed was certain amount due against the applicant-but No notice given during service period-No document produced inspite of direction of court-held-direction issued to given entire dues with 9% interest with cost of Rs.20,000/-.

Held: Para 6

Thus the withholding of the dues of the petitioner for such frivolous reasons is highly unreasonable and deprecated by this Court. A retired employee who has given prime years of his life in the service of the department is entitled under law for payment of his retiral dues immediately on his retirement so that he may be able to live with dignity even after his retirement.

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

1. On 9.5.1959, the petitioner joined the service as a Clerk in the Food and Civil Supplies Department of the Government of U.P. He was granted

promotions from time to time and had held the posts of Marketing Inspector, Senior Marketing Inspector, Incharge Deputy Regional Marketing Officer and Regional Marketing Officer. After having served the department for more than 35 years, he retired on 31.1.1995. He submitted his pension papers on 5.5.1995 but due to non-furnishing of the "no dues certificate', the petitioner was not paid his gratuity amount and certain other dues, for which he approached the Pension Adalat by way of filing an application. After hearing the parties, on 16.12.1998, the Pension Adalat directed the Regional Food Controller, Jhansi to issue the "no dues certificate' within one month and also directed for payment of gratuity and other retiral dues to the petitioner. Still when the dues were not paid, the petitioner lodged a protest before the Regional Food Controller, Jhansi with the request to furnish the details, if any, of any amount said to be recoverable from him. When no response was received, the petitioner again approached the Pension Adalat. By order dated 5.7.1999, the Pension Adalat again directed the Regional Food Controller to make payment of the gratuity amount and commutation of pension etc. to the petitioner. It was at this stage that the petitioner received a letter dated 3.8.1999 issued by the Regional Food Controller stating therein that an amount of Rs. 2,57,610.73P. was sought to be recovered from him and hence the gratuity amount and other dues were not being paid to him. The petitioner has thus filed this writ petition challenging the said order dated 3.8.1999, and also a further prayer for a direction in the nature of mandamus commanding the respondents to issue the "no dues certificate' and pay the gratuity amount of over Rs.47,000/- as well as commutation of pension amounting to over Rs.45,000/- and the security amount of Rs. 2,000/- along with 18%, with effect from the date of retirement till the date of actual payment.

2. By way of amendment application, the petitioner has prayed for quashing of an order dated 11.11.2002 passed by the Regional Food Controller, Jhansi during the pendency of this writ petition whereby it has been intimated that the gratuity amount of Rs.43,164/- has been sanctioned and after adjusting the same from the amount of Rs.2,57,539/- sought to be recovered, the balance amount of Rs.2,14,375/- remains to be recovered from the petitioner. Thus, the said order has also been challenged in this writ petition.

3. I have heard Sri Gulrez Khan, learned counsel holding brief of Sri W.H. Khan, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the respondents. Pleadings have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

4. The specific case of the petitioner is that at no stage during his service period or even thereafter, the petitioner had ever received any notice with regard to any departmental proceedings or proceedings for recovery having been initiated against him. The petitioner contends that he has been paid his G.P.F. amount and is also being paid his pension, but the amount of gratuity, as well as commutation of pension and security amounts have wrongly been withheld by the respondents, without assigning any reason.

5. In the counter affidavit, the respondents have merely stated that a sum of Rs.2,57,000/- and odd is sought to be recovered from the petitioner. The said plea came to light for the first time in the year 1999. From 1995 to 1999 the respondents had never sent any communication to the petitioner nor intimated the Pension Adalat in the year 1998 when such protest regarding non-payment of his dues was lodged by the petitioner. Had there been any order for recovery passed against the petitioner earlier, the same ought to have been filed before the Pension Adalat, which was seized of the matter on an application filed by the petitioner in the year 1998. After the filing of the counter affidavit by the respondents, since nothing material was stated therein, on 10.7.2001 this Court directed the respondents *"to file supplementary counter affidavit enclosing the copies of the orders by which liability of the petitioner has been fixed in respect of the amount in question.'* In response thereto, a supplementary counter affidavit has been filed in which it has merely been stated that certain notices for recovery of amount of Rs.4,000/- and odd, 2 lacs and odd and 3,000/- and odd had been sent to the petitioner and some other employees, for having committed certain lapses. Such notices are said to have been sent in the years 1992 and 1994 but no copies of such notices have been enclosed alongwith the counter affidavit nor has any order pursuant to such notices been filed requiring the petitioner to deposit any amount. Since the respondents did not disclose about passing of any orders in the counter affidavit earlier, this Court had specifically directed the respondents to enclose copies of the orders by which liability of the petitioner had been fixed in respect of the amount in question sought to be recovered from him.

6. It is very surprising that the respondent-authorities have not come forward with clean hands and have just been evading the issue and have not even filed copies of the alleged show cause notices or any specific orders relating to recovery of any amount from the petitioner. In paragraph 3 of the writ petition, it has been stated that *"no departmental action of such reprimand was ever intimated against the petitioner rather his work and conduct was through-out highly appreciated and praised by his superiors.'* The reply to this has been given in paragraph 5 of the counter affidavit, wherein it has merely been stated that the said averments are not admitted as written. Without the respondents specifying as to whether any departmental action was ever taken against the petitioner or that his work and conduct had not been proper during his service tenure, the averments made in paragraph 3 of the writ petition would be taken as correct. Even otherwise, the respondents have not even stated that at any stage, any departmental proceedings or enquiry was initiated against the petitioner with regard to his conduct or with regard to recovery of any amount. Thus the withholding of the dues of the petitioner for such frivolous reasons is highly unreasonable and deprecated by this Court. A retired employee who has given prime years of his life in the service of the department is entitled under law for payment of his retiral dues immediately on his retirement so that he may be able to live with dignity even after his retirement.

7. As such, for the foregoing reasons, the orders dated 3.8.1999 and

11.11.2002 passed by the Regional Food Controller, Jhansi are quashed. It is directed that the respondent no. 1, the Commissioner/ Secretary, Food & Civil Supplies Department, U.P. Government, Jawahar Bhawan, Lucknow shall ensure payment of the entire balance retiral dues of the petitioner, which includes the gratuity amount, commutation of pension and security amount etc. within three months from today alongwith 9% interest from the date of his retirement, till the date of actual payment.

8. Considering the fact that the petitioner had been agitating his claim for payment of pension for the last 12 years, the petitioner would also be entitled to payment of costs, which this Court assesses at Rs.20,000/-. The said amount of cost would also be paid to the petitioner within the same period of three months from today.

Accordingly, this writ petition stands allowed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 25086 of 2002

Ram Mohan Agarwal ...Petitioner
Versus
Secretary/General Manager, District Cooperative Bank, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri H.R. Misra

Counsel for the Respondents:
Sri Ajit Kumar Singh
Sri K.N. Mishra

U.P. Cooperative Societies Employees Service Regulations 1975-Regulation 24-Age of Retirement-employees working prior to enforcement of Regulation shall be governed by the contract-as the case may be the age of superannuation would be 60 years-otherwise-any appointment after enforcement of Regulation-the age retirement age shall be 58 years-in absence of contract-can not be allowed to work up to 60 years of age.

Held: Para 13

In view thereof this Court held that the employees appointed prior to enforcement of 1975 Regulations and those governed by the Settlement dated 22.2.1966 would be entitled to continue till the age of 60 years and shall not be retired on attaining the age of 58 years in view of proviso to Regulation 24 of 1975 Regulations. Ram Swarup Srivastava (supra) was also a case arising from Allahabad Cooperative Bank where existed a similar agreement as involved in Lalji Srivastava (supra). It is also worthy of notice that in Ram Swarup Srivastava (supra) there was another connected matter, i.e., Hari Narain Ojha vs.Allahabad District Co-operative Bank Ltd. Allahabad (Special Appeal No.66 of 2003) but in that case it was found that he was appointed subsequently and was not governed by the settlement dated 22.2.1966 but in view of the Joshi Award was liable to retire on attainment of 58 years and his appeal was dismissed by the Division Bench. Similarly, in Dhyan Chand Gupta (supra) we find that there was a settlement dated 6.5.1965 executed by Meerut District Cooperative Bank Meerut, providing the age of retirement as 60 years and pursuant thereto he was held entitled to continue till the age of 60 years. Therefore, none of the aforesaid judgments are applicable or

lend any support to the petitioner for the reason that in the case in hand there is no contract executed between the parties, providing any higher age of retirement in order to attract proviso to Regulation 24 of 1975 Regulations. We, therefore, do not find any force in the contention advanced on behalf of the learned counsel for the petitioner that he was entitled to continue till he attains 60 years of age.

Case law discussed:

1994 (3) UPLBEC-1701
2005 (2) ESC-1215
1980 UPLBEC-202

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

1. The petitioner has sought a writ of mandamus commanding the respondents not to treat him as retired w.e.f. 1.7.2002 on completion of 58 years of age since he is entitled to continue in service till 1.7.2004 i.e., till he attains the age of 60 years.

2. The facts in brief as stated in the writ petition are that the petitioner was appointed as Clerk in District Cooperative Bank, Gorakhpur (*hereinafter referred to as "the Bank"*) on 2.5.1969 where he joined on 3.5.1969. He was promoted to the post of Junior Branch Manager on 25.9.1978 and thereafter as Senior Branch Manager on 12.1.2002. The conditions of service of the employees of Cooperative Societies are governed by U.P. Cooperative Societies Employees' Service Regulations, 1975 *(hereinafter referred to as "1975 Regulations")* but prior to promulgation of the said Regulations, the conditions of service of the employees used to be governed by individual contract and/or the Rules framed by the respective Cooperative Societies. The Bank entered into a contract according to the Rules and Circulars issued by the Registrar, Cooperative Societies, which was adopted by the Bank, wherein the age of superannuation of the employees of the Bank was prescribed as 60 years. It is said that a resolution was passed by the General Body of the Bank on 27.7.1958 to the effect that a detailed report from the Secretary/Managing Director of the Bank be obtained in regard to the import and effect of the conditions of service mentioned in the Circular issued by the Registrar, Cooperative Societies, U.P., Lucknow vis-a-vis the conditions of service prevailing in the Bank. The Secretary/ Managing Director of the Bank in consultation with the Employees Association after due deliberation submitted a report that the age of retirement of the employees of the Bank would be 60 years and with that modification circular issued by the Registrar, Cooperative Societies be adopted by the Bank. The report was placed before the committee of management of the Bank vide resolution dated 12.10.1958 it adopted the circular of the Registrar in the light of the report submitted by the Managing Director of the Bank. However, under Regulation 24 of 1975 Regulations the age of retirement prescribed is 58 years but proviso thereto states where before commencement of 1975 Regulations, the Society at the time of appointment had entered into a contract with the employees, whereby he is entitled to be retained in service after the date he attains the age of 58 years, the provision of Regulation 24 of 1975 Regulations shall not apply and in case of such employees, the date of superannuation shall be determined in accordance with the said contract. It is contended that since the petitioner had already executed a contract with the Bank, providing age of retirement as 60

years, as is corroborated by the Bank's resolution dated 12.10.1958, hence he cannot be retired on attaining the age of 58 years and is entitled to continue till he attains the age of 60 years.

3. Respondents no.1 and 2 have filed counter affidavit stating that the date of birth of the petitioner is 2.7.1944 and he was appointed as Cashier on 30.4.1969/2.5.1969. A copy of the appointment letter has been placed on record as Annexure CA-1. The petitioner after promotion to the post of Senior Branch Manager on 12.1.2002 attained the age of superannuation of 58 years on 1.7.2002 and as per Rules applicable to the Bank was allowed to retire at the end of the month, i.e., 31.7.2002 vide letter dated 4.7.2002, a copy whereof has been placed on record as Annexure CA-2. It is denied that there was any contract between the petitioner and the Bank whereunder he was entitled to continue beyond the age of 58 years and it is said that the petitioner is governed by 1975 Regulations and, therefore, liable to retire on attainment of the age of 58 years.

4. Sri H.R. Mishra, learned counsel for the petitioner contended that in view of the averments made in the writ petition and Joshi Award, the petitioner was entitled to continue till he attains the age of 60 years. He also placed reliance on Division Bench judgments in **Allahabad District Co-operative Bank Ltd. Vs. Lalji Srivastava (1994) 3 UPLBEC 1701; Ram Swarup Srivastava Vs. Allahabad District Co-oiperative Bank Ltd., Allahabad and another 2005(2) ESC 1215 and a Single Judge judgment in writ petition no. 16365 of 2004, Sri Dhyan Chand Gupta vs. District Cooperative Bank Ltd. & another, decided on 25.5.2005.**

5. We have heard Sri H.R. Mishra, learned counsel for the petitioner and Sri K.N. Mishra appearing for respondents no.1 and 2 and perused the record.

6. It is not disputed between the parties that if there existed any contract executed between the petitioner and the respondent Bank prior to enforcement of 1975 Regulations, whereunder the petitioner is entitled to continue beyond 58 years of age, he would be entitled to avail the same and Regulation 24 of 1975 Regulations would not curtail his age of superannuation. It is also not disputed between the parties that in case the matter is governed by Regulation 24 of 1975 Regulations, then the petitioner would not be entitled to continue beyond 58 years.

7. The controversy, therefore, has been narrowed down in this case as to whether the case of the petitioner would be governed by the proviso to Regulation 24 of the 1975 Regulations or by the main provision or in other words, whether there existed any contract between the petitioner and the Bank entitling him to continue for the period beyond 58 years. Though the petitioner in an indirect way has attempted to assert in the writ petition that there existed a resolution passed by the Bank in 1958 in consultation with the employees prescribing age of retirement as 60 years. However, the petitioner could not show existence of any such contract executed with the Bank providing age of retirement more than 58 years which may attract the proviso to Regulation 24 of 1975 Regulations and, therefore, he has rightly been retired at the age of 58 years. Learned counsel for the petitioner tried to

construe the said averment as a contract between the petitioner and Bank but no such document, however, has been placed on record to substantiate that at any point of time, the Bank made any provision prescribing the age of retirement beyond 58 years. On the contrary, the respondents in the counter affidavit have specifically said that there was no condition of service available providing age of retirement as 60 years and no contract existed between the Bank and the petitioner to this effect. The averments made in paragraphs no. 9 and 10 of the counter affidavit are reproduced as under:

"9. That the contents of paragraph no. 6 of the writ petition, as stated, is wholly misconceived and incorrect, hence denied. It is wholly incorrect to say that the petitioner is saved by Regulation 24-A proviso. The U.P. Cooperative Societies Employees' Service Regulations 1975 is wholly applicable in the case of petitioner. Further more, there was no condition as such, before the coming in force of Regulations 1975 before the petitioner and and answering respondents that he will retire after the age of 60 years. Even the Bank Rules, 1958 provide the age of retirement as 55 years, and the Joshi Award subsequent to that which was agreed between the Bank Employees' Union and the management also provide the age of retirement as 58 years. Therefore, the contention of the petitioner is totally misconceived and wrong.

10. That, the contents of paragraph no.7 of the writ petition, as stated, are incorrect and wrong, hence denied. There are no such contract between the petitioner and the answering respondents regarding the retirement of the petitioner at the age of 60 years."

8. It is also pleaded in paragraphs 3(j) and (o) of the counter affidavit that in regard to age of retirement of employees of various Cooperative Banks including the Bank in question, an industrial dispute was raised by U.P. Bank Employees Union which was referred for adjudication before the Industrial Tribunal III at Allahabad in Adjudication Case No.53 of 1963 wherein 50 Cooperative Banks were parties. The Industrial Tribunal vide its award dated 25.6.1971 adjudicated the matter and in para 21 the issue pertaining to the age of retirement was considered and it was held as under:

"In the Staff Service Rules of U.P. Cooperative Bank, Lucknow, the age of retirement is 58 years. It was argued for the workmen that the uncertainty in this respect should be set at rest as different Banks had taken action on different lines in such cases. Having regard to the entire circumstances, I am of the view that the age of retirement in the case of all the Bank should be 58 years...."

9. It is evident from the said finding of Joshi Award that the age of retirement of employees of the Bank was held to be 58 years. However, it was also observed that there would be no objection to the Board of Directors re-employing an employee provided the re-employment is not for a period of more than one year at a time and more than two years in all after attaining the age of retirement. The said award given on 25.6.1971 was published by the State Government on 17.7.1971.

10. The respondents no.1 and 2 have also filed a copy of the District Cooperative Bank Limited Gorakhpur Service Rules which came into force on 12.10.1958, as Annexure CA-10, which

contain conditions of service of the employees of the Bank. Rule 17 thereof provides that the maximum age beyond which an employee may not continue in the Bank, is 55 years which may be extended by the Board of Directors, in very special cases, by giving extension of one year at a time but not more than 5 years in aggregate. The said Rules also make it clear that age of retirement was only 55 years in 1958 and no employee had right to continue thereafter. Subsequently, since the Rules have been replaced by 1975 Regulations, which provided age of retirement as 58 years, therefore, the petitioner has been made to retire on attaining the age of 58 years. Moreover, in Joshi award also the age of retirement was provided as 58 years.

11. 1975 Regulations came up for consideration before the Apex Court in Virendra Pal Singh & others vs. The District Assistant Registrar, Cooperative Societies, Etah and another, 1980 UPLBEC 202 and with respect to the age of retirement qua Regulation 24 of 1975 Regulations, the Apex Court observed that if an employee before enforcement of 1975 Regulations had entered into any contract with the Society whereunder he is entitled to continue beyond 58 years, the Regulation 24, providing the age of retirement as 58 years shall not apply in his case and in the matter of age of retirement, he shall be governed by the contract. In para 14 of the judgment, the Apex Court held:

*"**14.** Another question which was raised was that though the age of retirement of employees of some of the Cooperative Societies was originally 60 years under the U.P. Cooperative Societies Employees Service Regulations, the age of retirement has now been made 58 years. We are unable to see any force in this submission. Regulation 24(ii) itself provides that if before the coming into operation of the Regulations, the Society had entered into any contract with an employee on the date of his employment whereby he was entitled to continue beyond 58 years. The Rule of retirement at the age of 58 years shall not apply and the age of retirement shall be governed by the contract. Therefore, if in any case there is a contract between a Cooperative Society and an employee entered into before the Regulations came into force, stipulating the age of retirement as 60 years the Regulation now stipulating the age of retirement as 58 years will not apply to him. We make it clear that this principle does not apply to the members of the Centralised service...."*

12. Coming to the judgments relied upon by learned counsel for the petitioner, we find that the facts of those cases were totally different and have no application to the facts of the case in hand. In **Lalji Srivastava (supra)** it was the admitted position that there was a settlement dated 22.2.1966 reached between the Bank and the Employees' Union which provided age of retirement as 60 years. This is evident from para 3 of the judgment:

"3. respondent was appointed on 18.5.1960 as a clerk in the Bank. On 22.2.1966 a settlement was reached between the Bank and its employees union of which the respondent was a member. In this settlement age of retirement was fixed at 60 years."

13. In view thereof this Court held that the employees appointed prior to enforcement of 1975 Regulations and

those governed by the Settlement dated 22.2.1966 would be entitled to continue till the age of 60 years and shall not be retired on attaining the age of 58 years in view of proviso to Regulation 24 of 1975 Regulations. **Ram Swarup Srivastava (supra)** was also a case arising from Allahabad Cooperative Bank where existed a similar agreement as involved in **Lalji Srivastava (supra)**. It is also worthy of notice that in **Ram Swarup Srivastava (supra)** there was another connected matter, i.e., **Hari Narain Ojha vs.Allahabad District Co-operative Bank Ltd. Allahabad (Special Appeal No.66 of 2003)** but in that case it was found that he was appointed subsequently and was not governed by the settlement dated 22.2.1966 but in view of the Joshi Award was liable to retire on attainment of 58 years and his appeal was dismissed by the Division Bench. Similarly, in **Dhyan Chand Gupta (supra)** we find that there was a settlement dated 6.5.1965 executed by Meerut District Cooperative Bank Meerut, providing the age of retirement as 60 years and pursuant thereto he was held entitled to continue till the age of 60 years. Therefore, none of the aforesaid judgments are applicable or lend any support to the petitioner for the reason that in the case in hand there is no contract executed between the parties, providing any higher age of retirement in order to attract proviso to Regulation 24 of 1975 Regulations. We, therefore, do not find any force in the contention advanced on behalf of the learned counsel for the petitioner that he was entitled to continue till he attains 60 years of age.

14. The writ petition lacks merit and is accordingly, dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.11288 of 1984

M.K. Shukla ...Petitioner
Versus
The Additional Labour Commissioner, Kanpur and another ...Respondents

Counsel for the Petitioner:
Sri K.P. Agrawal
Sri B.N. Singh
Sri N.C. Pandey
Sri Dinesh Chandra

Counsel for the Respondents:
Sri V.P. Varshney
S.C.

U.P. Industrial Dispute Act 1947-Section 6 (2)-Power of Review-order passed under Section 2 H (2) regarding the arrear of wages recall application on the ground the workman gainfully worked during these period-objection that the labor Commissioner has no power of review-held-misconceived-order passed exercising Quasi judicial power-can be reviewed.

Held: Para 12

The submission of the learned counsel for the petitioner that the Additional Commissioner had no power to review or recall its own order is patently erroneous. The Additional Commissioner is exercising quasi judicial powers under Section 6-H(1) of the Act and therefore, the authority has the power to review or recall its order.

Case law discussed:
AIR 1965 SC-1488
1983 LIC-1738

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

1. Heard Sri B.N. Singh, the learned counsel for the petitioner. No one appears for the respondents. The services of the petitioner was terminated by an order dated 19.10.1968. The petitioner raised an industrial dispute which was referred for adjudication before the Labour Court. The Labour Court gave an award dated 30.6.1972 directing reinstatement with back wages. The employer filed a writ petition which was eventually dismissed by a judgment dated 30.1.1978. Upon the dismissal of the writ petition, the petitioner moved two applications under Section 6-H(1) of the U.P. Industrial Dispute Act, for the recovery of wages in terms of the award. By the first application, wages amounting to Rs.12,378.39 was sought to be recovered for the period 1.1.1972 to 30.1.1978 and by the second application, an amount of Rs.6665.33 was sought to be recovered from 1.2.1978 to 30.4.1980. The Additional Labour Commissioner after considering the matter issued two recovery certificates dated 15.12.1980 for the recovery of the aforesaid amount from the employers. When the petitioners came to know about the aforesaid orders, they filed an application for the recall of the said order. The Additional Labour Commissioner after considering the matter and, after hearing the parties, recalled its order by an order dated 29.5.1984. Aggrieved by the aforesaid order, the petitioner has filed the present writ petition.

2. The learned counsel for the petitioner submitted that the Additional Commissioner committed a manifest error in recalling its earlier order, inasmuch as, the amount sought to be recovered was pursuant to the award of the Labour Court which could be recovered under Section 6-H(1) of the Act. Further, the contention of the employers that the petitioner was gainfully employed for the period 1.1.1972 to 30.4.1980 could not be considered or adjudicated in proceedings under Section 6-H(1) and could only be adjudicated under Section 4-K of the Industrial Disputes Act. The learned counsel for the petitioner further submitted that the Additional Commissioner had no power or jurisdiction to recall or review its own order since no such power had been provided under the Act.

3. In support of his submission, the learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in case of **Kays Construction Co. (P) Ltd. Vs. State of U.P. and others, AIR 1965 SC 1488, Abhinash Chandra Gautam (since deceased) through its L.Rs. vs. Union Territory of Tripura and another, 1983 LIC 1738 and Cox and Kings (Agents) Ltd. Vs. Their Workmen and others, 1977(34) FLR 235.**

4. In my opinion, the submissions of the learned counsel for the petitioner is misconceived and bereft of merit. Further, the judgment relied upon by the petitioner has no application to the present facts and the circumstances of the case.

5. Section 6-H of the U.P. Industrial Disputes Act is quoted herein under for ready reference:

6-H. Recovery of money due from an employer- (1) Where any money is due to a workman from an employer under the provisions of Section 6-J to 6-R or under a settlement or award, or under an award

given by an adjudicator or the State Industrial Tribunal appointed or constituted under this Act, before the commencement of the Uttar Pradesh Industrial Disputes (Amendment and Miscellaneous Provisions) Act, 1956, the workman may, without prejudice to any other mode of recovery, make an application to the State government for the recovery of the money due to him, and if the State Government is satisfied that any money is so due , it shall issue a certificate for that amount to the Collector who shall proceed to recover the same as if it were an arrear of land revenue.

(2) Where any workman is entitled to receive from the employer any benefit which is capable of being computed in terms of money, the amount at which such benefit should be computed may, subject to any rules that may be made under this Act, be determined by such Labour Court as may be specified in this behalf by the State Government, and the amount so determined may be recovered as provided for in sub-section (I).

(3) For the purposes of computing the money value of a benefit, the Labour Court may, if it so thinks fit, appoint a Commissioner in the prescribed manner who shall, after taking such evidence as may be necessary, submit a report to the Labour Court and the labour Court shall determine the amount after considering the report of the Commissioner and other circumstances of the case]

6. The Supreme Court in **Kays Construction Co.(P) Ltd.**(supra) interpreted the provisions of Section 6H(1) and 6-H(2) of the U.P. Industrial Disputes Act and held-

"It is contended before us that the judgment of the Division Bench is erroneous in the interpretation of S. 6-H(1) and (2). The question thus is how are the two sub-sections to be read ? This section is analogous to S.33-C of the Industrial Disputes Act, 1947 and S. 20 of the Industrial Disputes (Appellate Tribunal) Act, 1950. It is significant that in all the three statutes the cognate section is divided into two parts and the first part deals with recovery of 'money due' to a workman under an award and the second deals with a 'benefit' computable in terms of money. Under the first sub-section the State Government (or its delegate), if satisfied that any money is due, is enabled to issue a certificate to the Collector who then proceeds to recover the amount as an arrears of land revenue. The second part then speaks of a benefit computable in terms of money which benefit after it is so computed by a Tribunal is again recoverable in the same way as money due under the first part. This scheme runs through Section 6-H, sub-ss.(1) and (2)."

7. From the aforesaid, it is clear that under Section 6-H(1) recovery can be made of a money due to a workman under an award while the Section 6-H(2) deals with computation of 'benefit' in terms of money. The difference between the two sub-sections is, that the benefit contemplated under Section 6-H(2) is not 'money due' but some advantage or perquisite is to be computed in terms of money.

8. In the present case, the employer filed an application for the recall of the order of the Additional Labour Commissioner, alleging that no money was due or payable to the petitioner for

the period 1.1.1972 to 30.4.1980 on the ground that the petitioner was gainfully employed and was working in Kanpur Textile Mill and that his services was also regularized by that Company. The employers further submitted that after the dismissal of the writ petition, the employer had sent a letter asking the petitioner to join which he failed to do so. Consequently, the application under Section 6-H(1) of the Act filed by the petitioner was wholly misconceived and that no amount could be computed as no money was due or payable pursuant to the award.

9. The Additional Labour Commissioner in the impugned order found that the petitioner was gainfully employed in Kanpur Textile Mill during the said period and that he had received the wages from that textile mill. The fact that the petitioner was gainfully employed was not denied by the petitioner either before the Additional Labour Commissioner or even before this Hon'ble Court. Consequently, in the opinion of the Court, no money was due or payable to the petitioner under the award since he was gainfully employed. The application filed by the petitioner under Section 6-H(1) of the Act was not maintainable. The Additional Labour Commissioner, having found that a wrong recovery certificate was issued had rightly and validly recalled its own order.

10. The contention of the petitioner that disputed questions of fact, namely, as to whether the petitioner was gainfully employed or not could not be adjudicated under Section 6-H(1) by the authority is, patently misconceived. There is no disputed question of fact involved inasmuch as, the petitioner himself admitted that he was gainfully employed in Kanpur Textile Mill. Once the petitioner admits that he was gainfully employed and had received the wages for that period, he cannot move an application under Section 6-H(1) for the recovery of post award wages under an award from the erstwhile employers. The said application was wholly misconceived and was not maintainable.

11. In M/s Punjab Beverages Pvt. Ltd., Chandigarh vs. Suresh Chand and another, A.I.R. 1978 SC 995, the Supreme Court held that the workman could not maintain an application under Section 33-C (2) for determination or payment of wages on the basis that he continues to be in service. The Supreme Court held that the workman could proceed under Section 33-C (2) only after his complaint was adjudicated by the Tribunal under Section 10 of the Act. The same principle would equally apply in the present case. The fact that the petitioner was gainfully employed in another establishment, debars the petitioner from moving an application for recovery of wages from his erstwhile employer.

12. The submission of the learned counsel for the petitioner that the Additional Commissioner had no power to review or recall its own order is patently erroneous. The Additional Commissioner is exercising quasi judicial powers under Section 6-H(1) of the Act and therefore, the authority has the power to review or recall its order.

13. In view of the aforesaid, this Court does not find any merit in the writ petition and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 51163 of 2002

Gaya Prasad Yadav ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Manu Khare

Counsel for the Respondents:
S.C.

Constitution of India-Dismissal order- Petitioner working as Accountant in Treasury-for certain wrong payment-FIR lodged against 7 persons-criminal Court identified four person-but three persons including petitioner not identified-in departmental proceeding punishment of dismissal with recovery of Rs.1,54,481/- while first charge regarding empossing seal of competent authority on pension paper-the disbursing authority is responsible-second charge signature by sketch pen-being ink pen-can not be held guilty-dismissal order held illegal.

Held: Para 8

With regard to the first charge, once the pension papers produced were having Embossed Seal of the Competent Officer, it could not be said that there was any fault of the petitioner, specially when the responsibility for payment of pension was that of Pension Disbursing Officer and not the petitioner. As regard the second charge, the signature had been made by sketch pen which is also an ink pen. In the absence of the Rule providing for any specific pen to be used for the signature, the petitioner cannot be held guilty of the charge. The third charge, as stated above, has been partly proved against the petitioner, merely because the petitioner was assisting the Pension Disbursing Officer. The petitioner could not be held responsible for any act of some other officer responsible for performance of such duty under law. In such circumstances at best, the petitioner could have been warned for his conduct as a person who assisted the Pension Disbursing Officer, but he could not be held responsible for acts or performance of duty specifically assigned to the Pension Disbursing Officer. As such, none of the three charges could be said to have been proved against the petitioner so as to warrant any punishment. Even the order directing recovery from the petitioner has been wrongly made, as admittedly it was the responsibility of the Pension Disbursing Officer to make such payment and not that of the petitioner. If at all, recovery could have been made from to officer concerned and not from the person who assisted such officer. In its order, the appellate authority has also observed that the petitioner was having 38 years of service career with unblemished record and still awarded such punishment of reversion and recovery, without the petitioner being found responsible for such acts, which is wholly unjustified and cannot be sustained in the eyes of law.

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

1. The petitioner was Accountant in the Agra Treasury. For some instance of wrong payment made in the year 1990, an F.I.R. was lodged against seven persons, which did not include the name of the petitioner. However, departmental enquiry was initiated against the petitioner, in which chargesheet was submitted on 26.8.1992, to which the petitioner submitted his reply. However, in the meantime, in the criminal case, out of seven persons named, four persons were found to be guilty of offences and

were identified. However, the remaining three persons could not be identified. The same was communicated by the Economics Offences Wing, U.P. to the State Government vide communication dated 26.12.1996, wherein it was mentioned that the departmental proceeding may be initiated against some official of treasury, including the petitioner.

2. After submission of the charge sheet and reply given by the petitioner in the departmental proceedings on 26.8.1992, an enquiry report was submitted only on 15.9.2000 and thereafter vide order 24.5.2002 passed by the District Magistrate, Agra the punishment of dismissal of service and recovery of Rs.1,54,481/- was directed to be made from the petitioner. Challenging the said order, the petitioner filed an appeal which was decided by the Commissioner, Agra Division, Agra on 23.10.2002 whereby the punishment of dismissal was reduced to that of reversion to the next lower grade in the pay scale of Rs.4000-6000 but the same was also subject to the condition that the petitioner deposited the sum of Rs.1,54,481/-. It was further directed that the petitioner would not be entitled to salary during the period he remained out of service. Aggrieved by the aforesaid orders dated 24.5.2002 and 23.10.2002 the petitioner has filed this writ petition.

3. By a detailed interim order dated 2.12.2002, the operation of the aforesaid orders dated 24.5.2002 and 23.10.2002, insofar as they direct the petitioner to deposit Rs.1,54,481/- had been stayed. Consequently, the petitioner was permitted to join on the reverted post in the pay scale of Rs.4000/6000. During the pendency of this writ petition, the petitioner has retired from service on 31.1.2004.

4. I have heard Sri Manu Khare, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the record.

The submission of learned counsel for the petitioner is that even in the enquiry report the three charges against the petitioner had only been said to be proved partly but still the impugned order punishing the petitioner has been passed. It has further been submitted that the petitioner was not the person responsible for payment of pension and it was the Pension Disbursing Officer who was responsible for the same. It has thus been urged that order of reversion as well the order directing the recovery from the petitioner is wholly unjustified and liable to be quashed. It has also been submitted that as per the instructions issued by the Controller of Defence Accounts (Pensions) Government of India regarding payment of pension, in para 10 it has been provided that Pension Disbursing Officers are to be personally responsible for the acts of their subordinates and Government will hold them responsible for any loss which may result from their own supineness or the dishonesty of their subordinates. As such, the contention is that the petitioner, who was only an Accountant, could not be held responsible for any such wrong payment of pension.

5. Learned Standing Counsel has, however, submitted that since the charges have been partly proved against the petitioner, the punishment imposed by the

appellate authority is fully justified and liable to be confirmed.

6. The summary of three charges levelled against the petitioner are that; (i) the payment of pension was made on a photocopy of the Pension Payment Order and not the original; (ii) the signature of the pensioner was made by the sketch pen and not by ink pen, and even then pension was accepted by the petitioner; and (iii) the pensioner was not properly identified by two witnesses.

7. With regard to the first charge, even though the finding recorded by the enquiry officer is to the effect that the photocopy of the Pension Payment Order bore the duly Embossed Seal of the Competent Officer and that it was the duty of Pension Disbursing Officer to see the correctness of the documents and not that of the accountant or clerk, but still the enquiry officer held the charge against the petitioner to be partly proved. As regards the second charge, even though the enquiry officer admitted that the provision of signature of the pensioner was to be made by the ink pen and that sketch pen was also an ink pen, but in the end the enquiry officer stated that the said charge was also partly proved. With regard to third charge, relating to identification by two witnesses, the enquiry officer has stated that although there was no provision under the Rules for such identification, but as per practice, it was being done for first payment. It was admitted by the enquiry officer that despite no such requirement, the identification had been done by two existing pensioners but it was then stated that had the accountant and the Pension Disbursing Officer made enquiries from those identifying, then false payment could have been avoided. In the end, the enquiry officer has also mentioned that it is true that the responsibility of making such payment was of the Pension Disbursing Officer but since the petitioner was to assist the Pension Disbursing Officer, he would also be responsible and thus this charge was said to be partly proved against the petitioner.

8. With regard to the first charge, once the pension papers produced were having Embossed Seal of the Competent Officer, it could not be said that there was any fault of the petitioner, specially when the responsibility for payment of pension was that of Pension Disbursing Officer and not the petitioner. As regard the second charge, the signature had been made by sketch pen which is also an ink pen. In the absence of the Rule providing for any specific pen to be used for the signature, the petitioner cannot be held guilty of the charge. The third charge, as stated above, has been partly proved against the petitioner, merely because the petitioner was assisting the Pension Disbursing Officer. The petitioner could not be held responsible for any act of some other officer responsible for performance of such duty under law. In such circumstances at best, the petitioner could have been warned for his conduct as a person who assisted the Pension Disbursing Officer, but he could not be held responsible for acts or performance of duty specifically assigned to the Pension Disbursing Officer. As such, none of the three charges could be said to have been proved against the petitioner so as to warrant any punishment. Even the order directing recovery from the petitioner has been wrongly made, as admittedly it was the responsibility of the Pension Disbursing Officer to make such

payment and not that of the petitioner. If at all, recovery could have been made from to officer concerned and not from the person who assisted such officer. In its order, the appellate authority has also observed that the petitioner was having 38 years of service career with unblemished record and still awarded such punishment of reversion and recovery, without the petitioner being found responsible for such acts, which is wholly unjustified and cannot be sustained in the eyes of law.

9. For the foregoing reasons, the order impugned orders in this writ petition deserve to be quashed.

10. Accordingly, this writ petition stands allowed. The impugned orders 24.5.2002 and 23.10.2002 passed by the District Magistrate, Agra, respondent no.1 and Commissioner, Agra Division Agra, respondent no.2 are quashed. The petitioner shall be entitled to all consequential benefits. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 46474

Tufail Ahmad and others ...Petitioners
Versus
The Chairman/Director, Gas Authority of India and another ...Respondents

Counsel for the Petitioners:
Sri Manoj Kumar Sharma
Sri Rajeev Trivedi

Counsel for the Respondents:
Sri Siddharth Singh
Sri D.P. Singh
Sri K.N. Pandey

Constitution of India, Art. 226-Regularisation-petitioners working on different status with registered contractor-which provides services to the Gas Authority of India-who under takes work of HUAC System, Split and window Air conditioning water cooler etc.-never worked as employee of GAIL-held-'No' mandamus can be issued to private contractor.

Held: Para 17 & 18

The petitioners are not the employees of Gas Authority of India, as such, have not worked as employees of GAIL for more than 240 days continuously.

So far as regularization of their service is concerned the petitioners are permanent employees of Contractor Company, hence, no writ of mandamus can be issued to a private Contractor and even otherwise, in view of decision of Hon'ble Apex Court in *State of Punjab and another V. Sardara Singh* 1998 (9) SCC-709 holding that relief of regularization in service cannot be granted by High Court in exercise of extraordinary powers under Article 226 of the Constitution,

Case law discussed:
1999 (3) J.T.-277
1998 (9) SCC-709

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

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

2. The petitioners are permanent employees of Advance Air Conditioning Works (Pvt.) Ltd., Kanur (hereinafter referred to as 'the Contractor Company'), a company registered under the Companies Act, 1956 which has undertaken work of maintenance of

HVAC system, split and window Air Conditioning, Water Coller Machines and Refrigerators at GAIL Compressor Station, Dibiyapur.

3. By the impugned orders, Gas Authority of India Ltd., (hereinafter referred to as 'the GAIL') a Government of India undertaking has informed the petitioners that since they are permanent employees of Contractor, their services cannot be regularized by GAIL in their establishment.

4. Aggrieved by the impugned orders, the petitioners have invoked writ jurisdiction by means of this writ petition. Apart from other prayers, the petitioners have also prayed for a direction in the nature of mandamus commanding the respondents to regularize their services in GAIL.

5. The Contractor Company was also registered under EPF and Miscellaneous Provisions Act, 1952 with Regional Provident Fund Commissioner Kanpur (for short 'RPFC') having PF Code Number UP 20803. The Company also deposits PF contributions with RPFC Kanpur in respect of employees working with them as per the copies of challan submitted by the Company from time to time.

6. GAIL is a Government of India undertaking engaged in the work of maintenance of storage, distribution and production as well as system relating with gases etc., including maintenance of HVAC system, Split and window Air Conditioning, Water Coller Machines and Refrigerators. From the contract between the Contractor Company and GAIL, it appears that as and when any Air Conditioner, Water Cooler, Machine, Split/window Air Conditioner and HVAC system gets out of order or any problem is detected, GAIL informs the Company which, in turn, deputes its own employees, i.e., the petitioners for repair/rectification of defects. The said work, including change of parts etc., is taken up by the Contractor Company at is establishment either at Dibiyapur or Kanpur and after rectification of the defects, the Company installs/fixes these items at Compressor Station, Dibiyapur. The said repairing or maintenance work of Air Conditioning, Water Coller Machines, Split Air Conditioning etc., is being done with complete supervision of the Company at its establishment.

7. Establishment of GAIL Compressor Station, Dibiyapur is prohibited place under Official Secrets Act, 1923. Therefore, no one can enter the establishment without having a proper entry pass which is issued to anyone including visitors.

8. The petitioners have by means of this writ petition sought relief of regularization of their services/absorption in GAIL (Diyiyapur) Etawah on the ground that they have completed more than 240 days in a calander year. The details of their duties as claimed by them in paragraph 6 of the writ petition are as under :-

sl. no.	Name Appointment	Tenure/ nature of work
1.	Tufail Ahmad 11.6.92	7.7.99 Supervisor (2615 days)
2.	Rakesh Pal 11.6.92	6.7.99 Technician (2615 days)

3.	Mahesh Kumar 17.9.92	Operator (2465 days)
4.	Manish 1.5.92	Operator (2615 days)

9. The stand of the workmen is that in view of their continuous need, it is proved factum that their services are perennial and permanent in nature, the vacancies are always existing in the respondent-establishment but instead of appointing the petitioners as permanent employees in GAIL, the work of maintenance of Air Conditioning and Cooling systems was being taken by it through contract labour system which is wholly illegal and unjust.

10. In support of their claim, the petitioners have placed reliance upon gate passes issued to them for entry/exit in the establishment which is a prohibited area under the Official Secret Act. They have also filed work order dated 29.6.99 to establish that the contract Agency which has deployed the petitioners under the said work order is a contractor assigned the duties to carry out the work order entrusted to it under the Contract Labour (Regulation and Abolition) Act, 1970.

11. It is submitted by the counsel for the petitioners that for getting the work of perennial nature in the establishment done through the Contractor establishes the mala fide intention of the respondents to avoid regularization/absorption by GAIL in their establishment as well as the law laid down in ***Secretary Haryana State Electricity Board V. Suresh and others*** - 1999(3) Judgement Today- 277.

12. Moreover, the work awarded to Company by GAIL was for maintenance of HVAC, widow and split air-conditioning, water cooler machines, refrigerators of GAIL Compressor Station and not work of the respondent-undertaking. If any problem arose, that was communicated to the Company which used to depute its employees for rectification of the defects which were being made under the supervision of the Company hence the relationship of 'master and servant' existed between the petitioners and the Company and not between GAIL and the petitioners. In the case of Haryana State Electricity Board, work of 42 Safai Karmacharis supplied by the contractor was directly supervised by Haryana State Electricity Board.

13. The defects in the Air Conditioning and Cooling systems do not occur every day. Therefore, the said work is entirely of a non-perennial nature and the petitioners are on the rolls of the Company. Therefore, the relationship of employer-employee exists between the petitioners and the Company.

14. The ratio laid down in ***Secretary Haryana State Electricity Board*** (supra) does not apply to the case of the petitioners because Haryana State Electricity Board was not registered at the relevant time under the Contract Labour (R&A) Act, 1970 but GAIL Compressor Station had been registered under Contract Labour (R&A) Act, 1970 with Registering Officer and ALC (C), Ministry of Labour Government of India, Kanpur. In the case of Haryana State Electricity Board, the contractor Mr. Kashmir Singh had not obtained any licence under Contract Labour (R&A) Act, 1970 for engagement of 42 Safai Karmacharis awarded to him by the Haryana State Electricity Board whereas the work performed by the petitioners was

of perennial nature. Further that was a 'prohibited category' of work under Contract Labour (R&A) Act, 1970 whereas in the present case, the contract awarded to the Company by GAIL, it was never stipulated in the tender document for supply of any specific number of workers.

15. The contract between Haryana State Electricity Board and contractor Mr. Kashmir Singh was a camouflaged one, but in so far as the contract entered into between GAIL and the Contractor Company is concerned it is to be presumed to be genuine. The Contractor Company as well as respondent-GAIL are registered under the Companies Act, 1856 -a camouflage by the competant labour Court. The petitioners are on the rolls of the Contractor Company. The nature of work was non-perennial one and does not appear to be on the basis of averments made by the petitioners in various records appended with the writ petition. The relationship of employer-employee is only between Contractor Company and the petitioners and not between GAIL and the petitioners. The GAIL may be principal employer for the purpose of provisions of Contract Labour Regulation and Abolition Act but admittedly, petitioners are permanent employees of Contractor, namely, Advanced Air Condition Works (Pvt.) Ltd., Kanpur. Their attendance etc., is not maintained by GAIL. Their Provident Fund etc., are deducted by the Contractor Company. The contract labour system has not been abolished in the respondent-undertaking, hence it cannot be said that awarding specialized cooling work to the Contractor Company is illegal, mala fide or unjust.

16. The entry of the petitioners in GAIL is restricted to a particular area where they are deputed in the Air Conditioning/Cooling system. Permanent appointment in GAIL can be made according to the recruitment rules. The petitioners being permanent employees of another Company i.e. The Contractor Company they cannot be directed to be regularized/absorbed in the respondent-Government undertaking as they have never worked on its rolls as its employees.

17. The petitioners are not the employees of Gas Authority of India, as such, have not worked as employees of GAIL for more than 240 days continuously.

18. So far as regularization of their service is concerned the petitioners are permanent employees of Contractor Company, hence, no writ of mandamus can be issued to a private Contractor and even otherwise, in view of decision of Hon'ble Apex Court in ***State of Punjab and another V. Sardara Singh*** 1998 (9) SCC-709 holding that relief of regularization in service cannot be granted by High Court in exercise of extraordinary powers under Article 226 of the Constitution,

19. For all the reasons stated above, there is no illegality or infirmity in the impugned orders. The writ petition fails and is accordingly dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2007

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

Civil Misc. Writ Petition No. 47151 of 2004

M/s Super Cassettes Industries Limitted ...Petitioner
Versus
State of U.P and others ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Sri Ayub Khan

Counsel for the Respondents:
Sri C.B. Yadav
Sri Pradeep Kumar
S.C.

U.P. Imposition of Ceiling on Land Holding Act, 1960-Section-11 (1)- whether the appeal against the order pass u/s 11 (1) by Prescribed Authority maintainable? Held-'No'-under this section either the tenure holder or the state accept the case of each other-likewise consent decree.

Held: Para 11

No appeal against orders under Section 11(1) of the Act is maintainable for the reason that under the said sub-section, no adjudication takes place. Under the said sub-section, orders are passed on admission. Just as under Section 96, C.P.C., no appeal is maintainable against decree passed by the Court with the consent of parties, similarly, against orders passed under Section 11(1) of the Ceiling Act, no appeal is maintainable. Under the said sub-section, either tenure-holder accepts the case of the State or State accepts the case of the tenure-holder without any contest or adjudication.

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

1. Heard Sri Ravi Kiran Jain learned senior counsel assisted by Sri Ayyub Khan learned counsel for the petitioner, learned standing counsel for original respondents State of U.P and Additional Commissioner and Sri Pradeep Kumar learned counsel appearing on behalf of Greater Noida Gautam Budh Nagar which has been impleaded through order dated 4.4.2007 passed on its impleadment application.

2. Prescribed authority under U.P Imposition of Ceiling on Land Holdings Act, 1960/ Additional Collector (F & R) Gautam Budh Nagar in case No. 5 of 2002 under section 9(2) of the Act State Vs. Super Cassettes Industries Limited passed an order on 17.12.2003 cancelling the notice dated 24.1.2002 under section 9(2) of the Act. Against the said order State filed appeal before Commissioner being Appeal No. 3 of 2003-04. In the appeal petitioner who is respondent therein raised an objection that appeal was not maintainable. Additional Commissioner (Administration), Meerut Division Meerut through order dated 29.10.2004 rejected the objection and held the appeal to be maintainable. This writ petition is directed against the said order of the appellate court.

Provision of appeal is provided under section 13 (1) of the Act, which is quoted below:

"Any party aggrieved by an order under sub-section (2) of section 11 or section 12, may, within thirty days of the date of the order, prefer an appeal to the [Commissioner] within whose jurisdiction the land or any part thereof is situate."

3. The question to be decided in this writ petition is as to whether the order of the prescribed authority against which appeal has been filed falls under sub-section (1) or sub-section (2) of the section 11 of the Act. If the order falls under sub-section (1) then appeal is not maintainable.

4. Under section 9 as it stood prior to 1973, prescribed authority was required by general notice published in the Official Gazette to call upon every tenure holder holding land in excess of the ceiling area applicable to him to submit within thirty days statement in respect of his holdings giving particulars as prescribed. By virtue of U.P. Act No. 18 of 1973, section 9 as it stood till then was renumbered as sub-section (1) of section 9. Sub-sections (2), (2-A) and (3) were added in section 9 through the said amendment. Section 9 (2) alongwith its proviso is quoted below:

"S.9 [(2) As soon as may be; after the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, the Prescribed Authority shall, by like general notice, call upon every tenure-holder holding land in excess of the ceiling area applicable to him on the enforcement of the said Act, to submit to him within 30 days of publication of such notice, a statement referred to in sub-section (1)]

[Provided that at any time after October 10, 1975, the Prescribed Authority may, by notice, call upon any tenure holder holding land in excess of the ceiling area applicable to him on the said date, to submit to him within thirty days from the date of service of such notice a statement referred to in sub-section (1) or any information pertaining thereto.]

5. It appears that under the powers granted by the aforesaid proviso general notice was issued on 24.1.2002, copy of which is annexure 2 to the writ petition. The said notice as it top contains the provision of section 9 (2) of the Act. In the first para of the said notice given by Additional Collector (F& R) Gautam Budh Nagar, it is stated that as per report of Deputy Collector and Tehsildar, petitioner had unauthorisedly encroached upon the land in question. Thereafter it is mentioned in the notice that every tenure holder who on 8.6.1973 possessed more land than permitted to be held under the ceiling Act should file statement in CLH Form 2.

CLH Forms 1 and 2 are referred in Rule 6 of the rules framed under the Act, which is quoted below:

"6.The general notice to be published in pursuance of section 9 and the statement required to be submitted thereunder by every tenure holder holding the land in excess of the ceiling area applicable to him in the State shall be in CLH Forms 1 and 2 respectively."

Rules 7 and 8 are also relevant hence they are quoted below:

"7. (1) Soon after the issue of general notice in C.L.H Form 1, the Prescribed Authority shall, after making necessary enquiries, cause to be prepared a statement in C.L.H. Form 3.

(2) In proposing the ceiling area applicable to a tenure-holder in Part C of C.L.H Form 3, the Prescribed Authority shall have regard to the following:

*[(a) ******]*

(b) As far as possible, sub-division of holdings should be avoided by including in the first instance share of the tenure-holder in joint holdings in the proposed ceiling area applicable to the tenure-holder.

(c) The ceiling are proposed to be given to the tenure-holder should be as compact as possible.

[8. As soon as may be, after the expiry of thirty days from the date of publication of the general notice in C.L.H Form 1 in the ***Official Gazette****, the Prescribed Authority shall cause to be served upon every tenure- holder, who has failed to submit the statement in C.L.H Form 2 or has submitted an incomplete or incorrect statement, a notice in C.L.H Form 4 together with a copy of the statement in C.L.H Form 3 prepared under Rule 6 calling upon him to show cause within a period of fifteen days from the date of service of the notice why the aforesaid statement be not taken as correct:*

Provided that where the statement in C.L.H. Form 3 also includes land ostensibly held in the name of any other person, the prescribed authority shall cause to be served upon such other person a notice in C.L.H Form 4 together with a copy of the statement in C.L.H. Form 3 calling upon him to show cause within a period of fifteen days from the date of service of the notice why the aforesaid statement be not taken as correct:

Provided further that in the case of a tenure-holder who is a member of Armed Forces (Military, Naval or Air Force) of the Union of India, the period within which he will be called upon to show cause why the statement in C.L.H Form 3 be taken as correct shall be ninety days from the date of service of the notice in C.L.H. Form 4.]"

6. In pursuance of notice dated 24.1.2002, petitioner filed objections, copy of which is annexure 3 to the writ petition. From perusal of the objections dated 4.6.2002, it appears that notice dated 24.1.2002 contained some annexures also which have not been annexed alongwith annexure 2, which is copy of the notice. In annexure 2 no plot number is mentioned. However, in the objections it is mentioned that alongwith notice CLH Form 5 was annexed mentioning number of plots belonging to the petitioners i.e. Khata No. 33, 93 and 102. The main objection was that land had been purchased through three different sale deeds of March and April 1987; that most of the lands purchased were non agricultural as the vendor had already obtained a certificate to that effect under section 143 of U.P.Z.A.L.R Act. In respect of third Khata i.e Khata number 102 the objection was that it was abadi land. It was also mentioned that while preparing CLH Form 5 land was wrongly shown to be irrigated.

Thereafter prescribed authority decided the matter on 17.12.2003. Prescribed authority in its detailed judgement running into 15 pages held that provisions of section 9(2) of the Act were not applicable. Section 11 of the Act is quoted below:

"S.11. Determination of Surplus land where no objection is filed.-- *(1) Where the statement submitted by a tenure holder in pursuance of the notice published under Section 9, is accepted by the Prescribed Authority or whether the*

statement prepared by the Prescribed Authority under- Section 10 is not disputed within the specified period, the Prescribed Authority shall accordingly, determine the surplus land of the tenure-holder.

(2) The Prescribed Authority shall, on application made within thirty days from the date of the order under sub-section (1) by a tenure holder aggrieved by such order passed in his absence and on sufficient cause being shown for his absence, set aside the order and allow such tenure-holder to file objection against the statement prepared under Section 10 and proceed to decide the same in accordance with the provisions of Section 12.

(3) Subject to the provisions of Section 13, the order of the Prescribed Authority shall be final and conclusive and be not questioned in any court of law.

7. On 22.05.2007 and 23.05.2007, matter was heard again in respect of discrepancy between the notice and objection. Learned counsel for the petitioner supplied certain documents, which were taken on record. Learned counsel for the petitioner stated that in reply to the notice dated 24.01.2002, initially reply/objection was filed by the petitioner on 21.02.2002. Copy of the said objection has been supplied. Under Section 9(2) statement/reply is to be filed within 30 days. The reply dated 21.02.2002 was within 30 days from the notice dated 24.01.2002.

8. In the order passed by the Prescribed Authority in favour of the petitioner (Annexure-8 to the writ petition), it is mentioned on internal Page-8 (Page 45 of the Paper Book) that in pursuance of order dated 23.05.2002, petitioner had submitted statement of his land. On 22.05.2007 and 23.05.2007, learned counsel for the petitioner was required to file copy of order dated 23.05.2002. However, the said copy was not supplied. Instead, the statement filed by the petitioner was supplied on 23.05.2007, which at its top mentions in bold letters that it is statement of tenure-holder in compliance of order dated 23.05.2002.

Rule 12 is quoted below:-

"Objections filed under Section 10 and 11 shall be entered in Misal Band Register in C.L.H. Form 5"

9. The fact that in the reply dated 04.06.2002, reference was made to C.L.H. Form 5 makes it quite clear that the reply was under Section 10(2) of the Ceiling Act.

10. Moreover, notice under proviso to Section 9(2) is more akin to a notice under Section 10 of the Act.

11. However, the most important thing is that quoting of wrong provision either in notice or reply or order is never fatal. It is the essence, which is to be seen. No appeal against orders under Section 11(1) of the Act is maintainable for the reason that under the said sub-section, no adjudication takes place. Under the said sub-section, orders are passed on admission. Just as under Section 96, C.P.C., no appeal is maintainable against decree passed by the Court with the consent of parties, similarly, against

orders passed under Section 11(1) of the Ceiling Act, no appeal is maintainable. Under the said sub-section, either tenure-holder accepts the case of the State or State accepts the case of the tenure-holder without any contest or adjudication. However, if matter is disputed by either party and thereafter Prescribed Authority adjudicates the dispute either in favour of the State or tenure-holder, the order falls under Section 11(2) of the Ceiling Act. Such order is clearly appealable under Section 13. In the instant case, the order of the Prescribed Authority dated 17.12.2003 is clearly an order after considering and resolving the dispute. It runs into 15 pages. Each and every point of the tenure-holder has been decided after discussion of the material on record. Several points had been raised by the tenure-holder and on every point, there was a serious dispute in between tenure-holder and the State. Accordingly, the order of the Prescribed Authority cannot be said to be based on consent.

12. Moreover, copy of order dated 23.05.2002 has not been filed. It appears that through the said order, petitioner was directed to file objections on merit and confusion of provision, which was quoted in the notice dated 24.01.2002 was cleared. In any case as mentioned earlier, quoting a wrong provision is never fatal.

13. Accordingly, I hold the appeal to be maintainable. Writ petition is, therefore, dismissed.

14. As far as prayer of Greater NOIDA is concerned, no order is required to be passed thereupon. Learned counsel for Greater NOIDA had only argued that due to continuance of stay order passed in this writ petition, some difficulties were being felt in proposed acquisition of the land in dispute along with other adjoining lands. As the writ petition itself has been dismissed, hence interim order passed in the writ petition automatically comes to an end. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 11080 Of 2002

Umesh Chandra Shukla ...Petitioner
Versus
Additional District Judge, Room No. 1, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Pandey
Sri M.S. Uddin
Sri S.L. Mishra

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

U.P. Urban Building (Regulation of Letting Rent & Eviction 1972-S-21 (1)(a)-Release Application on ground of bonafide need-resisted by prospective allottee-held prospective allottee has no right to contest the release application.

Held: Para 14

In my opinion the contention of the learned counsel for the petitioner has force and the need of the petitioner is bona fide. Even comparative hardship of the petitioner is greater than that of the respondent who otherwise being a prospective allottee has neither any right of say in the matter nor has any right to challenge the bona fide need and

comparative hardship of the landlord. The allotment to a prospective allotttee was in the teeth of the law laid down in Smt. Savitri Devi (supra) and Full Bench decision rendered in Baleshwar Nath (supra) wherein it has been held that prospective allottee cannot even be heard at the time of consideration of release application. This right under the Act is only of the tenant who is in actual lawful physical possession of the accommodation.

Case law discussed:

2000 (62) ALR-267
2006 (62) ALR-201
1986 (12) ALR-113
AIR 2002 SC-2204

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

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

2. The petitioner is the owner and landlord of the southern portion of the premises no. 504, Mumfordganj, Allahabad which he got in family settlement. On the basis of the family settlement the petitioner got his name mutated in the records of the Nagar Mahapalika and a new number 504-A/1 was allotted to the portion allotted to him. The shop in dispute is situated in the said premises no. 504-A/1, Mumfordganj, Allahabad. The petitioner states that though he is a post-graduate from Allahabad University he could not get any job despite his best efforts. In the mean time he was married. To earn his livelihood he decided to ply a tracker and purchased the same in the year 1981. However, to his bad luck he fell seriously ill in the year 1987 and suffered heavy loss in that business compelling him to sell his tracker to pay the installments of the loan. It is further stated by the petitioner that he remained ill for about 3 years which badly affected his financial condition forcing him to partition the hall of his drawing room by erecting a wall facing the road and opened a small shop in the year 1990 under the name and style of "Manisha General Store". To his another misfortune he sustained injuries and fracture due to fall from the roof of his house and became unable to run the shop. The injuries were so grievous in nature that they continued for three years with the result he became financially indebted and physically incapacitated, hence he let out the shop to one Sri Nileshwar Das Gupta who subsequently shifted to Calcutta after handing over the vacant possession of the shop in dispute to the petitioner on 15.4.1997.

3. The intimation about vacancy of the shop in dispute was given to the Rent Control and Eviction Officer 1st, Allahabad who directed the Rent Control Inspector to inspect the shop in dispute and submit a report. In the mean time applications for allotment of the shop in dispute were moved by some prospective allottees. The Rent Control Inspector accordingly submitted his report dated 5.5.1997 and the Rent Control and Eviction Officer declared vacancy on 25.5.1998.

4. Since the petitioner had no other source of livelihood, as such in the compelling circumstances he decided to enter into business again in his own shop. He therefore filed release application for his personal need of the shop in dispute after declaration and notification of vacancy by the Rent Control and Eviction Officer who again called report from the Rent Control Inspector. The Rent Control Inspector also vide his report dated

2.9.1998 reported that the need of the petitioner is genuine and bona fide.

5. From the record it appears that the release application was rejected by the Rent Control and Eviction Officer vide judgment and order dated 15.12.1998 appended as Annexure 3 to the writ petition on the ground that the prospective allottee had intimated that the petitioner had wrongly mentioned his income from rent as Rs.1400/- per month whereas he is getting Rs.2270/- per month as rent and the shop in dispute was let out to someone. The prospective allottee is alleged to have filed several objections against the release application filed by the petitioner. The petitioner preferred Rent Control Revision No. 1 of 1999, Umesh Chandra Shukla Vs Rent Control and Eviction Officer, Allahabad, before the District Judge, Allahabad against the order dated 15.12.1998. However, the aforesaid revision filed by the petitioner against the order of the Rent Control and Eviction Officer before the District Judge was also dismissed vide impugned judgment and order dated 6.1.1999 appended as Annexure 8 to the writ petition.

6. The Rent Control and Eviction Officer thereafter allotted the shop in dispute to Sri Mohd. Yasin, respondent no. 3 vide order dated 31.3.1999 on a monthly rent of Rs. 250/- only.

7. The petitioner again filed Revision No. 410 of 1999 against the aforesaid order dated 31.3.1999 which too has been rejected vide impugned order dated 11.12.2001, hence this writ petition.

8. By means of this writ petition the petitioner has prayed for a writ of certiorari for quashing the impugned orders dated 11.12.2001, 31.3.1999 and 15.12.1998 passed by respondent nos. 1 and 2 and allow the release application of the petitioner. It is further prayed by the petitioner that a writ of mandamus be also issued commanding respondent no. 2 to stay further proceedings in Case No. 12 of 1997, Mohd. Yaseen Vs Umesh Chandra Shukla, in respect of premises no. 504, Mumfordganj, Allahabad and also not to interfere with the peaceful possession of the petitioner of the shop in dispute till the disposal of the writ petition.

9. The contentions of the learned counsel for the petitioner are that the shop in dispute was never let out to any one except Sri Nileshwar Das Gupta; that the need of the petitioner is genuine and bona fide; that there is basic difference between Section 16 and Section 21 (1) (a) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (Act No. XIII of 1972) and therefore the bona fide need of the petitioner cannot be compared under Section 21 (1) (a) of the Act; that the prospective allottee has no right to oppose the release application of the petitioner and to adduce any evidence in rebuttal on the bona fide need of the petitioner; that the allottee has not complied with the mandatory provision of paying rent within a week from the date of allotment and the courts below have erred in holding that the allottee could not pay the rent within a week from the date of alotment because the petitioenr had obtained stay order whereas the stay order was granted after more than a week of the passing of the allotment order; and that the courts below have erred in holding that the allotment order is in form 'B' whereas issuance of form 'B' is a

ministerial act and is issued in consonance with the allotment order.

10. In support of his contention the learned counsel for the petitioner has relied upon the decisions of this Court rendered in Smt. Savitri Devi Rohatagi Vs Vth Additional District and Sessions Judge, Kanpur Nagar, 2006 (62) A.L.R. 267; and Baleshwar Nath Bhargava Vs District Judge, Saharanpur and others, 2006 (62) A.L.R. 201.

In Smt. Savitri Devi (supra) it has been held: -

"In the absence of allotment order or release order, it is only landlord who is entitled to possess the building in dispute."

It has further been held: -

"the concept of bona fide need under Section 16 is slightly different in the concept of bona fide need under Section 21 of the Act. Under Section 16 there is no sitting tenant and prospective allottee has got no say in matter while under Section 21 there is a sitting tenant whose interest is to be safeguarded. In a particular case need may not be grave enough for release under Section 21 of the Act against sitting tenant but it may be quite sufficient for release under Section 16 of the Act."

In Baleshwar Nath Bhargava (supra) it has been held: -

"As held in the Full Bench authority of this Court in Talib Hasan Vs A.D.J., 1986 (12) A.L.R. 113 (FB) and by the Supreme Court in Kedar Nath Sharma Vs G. Gaur, A.I.R. 2002 S.C. 2204, prospective allottee cannot be heard at the time of consideration of release application of landlord under Section 16 of the Act. He cannot even oppose the need of the landlord. He can also neither refute the evidence adduced by the landlord nor adduce any evidence regarding bona fide need of the landlord. In the instant case not only allottee was permitted to adduce the evidence in rebuttal of bona fide need of landlord but even the need of landlord and prospective allottee were compared by the courts below. It is patently against the letter and spirit of Section 16 of the Act. Concept of bona fide need under Section 21 on the one hand and under Section 16 on the other hand is quite different. Under Section 21 interest of sitting tenant is to be safeguarded while under Section 16 there is no sitting tenant and prospective allottee has got no say in the matter unless release application of the landlord is rejected."

11. On the contrary the main contentions of the learned counsel for the respondent-prospective allottee are that the judgment and order dated 31.3.1999 passed by the Prescribed Authority is legal, proper and genuine and is liable to be confirmed by this Court; that the judgment and order dated 11.12.2001 passed by the revisional court is legal and proper and need no interference by this Court; that both the courts below have recorded concurrent findings of fact, as such liable to be upheld by this Court; that the petitioner has given contradictory statement regarding his income.

12. As far as the objection filed by the respondent is concerned, from the record it is disclosed that the same is not

supported by any affidavit, hence the same cannot be relied.

13. The shop in dispute was always found locked whenever the Rent Control Inspector visited the shop in dispute and is still vacant. Besides this it is also come on record that the daughter of the petitioner is of marriageable age and the petitioner is unable to marry her due to financial crunch and that after the shop is released the petitioner is desirous of opening his own General Merchant shop after taking loan from his relatives and friends.

14. In my opinion the contention of the learned counsel for the petitioner has force and the need of the petitioner is bona fide. Even comparative hardship of the petitioner is greater than that of the respondent who otherwise being a prospective allottee has neither any right of say in the matter nor has any right to challenge the bona fide need and comparative hardship of the landlord. The allotment to a prospective allotttee was in the teeth of the law laid down in Smt. Savitri Devi (supra) and Full Bench decision rendered in Baleshwar Nath (supra) wherein it has been held that prospective allottee cannot even be heard at the time of consideration of release application. This right under the Act is only of the tenant who is in actual lawful physical possession of the accommodation.

15. For the reasons stated above, the petition is allowed. The impugned orders are quashed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2007

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

Civil Misc. Writ Petition No.5236 of 1987

Sri Subhash Chandra ...Petitioner
Versus
Chief Controlling Revenue Authority, Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri Deo Raj

Counsel for the Respondents:
S.C.

Indian Stamp Act-Article-48 Scheduled 1-B-clause-(ee)-charge of Stamp duty and penality-Power of attorney executed in 1985-provisions of clause (ee) came in operation on 1.11.91-amount of consideration not specified in the Deed-stamp duty can be charged taking into account of consideration paid under agreement-held-No penality could be charged.

Held: Para 8

Neither in the deed of power of attorney nor in the impugned orders, it has been mentioned that what amount was paid under the agreement executed on the date of execution of power of attorney, i.e. 30.01.1985.

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

1. Heard learned counsel for the parties.

The question involved in this writ petition is regarding payment of stamp duty on power of attorney dated 30.01.1985, copy of which is Annexure-1

to the writ petition. The matter was registered before District Stamp Officer, Bijnor as Case No.208 under Section 33 of Indian Stamp Act, State Vs. Subhash Chandra. The said case was decided on 19.07.1985 and it was held that petitioner was liable to pay Rs.17745/- as stamp deficiency, Rs.251/- as deficiency in registration fees and Rs.20,000/- as penalty. However, by subsequent order of the same authority dated 10.10.1985, penalty was reduced from Rs.20,000/- to Rs.8,000/-. Against the said order, Stamp Revision No. 52(O) of 1985-86 was filed. Chief Controlling Revenue Authority/Board of Revenue, Allahabad dismissed the revision on 03.03.1987, hence this writ petition.

2. The relevant provision under which stamp duty on power of attorney is to be paid is provided under Article 48 of Schedule 1-B of Indian Stamp Act as applicable in U.P. The relevant clauses of the said article are (e) and (ee), which are quoted below:-

"(e) When given for consideration and authorising the attorney to sell any immovable property."	*"The same duty as a conveyance for the amount of the consideration."*
"(ee) when irrevocable authority is given to the attorney to sell immovable property.	*"The same duty as a conveyance on the market value of the property forming subject matter of such authority."*

3. The power of attorney in question squirely falls within aforesaid clause (ee). However, the said clause was added w.e.f. 01.11.1991, while power of attorney in question was executed in 1985 and both the impugned orders were passed in 1985-1987. Application of clause (ee) is, therefore, out of question. It has to be seen as to whether the power of attorney in question is covered by clause (e) or not.

4. In the power of attorney, it was mentioned that the executants, i.e. Raghubir Singh and others, had earlier executed a registered agreement for sale in respect of their property in favour of Lakhpat Rai-father of the petitioner on 01.08.1984 and 30.01.1985 (30.01.1985 is also the date of execution of power of attorney). It is further mentioned in the power of attorney that under the two agreements for sale in favour of father of the petitioner, it was mentioned that total sale consideration would be Rs.1,69,000/- out of which Rs.1,39,000/- had already been paid by him. It was further mentioned that the attorney could execute the sale deed in favour of the agreement holder, i.e. his father or other persons on the direction of his father and attorney should make payment of Rs.30,000/- to the executants after execution of the sale deed either in favour of his father or in favour of different persons in small portions on the direction of his father. It is also mentioned in the power of attorney that the executants would never cancel the same.

5. The question is as to whether the said deed (power of attorney) has been given for consideration or not.

6. Even though in the deed, no consideration is mentioned, however, execution of the agreement for sale in favour of the father of power of attorney

holder on the same date on which power of attorney was executed makes it abundantly clear that the said agreement and power of attorney were part of the same transaction. Accordingly, I hold that the earnest money given under the agreement of the same date was the consideration for power of attorney. One agreement had already been executed six months before, hence it may reasonably be inferred that no further earnest money or part of sale consideration would have been paid by Lakhpat Rai, in case power of attorney had not been executed by the vendors in favour of his son i.e. Petitioner Subhash Chandra.

7. By virtue of Section 202 of the Contract Act, a power of attorney given for consideration is irrevocable. The fact that in the power of attorney in question, it is mentioned that 'it is irrevocable' is a strong indicator of the fact that it was for consideration.

8. Neither in the deed of power of attorney nor in the impugned orders, it has been mentioned that what amount was paid under the agreement executed on the date of execution of power of attorney, i.e. 30.01.1985.

9. Accordingly, writ petition is allowed. Both the impugned orders are set aside. The matter is remanded to District Stamp Officer, Bijnor to charge the stamp duty and registration fees on the power of attorney in question taking the consideration to be the amount paid under agreement for sale executed on the same date, i.e. 30.01.1985 by the executants of power of attorney in favour of Lakhpat Rai-father of the petitioner.

10. Under the facts and circumstances of the case, I am of the opinion that there was absolutely no occasion to impose any penalty. Accordingly, it is further directed that no penalty shall be imposed.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 15161 of 2000

J.C. Saxena ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri K.C. Sinha
Sri Rakesh Sinha
Sri Ashish Srivastava
Sri P.P. Pandey
Sri Manoj Kumar Srivastava

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

<u>High Court Rules, Chapter XXII Rule- 7</u>- Second writ petition for same cause of action-without disclosing the earlier petition-held-not maintainable-petitioner is also committed criminal contempt by filing false affidavit-must be saddled with liability of heavy cost.

Held: Para 12

A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides

wasting precious time of the Court which could have been utilized for other more deserving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

Case law discussed:

AIR 1987 SC-88, 2003 (3) ESC-1333, 2005 ACJ-359, 2006 (2) SCC-541, 2003 (Suppl.) 3 SCR-352, AIR 2005 SC-3110, AIR 2005 SC-3330, J.T. 2004 © SC-88, AIR 1964 SC-345, 2003 (9) SCC-401

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

1. The petitioner having been allowed to retire voluntarily under Voluntarily Retirement Scheme (hereinafter referred VRS) on 21.5.1994 has sought a writ of mandamus commanding respondents to count his service from 27.5.1964 to 2.6.1973 and to give him 5 years weightage in calculating benefit of VRS or in the alternative to let him continue in service and revoke his VRS.

2. The facts in brief are that the petitioner was appointed as Technical Supervisor Grade-III under Chief Inspectorate of Textile and Clothing, Government of India, Ministry of Defence on 7 May 1964 (Annexure 1). The appointment was temporary and on probation of 2 years. He was declared quasi permanent w.e.f. 1st July 1967 under Rules 3 and 4 of the Civilians in Defence Service (temporary service) Rules 1949. In 1973, Export Council of India (hereinafter referred to as the "Council') advertised vacancy of technical officer. The petitioner applied and after his selection, vide appointment letter dated 22 September 1973 he was appointed as technical officer in the pay scale of Rs.300-600 in the Council. The appointment was temporary and terminable without any notice. The petitioner joined pursuant to the said appointment at Bhadohi and continued to work under the said Council. The Council is an undertaking of Government of India and a subsidiary company of State Trading Corporation of India Limited. It is "State" within the meaning of Article 12 of the Constitution of India. In 1993, the Council took a decision to close down export inspection agencies and offered a golden handshake permitting VRS to its employees vide scheme dated 21 May 1994 (Annexure 4). The petitioner submitted his option for accepting VRS on 19th July 1994 along with a representation that his service rendered as Technical Supervisor under Ministry of Defence, Chief Inspector of Textile and Clothing should be counted for the purpose of retrial benefits. Respondent No. 2 accepted his application for VRS on 19th July 1994 itself and he was relieved on 10 August 1994. In the meantime he made various representations including dated 26.8.1998 and 27.6.1998 to respondent No. 2 to give benefit of the said period when he has worked in Government of India. The petitioner also made a representation to the Director, Ministry of Defence and thereafter preferred this writ petition.

3. The respondents No. 1 to 3 have filed counter affidavit stating that the petitioner has not approached this Court with clean hands and therefore, his writ petition is liable to be dismissed. He has received and enjoyed a huge amount under VRS as long back as in 1995 and now after lapse of about five years, has filed this writ petition for reopening an issue which is a closed chapter. It is pointed out that VRS scheme was

accepted by 870 persons including the petitioner and 991 persons did not accept but opted to continue in service. Under the scheme the petitioner has accepted and was paid over Rs. 3.38 lakhs and now after such a long time he has filed this petition. It is also pointed out that earlier also he filed writ petition No. 43851 of 1999 with same cause of action in which there were 21 petitioners including the present petitioner and without disclosing the factum of the aforesaid writ petition, this second writ petition has been filed and therefore, it is liable to be dismissed under Chapter XXII Rule 7 of the Rules of the Court. On merits it is pointed out that there is no provision under law entitling the petitioner to count his past services rendered in Ministry of Defence Government of India. VRS was voluntary and was not forced upon him. If he was not satisfied with his option, he should not have accepted it and petitioner should not have received monetary benefits thereunder. It is not open to the petitioner to resile there from now. The writ petition is wholly misconceived and is liable to be dismissed.

4. The petitioner has filed rejoinder affidavit wherein he has reiterated averments made in the writ petition by generally denying the averments of the counter affidavit.

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

5. Assailing VRS Scheme and seeking a mandamus for giving 5 years weightage, the petitioner and 20 others have filed writ petition No. 43851 of 1999 wherein the following reliefs have been sought.

(A) to issue a writ order or direction in the nature of certiorari quashing and declaring the Voluntary Retirement Scheme dated 19.7.1994 (Annexure '2' to the writ petition), as ultravires;
(B) to issue a writ, order or direction in the nature of mandamus directing the respondents to permit the petitioners to work as regular employees of the respondents as if they have never filled the form of option under Voluntary Retirement Scheme dated 19.7.1994;
(C) to issue a writ, order or direction in the nature of mandamus permitting the petitioners to discharge their function as they are performing prior to 19.7.1994 and their continuity of service may be maintained;
(D) to issue a writ, order or direction in the nature of mandamus directing the respondents to grant facilities of 33% commutation of pension and 67% of regular pension;
(E) to issue writ, order or direction in the nature of mandamus granting the respondents to grant 5 years of weightage in payment of ex-gratia who has completed 20 years service;
(F) to issue writ, order or direction in the nature of mandamus directing the respondents to grant all the reliefs which has been granted to the employees who have completed 20 years of service, to those employees also who have not completed 20 years of service;
(G) to issue a writ, order or direction in the nature of mandamus to grant all the reliefs to the petitioners after 19.7.1994 which is being given to other Central Government employees after retirement, as per the provision of C.C.S. (Pension) Rules 1972;
(H) to issue any other writ, order or direction which this Hon'ble Court may

deem fit and proper in the circumstances of the case;
(I) to award costs in favour of the petitioners.

6. During the pendency of the said writ petition, the petitioner has filed the present writ petition. We found that reliefs No. 1, 2 and 4 of the present writ petition are similar to reliefs No. b, c and e of earlier writ petition. It is also evident from record that the petitioner in the present writ petition has not said anything about his earlier writ petition. Chapter XXII rule 7 of Allahabad High Court Rules provides where an application has been rejected, the petitioner has no right to move second application on the same cause of action. The petitioner has made a declaration in para 1 of the present writ petition that this is the first writ petition he has filed for the relief, which he has sought. Apparently the declaration is false and incorrect inasmuch as substantial reliefs which he has sought in this writ petition are same, which were sought by him in Writ Petition No. 43851 of 1999.

7. The earlier writ petition of the petitioner has been dismissed by a Division Bench by this Court vide order dated 27.3.2003 observing that there is no illegality in VRS, petitioners were given option on their own choice which has been accepted and they have also accepted benefit, therefore, no there is no justification to interfere in the present writ petition.

8. We are therefore satisfied that though it is a second writ petition but the petitioner has not disclosed about the earlier writ petition. Filing of successive writ petition on the same fact is not only against public policy but also amounts to abuse of the process of the Court. **(Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior and others, AIR 1987 SC 88).**

9. Learned counsel for the petitioner sought to argue that there is an additional prayer in the present writ petition that he should be given benefit of past service rendered in Ministry of Defence but this by itself would not make this writ petition based on different cause of action. Admittedly when the earlier writ petition was filed even this relief could have been claimed by the petitioner. In **Rakesh Kumar Agarwal Vs. State Bank of India, Mumbai and others, 2003(3) ESC 1333** a Division Bench of this Court held:-

"Even if a party does not pray for the relief in the earlier writ petition, which he ought to have claimed in the earlier petition, he cannot file a successive writ petition claiming that relief, as it would be barred by the principle of constructive res judicata."

10. The same view has been taken by Full Bench in **Farhat Hussain Azad and others Vs. The State of U.P. and others, 2005 ACJ 359.** A successive writ petition or second writ petition for the same cause of action is therefore not maintainable and liable to be dismissed.

11. Even otherwise we find that by not disclosing the fact of earlier writ petition in the present one, the petitioner is guilty of approaching this Court with unclean hands.

In ***Ram Saran Vs. IG of Police, CRPF and others, (2006) 2 SCC 541***, the Apex Court observed *"A person who*

seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. ....."

In ***Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and others, 2003 (Suppl.) 3 SCR 352***, it was reiterated after referring to various earlier decisions of the Apex Court that fraud misrepresentation and concealment of material fact vitiates all solemn acts. In ***State of Andhra Pradesh & another Vs. T. Suryachandra Rao, AIR 2005 SC 3110***, the Apex Court after referring to various earlier decisions held that suppression of a material document would also amount to a fraud on the Court. The same view has been reiterated in ***Bhaurao Dagdu Paralkar Vs. State of Maharashtra & others, AIR 2005 SC 3330***. In ***R. Vishwanatha Pillai Vs. State of Kerala & others, JT 2004(1) SC 88*** the Apex Court observed that a person, who seeks equity, must act in a fair and equitable manner. In ***Rajabhai Abdul Rehman Munshi Vs. Vasudev Dhanjibhai Mody, AIR 1964 SC 345***, it was held that if there appears on the part of a person, who has approached the Court, any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised in revoking the leave to appeal granted even at the time of hearing of the appeal. The same view was reiterated and followed in ***Vijay Syal & another Vs. State of Punjab & others (2003) 9 SCC 401.***

12. A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides wasting precious time of the Court which could have been utilized for other more deserving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

13. The writ petition is accordingly dismissed with cost quantified at Rs.10,000/-. The cost of Rs.10,000/- shall be deposited by the petitioner within two months with the Registrar General of this Court, who shall forward 50% thereof to the Legal Aid Society of Allahabad High Court and 50% to the Mediation Centre, Allahabad High Court. In case of failure by the petitioner to pay the amount of cost, it shall be recovered as arrears of land revenue for which the Registrar General of this Court shall take appropriate steps.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2007

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

First Appeal From Order No. 639 of 1992.

Ramesh Prasad Tripathi and **others**
...Appellants
Versus
Ibrahim and others **...Respondents**

Counsel for the Appellants:
Sri Vipin Saxena
Sri A.K. Tripathi
Sri S.K. Mishra
Sri B.P. Singh

Counsel for the Respondents:
Sri Awadhesh Chandra Nigam.
Sri S.C. Nigam
Sri N.P. Singh

Motor Vehicle Act 1939-110-B-mode of compensation-deceased a 6 years old boy accident took place 29.8.88-new Act came into force w.e.f. 1st July 1989-statutory liability governed by section 95-since the policy unlimited-award of Rs.25000/-totally unjust-compensation enhanced Rs.2 lac with 12% simple interest without deduction-reason explained.

Held: Para 5

Section 110 (B) of the old Act i.e. Act, 1939. Therefore, there is no bar even under the statute unless and until it is hit by Section 95 of the Act itself. Since factually we find that the insurance policy is unlimited, there is no bar for the purpose of granting an unlimited compensation in favour of the claimants. Hence, the tribunal has committed an error in giving an award only to the extent of Rs. 25,200/-, which, according to us, is totally unjust in nature. Therefore, in disposing of the appeal we fix the liability of compensation to be paid to the claimants by the insurance company for a sum of Rs. 2,00,000/- along with the interest, as awarded by the tribunal, at the rate of 12% simple interest in the light of the judgement of the Supreme Court in Lata Wadhwa (supra) as claimed by the appellants without any deduction since there is no question of income and dependency on account of death of a boy of six years old.
AIR 2001 SC-3218
AIR 2001 SC-3660
2002 (3) TAC-453
2002 SC-651

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

1. This is an appeal of the claimants arising out of the judgement and award passed on 09th April, 1992 by the Motor Accident Claims Tribunal, Basti. The motor accident claim case is admittedly filed under the old Act i.e. Motor Vehicles Act, 1939 (hereinafter in short called as the "Act, 1939") since the accident took place on 29th August, 1988 prior to coming into force of the new Act i.e. Motor Vehicles Act, 1988 (hereinafter in short called as the "Act, 1988") with effect from 01st July, 1989. The period of the policy expired on 22nd May, 1989, therefore, under no stretch of imagination it can be said that new Act will be applicable in the case of the claimants. Proviso under Section 147 (2) of the new Act i.e. Act, 1988 is categorical in this respect, which is as follows:

"Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier."

2. Now the question arose about the quantification of the compensation. A boy of six years age died in a road accident. The compensation awarded by the tribunal is to the extent of Rs.25,200/-. The claimants thought that the awarded amount is unjust, therefore, they preferred the instant appeal. The appeal has been contested between the claimants and the insurance company. Direction for

payment of compensation was given against all the respondents i.e. the respondent nos. 1 and 2, being driver and owner of the vehicle, as well as the insurance company, the respondent no. 3 herein. Now question arose before this Court whether the liability of the insurance company is limited or unlimited in view of the applicability of Section 95 of the old Act i.e. Act, 1939. Section 110 (B) of the Act, 1939 speaks as follows:-

"110-B. Award of the Claims Tribunal.--On receipt of an application for compensation made under Section 110-A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of Section 109-B, may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid; and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

Provided that where such application makes a claim for compensation under Section 92-A in respect of the death or permanent disablement of any person, such claim and any other claim (whether made in such application or otherwise) for compensation in respect of such death or permanent disablement shall be disposed of in accordance with the provisions of Chapter VII-A."

Section 95 (2) of the Act, 1939 is as follows:

"(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely—

(a) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle;
(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,--

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all ;
(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;

(c) save as provided in clause (d), where the vehicle is a vehicle of any other class, the amount of liability incurred;
(d) irrespective of the class of the vehicle, a limit of rupees six thousand in all in respect of damage to any property of a third party.

3. Learned Counsel appearing for the insurance company contended that under no stretch of imagination the liability of the insurance company can be made beyond Rs. 50,000/-, which is prescribed under the relevant provisions in Section 95 (2) as above. In such circumstances, on the last occasion when the hearing was continuing, we wanted to go through the records to verify the

policy. Today, at the time of hearing the copy of the policy was produced before this Court wherefrom we found that the liability is unlimited. Now, further question arose whether the insurance company even after making certain payments being limited or unlimited can be able to recover the same from the owner of the vehicle if the case of rash and negligent driving is made out. We are of the view that the law is not silent on that score and the order of the tribunal itself speaks for joint liability. Therefore, there is no bar for the insurance company to recover such amount from the owner, if it pays on his account.

4. Learned Counsel appearing for the appellants first of all cited two decisions to establish before the Court that just compensation in case of children aged about between 5-10 years would be Rs. 2 lacs. Claim petition was also filed claiming Rs. 2 lacs. As there is no question of any income of the children, there is no question of any deduction. Therefore, the claimants are entitled to have Rs. 2 lacs. He cited a decision, which arose in connection with an accident took place in Tata Iron and Steel Company, reported in **AIR 2001 SC 3218 (Lata Wadhwa and others Vs. State of Bihar and others).** Since it has been held only in case of just compensation but out of a writ petition not in respect of the motor accident claims, we wanted further hearing on the part of the appellants to establish whether the same is applicable here or not. He further cited a decision being **AIR 2001 SC 3660 (M.S. Grewal and another Vs. Deep Chand Sood and others),** wherein the decision of **Lata Wadhwa (supra)** was applied principally in case of motor accident even under the Fatal Accidents Act, 1855. The relevant portion is as follows:

"34. In Lata Wadhwa's case, however, this Court came to a conclusion that upon acceptability of the multiplier method and depending upon the facts situation namely the involvement of TISCO in its tradition that every employee can get one of his child employed in the company and having regard to multiplier 15 the compensation was calculated at Rs. 3,60 lacs with an additional sum of Rs. 50,000/- as conventional figure making the total amount payable at Rs. 4.10 lacs for approach of the claimants of the deceased children.

35. The decision in Lata Wadhwa, thus, is definitely a guiding factor in the matter of award of compensation wherein children died under an unfortunate incident as noticed more fully hereinbefore in this judgment."

Learned Counsel appearing for the insurance company by citing a Division Bench judgement of the Calcutta High Court reported in **2002 (3) TAC 453 (Cal.) (National Insurance Co. Ltd. Vs. Srimatya Basanti Mondal and others)** wanted to establish that there is no scope of any claim against the insurance company more than the fixed amount since the liability is limited. In that case there is a reference of the Supreme Court judgement being **AIR 2002 SC 651 (New India Assurance Co. Ltd. Vs. C.M. Jaya and others)** wherein a Five Judges' Bench of the Supreme Court considered the liability under the old Act i.e. Act, 1939 whether limited or unlimited. The relevant part is as follows:

"The liability of Insurance Company could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in S. 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term of clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to re-writing the statute or the contract of insurance, which is not permissible."

5. Initially we were under the impression that even if in the earlier judgements of the Supreme Court in Lata Wadhwa (supra) and M.S. Grewal (supra) the amount has been enhanced upto the extent of Rs. 2 lacs, but if the statute does not permit, how it will be prescribed to pay. However, from the aforesaid judgements we can get the guideline. The guideline is that either it will be a statutory liability or it will be a contractual liability. If there is no contract for unlimited liability, it has to be guided by the statutory liability under Section 95 of the Act. But if the insurance policy speaks that the same is unlimited, it has to be governed by the principles of Section 110 (B) of the old Act i.e. Act, 1939. Therefore, there is no bar even under the statute unless and until it is hit by Section 95 of the Act itself. Since factually we find that the insurance policy is unlimited, there is no bar for the purpose of granting an unlimited compensation in favour of the claimants. Hence, the tribunal has committed an error in giving an award only to the extent of Rs. 25,200/-, which, according to us, is totally unjust in nature. Therefore, in disposing of the appeal we fix the liability of compensation to be paid to the claimants by the insurance company for a sum of Rs. 2,00,000/- along with the interest, as awarded by the tribunal, at the rate of 12% simple interest in the light of the judgement of the Supreme Court in Lata Wadhwa (supra) as claimed by the appellants without any deduction since there is no question of income and dependency on account of death of a boy of six years old. However, the insurance company will be entitled to recover the said sum from the owner of the vehicle. The amount which has already been paid to the claimants will be adjusted. Thus, the appeal stands disposed of.

However, no order is passed as to costs. Appeal disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.04.2007

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No.13623 of 1990

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

Counsel for the Petitioner:
Sri A.K. Dwivedi

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Practice & Procedure-Petitioner's husband died in harness on 19.5.88-worjing on the Post

of officiating Principal-for the last 17 years-No counter affidavit filed-facts remained uncontroverted-Court proceeded on merit-direction issued for full arrear of salary as meant for regular principal with other consequential benefits.

Held: Para 4

It is a pathetic case where a widow is seeking pecuniary relief from this Court under Article 226 of the Constitution of India for the last about 17 years but no counter affidavit has been filed. In the absence of counter affidavit, this court may proceed on the basis of assertions made in the writ petition which remain un-controverted till date in view of the principles of law laid down by Hon'ble Supreme Court reported in:
1- Choksi Tubes Co. Ltd. Vs. Union of India (1997) 11 SCC 179 and
2- Nasim Bano Vs. State of U.P. & Others (AIR) 1993 Supreme Court 2592
Case law discussed:
1997 (11) SCC-179
AIR 1993 SC-2592

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

1. Heard Sri A. K. Dwivedi, learned counsel for the petitioner and learned Standing Counsel appearing for opposite party Nos. 1 to 5.

2. In this case, the petitioner, a widow of Late Sri Krishna Behari Misra, Principal of Acharya R. N. Kela Inter College, Najibabad, District-Bijnor (hereinafter referred to as the institution) who had died in harness on 19th May, 1988 in the premises of the institution, had approached the management of the institution and concerned authorities for allowing arrears of salary to Sri Misra who had worked as officiating Principal of the institution from 16th October, 1982 to 19th May, 1988.

3. This writ petition was filed in this court in the year 1990 and thus about 17 years have passed and no counter affidavit has been filed. The case has come for admission/hearing today i.e. after more than 16 years and it appears that counter affidavit has not yet been filed. Learned Standing Counsel has requested some more time to file counter affidavit. A perusal of the order sheet reveals that the case was listed on several occasions but counter affidavit has not been filed.

4. It is a pathetic case where a widow is seeking pecuniary relief from this Court under Article 226 of the Constitution of India for the last about 17 years but no counter affidavit has been filed. In the absence of counter affidavit, this court may proceed on the basis of assertions made in the writ petition which remain un-controverted till date in view of the principles of law laid down by Hon'ble Supreme Court reported in:

1- Choksi Tubes Co. Ltd. Vs. Union of India (1997) 11 SCC 179 and
2- Nasim Bano Vs. State of U.P. & Others (AIR) 1993 Supreme Court 2592

Accordingly, the court is proceeding with the matter.

5. It emerges from the record that at the relevant time the petitioner's husband Late Sri Krishna Behari Misra was working as Headmaster of High school but later on the college was upgraded on 16.10.1982 as an Intermediate college after receiving due recognition. The petitioner's husband who was working as a Headmaster of the High school in pay scale of 770-1600 was asked to look after the work of Principal. A formal order was

passed by the Management to allow Sri Misra to continue to officiate as Principal of the institution. He was possessing M.A. and B.T. Qualification. A detailed proposal resolution was sent to the Dy. Director of Education, Moradabad seeking approval for the same.

6. It appears from the record that the Dy. Director of Education did not respond to the proposal resolution submitted by the Management of the institution. There is nothing on record to show whether the Dy. Director of Education or other concerned authorities had refused to accord the sanction. However, petitioner's husband continued to discharge all the duties, functions and responsibilities of the post of Principal of the institution. The committee of management submitted several letters to the authorities enclosing resolutions of committee of management for according sanction for formal continuance of Sri Krishna Behari Misra as Principal of the institution. However, awaiting formal sanction, the petitioner's husband Sri Krishna Behari Misra had died in the premises of the institution on 19.5.1988 leaving behind a widow, Smt. Shail Prabha Misra and three children (two of them were minors). When nothing was done by the respondents and the management in making payment of salary admissible to Sri Krishna Behari Misra who had worked as officiating Principal of the institution, the petitioner had to enter the portals of this court by filing the present writ petition seeking payment of difference of salary and other monetary benefits admissible to the legal heirs of Late Sri Krishna Behari Misra. The widow and children of a Principal of an Intermediate College are suffering due the lethargy and inaction on the part of the respondents till date. It has been brought to the notice of the respondents several times but no action has been taken by the District Inspector of Schools, Binjor or by the Regional Dy. Director of Education regarding the status of the reference recommendation sent by the management of the institution for making available benefits to the teacher or his family.

7. In view of above, the opposite parties Nos. 3 to 5 are directed to call for the records from institution regarding employment of Late Krishna Behari Misra and after looking into the matter pass appropriate orders on the proposal submitted by the committee of management of the afore-mentioned institution. If the petitioner's husband had worked as Principal of the institution from 16.10.1982 to 29.5.1988 and had discharged all the duties and functions and responsibilities of the Principal during the aforesaid period, his legal heirs, petitioner etc. shall be paid full salary in the scale meant for the post of Principal and the petitioner shall also be paid arrears of salary and all the consequential benefits accruing as a result thereof. The above decision shall be taken within a period of 3 months from the date a certified copy of this order is produced before the concerned Dy. Director of Education, Regional Director of Education and District Inspector of Schools, Binjor and the committee of management.

With the above observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.04.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.19156 of 1986

Jangipur Sahkari Kraya Vikraya Samiti Ltd. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Mishra
Sri V.N. Agarwal

Counsel for the Respondents:
S.C.

Payment of Wages Act 1936-Section-15- whether is the U.P. Cooperative Society an establishment within the definition of Section 2 (ii)? Held-'No'-entire proceeding Ex-facie illegal without jurisdiction.

Held: Para 7 & 8

In Registrar, Co-operative Societies, Allahabad Vs. The State of U.P. And others, 1997 (75) FLR 356, this Court held that a Co-operative Society is not covered under the Payment of Wages Act. I am in complete agreement with the aforesaid judgment.

In view of the aforesaid, this Court holds that the Payment of Wages Act is not applicable upon a Co-operative Society formed under the Co-operative Societies Registration Act 1965. Consequently, the entire proceedings under the Payment of Wages Act, was Ex-facie, illegal and without jurisdiction. Consequently, the impugned order cannot be sustained and is quashed. The writ petition is allowed.

Case law discussed;
1997 (75) FLR-356

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

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

2. The petitioner is a Society registered under the U.P. Co-operative Societies Act 1965. Proceedings under Section 15 of the Payment of Wages Act, 1936, were initiated by the respondent no. 2 against the petitioner for the alleged illegal deduction of the wages. The Prescribed Authority passed an order to proceed exparte and thereafter passed an order under Section 15 of the Act.

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

3. The short submission of the learned counsel for the petitioner is, that the Payment of Wages Act, is not applicable upon the petitioner's society, inasmuch as, it is neither a factory nor a railway or an establishment and therefore, the petitioners are not covered under the provisions of the Payment of Wages Act. Consequently, the authority had no jurisdiction to proceed against the petitioner.

Sub-Section [4] of Section 1 and Sub Section [5] of Section 1 of the Act reads as under:

"1.(4) It applies in the first instance to the payment of wages to persons employed in any [factory, to persons] employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration,

[and to persons employed in an industrial or other establishment specified in sub-clauses (a) to (g) of clause (ii) of Section 2].

1.(5)The State Government may, after giving three months' notice of its intention of so doing, by notification in the Official Gazette, extend the provisions of [this Act] or any of them to the payment of wages to any class of persons employed in [any establishment or class of establishments specified by the Central Government or a State Government under sub-clause (h) of clause (ii) of section 2] :

Provided that in relation to any such establishment owned by the Central Government, no such notification shall be issued except with the concurrence of that Government."

4. From a perusal of the aforesaid, the Act applies to person employed in a factory, or in a railway or in such other establishment contemplated under Section 2 of the Act, namely,

"2.(ii) "Industrial or other establishment" means-any –

(a) tramway service, or motor transport service engaged in carrying passengers or goods or both by road, for hire or reward.

(aa) air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the union or the Civil Aviation Department of the Government of India;]

(b) dock, wharf or jetty;

(c) inland vessel, mechanically propelled;]

(d) mine, quarry or oilfield ;

(e) plantation ;

(f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale ;

(g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations reconnected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other forms of power is being carried on."

5. The aforesaid provisions includes tramway service, or motor transport service engaged in carrying passengers or goods or both by road, for hire or reward ; air transport service other than such service belonging to, or exclusively employed in the military, naval or air forces of the union or the Civil Aviation Department of the Government of India ; dock, wharf or jetty; inland vessel, mechanically propelled ; mine, quarry or oilfield ; plantation ; workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale ; or such establishment which relates to the constructions, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or such other establishments

or class of establishment which the Central Government or a State Government notifies in the official Gazette.

6. From the aforesaid provision, it is clear that the petitioner's society is not covered under the definition of establishment nor could it be called an industrial establishment. Further, nothing has been brought on record by the respondents to show that any notification has been issued including a society as an establishment covered under the Payment of Wages Act.

7. **In Registrar, Co-operative Societies, Allahabad Vs. The State of U.P. And others, 1997 (75) FLR 356**, this Court held that a Co-operative Society is not covered under the Payment of Wages Act. I am in complete agreement with the aforesaid judgment.

8. In view of the aforesaid, this Court holds that the Payment of Wages Act is not applicable upon a Co-operative Society formed under the Co-operative Societies Registration Act 1965. Consequently, the entire proceedings under the Payment of Wages Act, was Ex-facie, illegal and without jurisdiction. Consequently, the impugned order cannot be sustained and is quashed. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2007

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

Civil Misc. Writ Petition No. 12764 of 1986

Smt Asharfi Devi ...Petitioner
Versus
State of U.P and others ...Respondents

Counsel for the Petitioner:
Sri Nagendra Kumar Srivastava
Sri Neeraj Agarwal
Sri Rama Kant Mishra

Counsel for the Respondents:
S.C.

U.P. Imposition of Ceiling on Land Holdings Act 1960-4-A-Determination of irrigated and un-irrigated plots in the relevant year-if part of holding irrigated-whole plots can be treated to be irrigated-as approved by the Apex Court in Abai Ram's case.

Held: Para 4

There were different variations in different years. Prescribed authority rightly held that as the variations were different i.e. in some year only in 10 Bighas two crops were not grown and in some year in about 25 Bighas two crops were not grown hence it meant that nature of the soil was such that if efforts had been made then entire plot could have yielded two crops.

Case law discussed:
1978 AWC-577
1979 ALJ-1113
AIR 1990 SC-477

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

1. Heard learned counsel for the parties.

The following orders passed under U.P Imposition of Ceiling on Land Holdings Act 1960, (Hereinafter referred to as ***"The Act"***) have been challenged through this writ petition.

1. Order dated 29.1.1981 passed by the prescribed authority Ceiling / SDO, Dadri passed in case No. 8 of 1980, State Vs. Asharfi.
2. Order dated 14.4.1983 passed by the prescribed authority rejecting review petition filed against first order.
3. Order dated 13.5.1986 passed by Additional Commissioner, Meerut Division, Meerut dismissing appeal No. 18 of 1985-86, which was directed against orders of prescribed authority at serial No. 1 and 2.

2. The prescribed authority through orders at serial No. 1 and 2 declared 8 Bigha and odd irrigated land of petitioner as surplus land. By the third order appeal filed against the first two orders was dismissed.

3. Earlier matter had come to this court in the form of writ petition No. 5204 of 1977 which was allowed on 7.5.1979 and prescribed authority was directed to decide irrigated or unirrigated nature of plot Nos. 19 and 174 after permitting the parties to adduce evidence. In the said order, it was directed that the matter should be decided in the light of division bench authority of this court reported in ***Jaswant Singh Versus State 1978 AWC 577***. Thereafter prescribed authority passed the order at serial No.1 (Supra).

4. Both the courts below held that Khasras of 1378 to 1380 fasli were available. It was also held that plot No. 19 was quite big having an area of 61 Bigha and odd in which petitioner's share were only 17 Bighas and odd. It was further observed that in the relevant Khasras entire plot of 61 Bigha and odd was shown to have been irrigated through tube well of one Shahbari and it was also shown therein that every year two crops were grown in the said plot. It was argued by the petitioner tenure holder before the prescribed authority that the entire land in all the three relevant years i.e 1378, 1379 and 1380 fasli was not shown to be irrigated and growing two crops. There were different variations in different years. Prescribed authority rightly held that as the variations were different i.e. in some year only in 10 Bighas two crops were not grown and in some year in about 25 Bighas two crops were not grown hence it meant that nature of the soil was such that if efforts had been made then entire plot could have yielded two crops. It was also argued that plot No. 19 was subsequently irrigated by tube well No.22. Prescribed authority rightly held that it made no difference and relevant years to be seen were 1378 to 1380 fasli. Prescribed authority also observed that apart from petitioner Asharfi Devi, no other co-tenure holder of the said plot raised any objection regarding irrigated character of the said plot. The argument of petitioner that Lekhpal wrongly mentioned in relevant Khasras that the plot in dispute was wrongly shown to have been irrigated from the tube well of Shahbari, was rightly rejected. Prescribed authority under Ceiling Act can not go against Khasras of 1378 to 1380 fasli while determining irrigated nature of land as is evident from section 4-A of the Act. Prescribed authority also mentioned that Naib Tehsildar in his report also mentioned the irrigated nature of the plot. Learned counsel for the petitioner has

argued that the said report was not available. Even if the said report is completely ignored, position remains the same. The findings are based upon entries of Khasras 1378 to 1380 fasli and that is what is required by section 4-A of the Act.

5. The findings recorded by the courts below are not at all against the judgment of ***Jaswant Singh Vs. State 1978 AWC 577***. In the said authority, it was mentioned that under section 4-A of the Act, it was not permissible for the prescribed authority to make use of any oral evidence in the course of enquiry. Prescribed authority has not placed reliance upon any oral evidence. Even if the report of Naib Tehsildar, Lekhpal etc is completely ignored, the Khasras of 1378 to 1380 fasli completely proved that the plots in dispute were irrigated.

6. Moreover, the division bench authority of this court reported in ***Kallu Vs. State 1979 ALJ 1113*** held that if part of a plot was irrigated in any of the relevant years then it could be assumed that the nature of the soil of whole plot was such that if efforts had been made then the whole plot could have been irrigated and used for growing corps. The said authority has been approved by the Supreme Court in ***Kallu Vs. State*** decided along with ***Abiaram Singh Vs. State AIR 1990 SC 477***.

Accordingly I do not find any error in the impugned orders; writ petition is therefore dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 11156 of 2002

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

Counsel for the Petitioner:
Sri Prem Prakash
Sri Ramendra Pratap Singh
Sri Gajendra Pratap
Sri C.B. Yadav

Counsel for the Respondents:
S.C.

U.P. Fundamental Rules-Rule 56 (c)-Compulsorily retirement-service performance find good, very good and excellent-order suffers from perversity-the petitioner while working as Inspector refused to give undue favour to the relative of Police officer- can not be imposed as punitve measure.

Held: Para 11

As such, passing of the impugned order of compulsory retirement of the petitioner in the aforesaid circumstances is nothing but an act which suffers from perversity, as it is clear that the said order has been passed on extraneous considerations and not on the basis of the relevant service record and other material on perusal of which a rational mind may conceivably be satisfied that compulsory retirement of the officer concerned was necessary in public interest.

Case law discussed:
AIR 1979 SC-49
1980 (4) SCC-321
2001 (3) SCC-314

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

1. The petitioner was selected as a Sub Inspector in the Civil Police on 7.3.1974. By an order dated 7.2.2002 passed by the Deputy Inspector General of Police, Bareilly Range, Bareilly, the petitioner was compulsorily retired under Rule 56 (c) of the Fundamental Rules. Aggrieved by the said order, this writ petition has been filed. A further prayer has been made for issuance of a writ in the nature of mandamus commanding the respondents to permit the petitioner to work till completing the age of retirement and to pay him salary and other emoluments admissible to him.

2. I have heard Sri R.P. Singh, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents. Pleadings have been exchanged and with consent of the learned counsel for the parties this writ petition is being disposed of at this stage.

3. The submission of the learned counsel for the petitioner is that the impugned order has been passed on extraneous considerations without assigning any reason or giving any opportunity of hearing to the petitioner. The contention of the learned counsel for the petitioner is that the service record of the petitioner has been very good and only because of the petitioner having made an entry in the General Diary on 13.4.2000 with regard to pressure exerted on him by the senior officers for submitting a final report in a particular case, a vigilance enquiry was directed against the petitioner on 17.4.2000. Thereafter on 11.5.2000 and 4.7.2000 the petitioner was repeatedly transferred. When nothing was found against the petitioner in the vigilance enquiry, in order to punish and harm the petitioner, without assigning any reason the impugned order of compulsory retirement has been passed by the respondents.

4. Learned Standing Counsel has, however, justified the action of compulsorily retiring the petitioner and has stated that no notice to the petitioner was required to be given nor any reason was required to be assigned in the order compulsorily retiring the petitioner and as such the same does not call for any interference.

5. In paragraph 3 of the writ petition it has been stated that *"The service career of the petitioner is found to be satisfactory and the entire service role of the petitioner contains good, very good and excellent also*". In reply to the said paragraph of the writ petition, it has merely been stated in paragraph 6 of the counter affidavit that such averments are wrong and denied. No explanation as to why the said averments are wrong, has been given in the counter affidavit. It has also not been stated that there has ever been any adverse entry awarded to the petitioner. In paragraph 11 of the writ petition it has been stated that *".....the impugned order has been passed without taking into account the entire relevant material, history and service record of the petitioner. The petitioner is quite physically fit to discharge the duties assigned to the post of Sub Inspector of Police and from the service record of the petitioner, no reasonable person would form the requisite opinion on the given material about the retirement of the petitioner. Therefore, the order impugned suffers from perversity".* In paragraph 12 of the writ petition the petitioner has

stated that *"There is nothing adverse in service record of the petitioner which may entitle the respondents to pass the impugned order in the event when the petitioner has been finally exonerated by the Vigilance Department."* In paragraph 13 of the writ petition it has been averred that no opportunity of hearing was given to the petitioner prior to the passing of the impugned order and that the subjective satisfaction of the respondents must be verified by independent material and the service record of the petitioner.

6. The reply to paragraphs no.10,11,12 and 13 of the writ petition has been given paragraph 13 of the counter affidavit and it has merely been stated that the averments of the said paragraphs are wrong and that the petitioner was given sufficient opportunity of hearing. Except for that, nothing has been stated in reply to the specific averments made by the petitioner in paragraphs no. 11 and 12 of the writ petition, relevant extract of which have been quoted above. As such, from the record it does not appear that there was any material against the petitioner so as to warrant an order of compulsory retirement. Merely because a Vigilance enquiry had been initiated against the petitioner would not be a sufficient ground to take such action against the petitioner. In the vigilance enquiry report also nothing material has been found against him, as the property which was sold by the wife of the petitioner was inherited by her from her parents. The only remark against the petitioner in the said report is that prior permission of such sale had not been obtained by the petitioner.

7. The Apex Court in the case of *Smt. S.R.Venkataraman vs. Union of India* AIR 1979 SC 49 has held that *"An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."* In the present case, the impugned order appears to be infected with abuse of power as it is based on no reason of fact.

8. While dealing with a case of compulsory retirement, the Supreme Court in the case of *Baldev Raj Chadha vs. Union of India* (1980) 4 SCC 321 has held that onus lies on the State to furnish material before the Court to justify its action in public interest. In paragraph 8 of the judgment the Court has observed as under:-

"8. This takes us to the meat of the matter, viz., whether the appellant was retired because and only because it was necessary in the public interest so to do. It is an affirmative action, not a negative disposition, a positive conclusion, not a neutral attitude. It is terminal step to justify which the onus is on the Administration, not a matter where the victim must make out the contrary. Security of tenure is the condition of efficiency of service. The Administration, to be competent, must have servants who are not plagued by uncertainty about tomorrow. At the age of 50 when you have family responsibility and the sombre problems of one's own life's evening, your experience, accomplishments and fullness of fitness become an asset to the Administration, if and only if you are not harried or worried by 'what will happen to me and my family?' 'Where will I go if cashiered?' 'How will I survive when I am too old to be newly employed and too young to be superannuated?' These considerations become all the more

important in departments where functional independence, fearless scrutiny, and freedom to expose evil or error in high places is the talk..... So it is that we must emphatically state that under the guise of 'public interest' if unlimited discretion is regarded acceptable for making an order of premature retirement, it will be the surest menace to public interest and must fail for unreasonableness, arbitrariness and disguised dismissal. To constitutionalise the rule, we must so read it as to free it from the potential for the mischiefs we have just projected. The exercise of power must be bona fide and promote public interest. There is no demonstrable ground to infer mala fides here and the only infirmity alleged which deserves serious notice is as to whether the order has been made in public interest. When an order is challenged and its validity depends on its being supported b public interest the State must disclose the material so that the court may be satisfied that the order is not bad for want of any material whatever which, to a reasonable man reasonably instructed in the law, is sufficient to sustain the grounds of 'public interest' justifying forced retirement of the public servant. Judges cannot substitute their judgment for that of the Administrator but they are not absolved from the minimal review well settled in administrative law and founded on constitutional obligations. The limitations on judicial power in this area are well known and we are confined to an examination of the material merely to see whether a rational mind may conceivably be satisfied that the compulsory retirement of the officer concerned is necessary in public interest." (Emphasis supplied).

9. In a more recent case of <u>*State of Gujarat vs. Umedbhai M. Patel*</u> (2001) 3 SCC 314 the Apex Court has summarised the principles relating to compulsory retirement in paragraph 11, which is quoted below:-

"11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:

(i) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administrative, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(viii) Compulsory retirement shall not be imposed as a punitive measure."

10. As such it is clear that an order of compulsory retirement cannot be imposed as a punitive measure or as a short cut measure to avoid departmental enquiry. The same can be passed for valid reasons after taking into account the confidential records which may include uncommunicated entries also. The purpose of the same is to chop off the dead wood but cannot be done without having due regard to the entire service record of the officer.

11. In the present case it is not denied by the respondents that the confidential reports of the petitioner contained entries of good, very good and excellent. It has also not been denied that the petitioner is physically fit to discharge duties as Sub Inspector of Police. The fact that the petitioner has already been exonerated in the vigilance enquiry is also not denied. As such, passing of the impugned order of compulsory retirement of the petitioner in the aforesaid circumstances is nothing but an act which suffers from perversity, as it is clear that the said order has been passed on extraneous considerations and not on the basis of the relevant service record and other material on perusal of which a rational mind may conceivably be satisfied that compulsory retirement of the officer concerned was necessary in public interest.

12. Accordingly, for the foregoing reasons, the impugned order by which the petitioner has been compulsorily retired, deserves to be set aside.

13. This writ petition, thus, stands allowed. The impugned order dated 7.2.2002 passed by Deputy Inspector General of Police, Bareilly Range, Bareilly, Respondent no.2 is quashed. The petitioner shall be entitled to all consequential benefits. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.06.2007

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 26910 Of 2007

Union of India and others ...Petitioners
Versus
Smt Mithauli Devi ...Respondent

Counsel for the Petitioner:
Sri Piyush Mishra

Counsel for the Respondent:

Constitution of India-Art. 226-Payment of Interest-amount withheld illegally-the affected person to be compensated-payment of interest is neither penality nor punitive action but a compensation for deprivation of principal amount be awarded on equitable ground.

Held: Para 18

Thus, the law can be summarised that the interest, being compensatory in nature, should be awarded if it is provided in the contract/agreement, or the statutory provisions provide for it. It may also be awarded on equitable ground, provided the facts and circumstances of the case justify it and the law does not prohibit it.

Case law discussed:
AIR 1997 SC-3559
1998 (3) SCC-376
AIR 1938 P.C.-67
AIR 1961 SC-908
AIR 1975 SC-1303

AIR 1987 SC-2257
AIR 1999 SC-3027
AIR 1999 SC-2963
1994 (2) SCC-240

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

1. This writ petition has been filed against the judgment and order dated 24.11.2006, passed by the Central Administrative Tribunal, Allahabad Bench, by which the learned Tribunal has allowed the interest on the amount withheld unjustifiedly by the present petitioner, Union of India for a period of 9 years.

2. Shri Piyush Mishra, learned counsel for the petitioners has submitted that the finding has been recorded by the learned Tribunal in the impugned judgment that the ex gratia payment from July, 1995 to June, 2004, i.e., for a period of 9 years has been withheld without any justification. Therefore, interest on the said amount was not payable. Learned counsel for the petitioners has further submitted that the amount of ex gratia payment to the respondent was illegal, as her deceased husband was not entitled for pension, and therefore, the impugned judgment and order is liable to be set aside. It is further submitted by Shri Mishra that though this issue has never been agitated by the petitioner before the Tribunal, the issue being the pure question of law, he is entitled to agitate the same before this Court.

3. The case represents a very sorry state of affairs, as earlier the respondent had approached the Tribunal for quashing the impugned orders dated 02.08.1999 and 24.02.2003 by filing the Original Application No. 768 of 2003, by which she had been denied the ex gratia payment,. The said Application was disposed of vide judgment and order dated 8th January, 2004. The Tribunal while deciding the case had taken note of the fact that during the pendency of the Application, the payment of the ex gratia had been directed and the said application was disposed of with the following directions.

"Now that the respondent has already taken a decision to grant ex gratia payment to the applicant in accordance with law, Office Memorandum dated 13.05.1988, I am sure they would apply their mind to the point of delay also and in case it is so admissible under law, she may be granted the interest as well at admissible rates in accordance with law."

4. Thus, it is evident from the aforesaid judgment and order that the issue of grant of ex gratia payment had been decided by the petitioners themselves and it has not been decided by the Tribunal. Therefore, the issue agitated before us cannot be entertained.

5. So far as the impugned order dated 24th November, 2006 is concerned, admittedly, there was a delay of 9 years in making the ex gratia payment, which the respondent was entitled in view of the decision taken by the petitioners themselves. In the facts and circumstances of the case, direction for making the payment of interest is justified.

6. Interest is compensatory in character and can be recovered for withholding the payment of any amount when it is due and payable. It is different from penalty and tantamount to compensation as the person entitled for

recovery has been deprived of the right to use the said amount.

7. In Associated Cement Co. Ltd. Vs. Commercial Tax Officer, Kota & Ors., AIR 1981 SC 1887, the Hon'ble Apex Court held as under:-

"Interest is ordinarily claimed from an assessee who has withheld payment of any tax payable by him and it is always calculated at the prescribed rate on the basis of the actual amount of tax withheld and the extent of delay in paying it. It may not be wrong to say that such interest is compensatory in character and not penal."

8. A similar view has been reiterated in Baij Nath Gupta Vs. State of Bihar & Ors., (1996) 10 SCC 297; S.R. Bhanrale Vs. Union of India & Ors (1996) 10 SCC 172 ; Pratibha Processors & Ors. Vs. Union of India & Ors., (1996) 11 SCC 101; Union of India Vs. Ujagar Lal (1996) 11 SCC 116 & Om Prakash Gargi Vs. State of Punjab (1996) 11 SCC 399.

9. In Abati Bezbaruah Vs. Deputy Director General, Geological Survey of India & Anr., (2003) 3 SCC 148, the Hon'ble Apex Court held that interest is a compensation for forbearance from detention of money and that interest being awarded to a party only for being kept out of the money which ought to have been paid to him.

10. Interest means, inter-alia, a compensation paid by the borrower to the lender for deprivation of the use of his money as held by Hon'ble Apex Court in Consolidated Coffee Ltd. Vs. Agricultural Income Tax Officer, Madikeri & Ors., (2001) 1 SCC 278; and Central Bank of India Vs. Ravindra & Ors., AIR 2002 SC 3095.

11. In Secretary, Irrigation Department, Government of Orissa & Ors. Vs. G.C. Roy, AIR 1992 SC 732, the Constitution Bench of the Hon'ble Apex Court observed that a person deprived of use of money to which he is legitimately entitled as of right, to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages.

12. The payment of interest can be awarded by application of the statutory provisions as held by the Supreme court in Mafatlal Industries Ltd. Vs. Union of India & Ors., (1997) 5 SCC 536; Kuil Fireworks Industries Vs. Collector of Central Excise & Anr., AIR 1997 SC 3559; and GTC Industries Ltd. Vs. Union of India & Ors., (1998) 3 SCC 376.

13. Interest may also be awarded on equitable grounds. (Vide Bengal Nagpur Railway Co. Ltd. Vs. Ruttanji Ramji & Ors., AIR 1938 PC 67; Satinder Singh Vs. Umrao Singh & Anr., AIR 1961 SC 908; Laxmichand Vs. Indore Improvement Trust, AIR 1975 SC 1303; D.P. Gupta Vs. Union of India & Ors., AIR 1987 SC 2257; United India Insurance Vs. Ajmer Singh Cottan & General Mills & Ors., AIR 1999 SC 3027; and Sovintorg (India) Ltd. Vs. State Bank of India, AIR 1999 SC 2963).

14. That payment of interest is obligatory on the part of that party responsible for withholding the amount legally due to another party is crystallized as law by the Apex Court in the case of Union of India Vs. Justice S.S.

Sandhawalia (1994) 2 SCC 240, as already cited above.

15. When rules are silent about payment of interest, whether an individual is entitled to grant to interest on equity basis? Answer to this question is available in Union of India Vs. J.K. Goel (Dr) 1995 Supp (3) SCC 161.

16. In J.K. Synthetics Ltd. Vs. Commercial Taxes Officer, AIR 1994 SC 2393, the Constitution Bench of the Hon'ble Apex Court overruled its earlier judgment in Associated Cement Ltd. (supra) on certain points but observed as under:-

"Therefore, any provision made in a Statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law."

17. In Union of India & Ors. Vs. Upper Ganges Sugar Industries Ltd., (2005) 1 SCC 750, after considering various aspects of interest, the Court held that the interest can be granted on the grounds of equity or in view of the statutory requirement but where the amount has not been withheld without any justification, the equity would not apply. The Court held that in absence of any provision in the contract or any statutory provision and not justifying on equity, the interest should not be awarded.

18. Thus, the law can be summarised that the interest, being compensatory in nature, should be awarded if it is provided in the contract/agreement, or the statutory provisions provide for it. It may also be awarded on equitable ground, provided the facts and circumstances of the case justify it and the law does not prohibit it.

19. If the instant case is examined in the aforesaid settled legal propositions, the case does not present special features warranting any interference with the impugned judgment and order of the learned Tribunal.

20. Petition is totally misconceived and accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 12656 of 1999

Shyam Narain Tewari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Mahendra Bahadur Singh

Counsel for the Respondents:
Sri M.A. Qadeer
Sri Niraj Upadhyaya
Sri Pushpendra Singh
S.C.

(A) U.P. Public Services (Reservation of Physically Handicapped Dependents of Freedoms Fighters of Ex-Servicemen) Amendment Act 1997-Reservation for Physically Handicapped persons-Post of Child Development Project Officer advertised on 31.12.97-providing 2% reservation-while amendment Act become effective from 31.7.97-petitioner and one Mr. Anil Kumar secured 599 marks under P.H. Quota Mr. Anil Kumar

selected as his marks in written examination were higher than petitioner-state government as well as commission committed error appearent on the face of record-held-petitioner entitled for selection-if no post available one more supernumerary post be created to appoint the petitioner-but the seniority would be counted from the date of appointment.

Held: Para 8

The State Government as well as the Commission have committed an error apparent on the face of the record in not providing 3% reservation to physically handicapped candidates in the aforesaid selection. Therefore, one more vacancy was to be filled from physically handicapped candidates and since the petitioner had secured 599 marks equivalent to to the marks secured by Sri Anil Kumar who was selected at serial no.2 under the physically handicapped candidates category, therefore, the petitioner was also entitled for selection and appointment as physically handicapped candidate on the post of Child Development Project Officer.

(B) Constitution of India, Art. 226-Practice of Procedure-Petitioner under physically Handicapped Quota-Selection made in 1997-writ petition filed in 1999-pendency of long period-petitioner can not be put to suffer-for the omission on the part of state government as well as the commission.

Held: Para 9

In our considered opinion, since the writ petition was filed by the petitioner raising his grievances in March 1999 itself and the petition remained pending for disposal before this court, therefore, the petitioner cannot be made to suffer due to the pendency of the writ petition and he is entitled to be appointed on the post of Child Development Project Officer and if no post is available a direction is liable to be issued to the State Government to create a supernumerary post and appoint the petitioner as Child Development Project Officer. However, we make it clear that on such appointment the petitioner shall not be given any seniority benefit w.e.f. the date of appointment of other candidates who had been selected and given appointment in pursuance of advertisement in question. The seniority of the petitioner shall be counted forthwith from the date of his appointment.

Case law discussed:

2006 (3) ESC-1980 (DB) relied on.

(Delivered by Hon'ble V.M.Sahai, J.)

1. The Public Service Commission, U.P. Allahabad (in brief the Commission) issued an advertisement no. A-7-E-1/97-98 on 31.12.1997 inviting applications for 144 posts of Child Development Project Officer (Bal Vikas Pariyojna Adhikari). The petitioner being qualified and eligible applied in pursuance of the aforesaid advertisement and claimed reservation as physically handicapped candidate. He submitted a certificate showing that he was physically handicapped person. The written examination was held on 11.4.1998 to 13.4.1998. The petitioner was declared successful in the written examination with roll no.022666 and was called for the interview. After the interview was over, the Commission declared the result. The Commission sent its recommendation to the State Government for appointing 122 candidates for plain cadre and another 22 candidates were recommended for hill cadre on 10.12.1998. The petitioner was a candidate of plain cadre. He secured total 599 marks in written examination and interview and Ms Shriddha Katiyar was recommended at serial no.1 in the merit list of physically handicapped candidates

for appointment. Sri Anil Kumar and the petitioner had secured 599 marks each. The name of Sri Anil Kumar was recommended at serial no.2 for appointment as physically handicapped candidate as only 2 vacancies were reserved under the physically handicapped category by the Commission. The petitioner's name was not recommended though he had secured equal marks along with Sri Anil Kumar. The said Sri Anil Kumar who had secured higher marks in written test had to be placed higher in the merit list.

2. This writ petition has been filed by the petitioners on the ground that the Commission had illegally applied only 2% reservation quota for physically handicapped candidates though as per The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependants of Freedom Fighters and Ex-Servicemen)(Amendment) Act, 1997, U.P. Act No.6 of 1997 which was published in U.P. Gazette Extraordinary on 31st July, 1997 provided for 3% reservation for physically handicapped candidates.

3. We have heard Sri Ashok Khare, learned senior counsel assisted by Sri Mahendra Bahadur Singh for the petitioner, learned standing counsel appearing for respondent no.1 and 2 and Sri M.A. Qadeer, learned counsel appearing for respondent no.3.

4. Shri Ashok Khare, learned senior counsel for the petitioner has urged that no doubt, requisition was sent by the State Government to the Commission on 8.4.1997 reserving only 2% posts for physically handicapped candidates but in view of the fact that U.P. Act No. 6 of 1997 came into force w.e.f. 9.7.1997 was applicable and the Commission had issued the advertisement on 31.12.1997, therefore, since the law had been amended w.e.f. 9.7.1997 any advertisement issued by the Commission or written test or interview held thereafter was to be held in conformity with the U.P. Act No.6 of 1997. On the other hand, Sri M.A. Qadeer, learned counsel for the respondents has urged that since the requisition was sent by the State Government to the Commission on 8.4.1997, providing only 2% reservation in favour of the physically handicapped candidates, therefore, only two vacancies were reserved by the commission under the aforesaid category. Sri Vikas Tripathi, learned standing counsel has supported the arguments of Sri M.A. Qadeer.

5. U.P. Act No.6 of 1997 has amended section 3 of the principal Act, U.P. Act no.4 of 1993 and now under the physically handicapped category 3% vacancy had been reserved. This question had been considered by this court in Dr. Ravindra Kumar Pandey v. State of U.P. and others, 2006(3) ESC 1880(DB) wherein this court had considered the effect of amendment made in section 3 of the principal Act and had laid down the law as to how the vacancy of physically handicapped candidates had to be worked out and how horizontal reservation for physically handicapped candidates had to be applied. The court has held as under:

".....From the amendment introduced by U.P. Act No.6 of 1997 it appears obvious that the State in keeping with the Central enactment provided reservation for physically handicapped incorporating the provision of one percent for each category of physically

handicapped. Even though the State Act has not specifically provided that three percent of the vacancies shall be reserved for physically handicapped but the two enactments the Central and State dealing with the same subject and the Central Act having directed every appropriate government to provide not less than three percent for physically handicapped, the State enactment has to be read as providing three percent reservation for physically handicapped....."

The court has further held that:

".....It is only those persons who suffer from the disability mentioned in the section who are entitled to claim reservation. The extent of protection has been determined by Central Legislature by directing that it should not be less than three percent. Who would be entitled for such benefit is mentioned and one percent has been marked for each category of disability. Therefore, reservation for physically handicapped has to be worked out on three three percent at the stage of direct reservation in public services and posts in connection with the affairs of the State....."

The controversy involved in this petition is covered by the decision in Dr. Ravindra Kumar Pandey case (supra).

6. It is not disputed by the learned counsel for the respondents that there were 122 posts of Child Development Project Officers to be filled. If 3% reservation is applied under the U.P. Act No.6 of 1997, then 3 vacancies would be reserved and would be available to be filled by physically handicapped candidates. But the respondents have filled only two vacancies of physically handicapped candidates by applying reservation of 2% only. In our opinion, since the Amendment Act U.P. Act No.6 of 1997 had come into force on 9.7.1997 prior to the advertisement and initiation of the selection process, namely, the written test and the interview, therefore, the physically handicapped candidates were entitled for 3% reservations and 3 vacancies were required to be reserved for physically handicapped candidates. Section 5 of the principal Act had been amended and it had clearly been explained that the selection process shall be deemed to have been initiated where under the relevant service rules recruitment has to be made on the basis of written test and the interview, if the written test has started.

7. Section 5 of U.P. Act No.6 of 1997 by which section 5 of the principal Act U.P. Act No.4 of 1993 has been amended is extracted as under:-

"5. Savings- *(1) The provisions of this Act as amended by the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) (Amendment) Act, 1997 shall not apply to cases in which selection process has been initiated before the commencement of the said Act and such cases shall be dealt with in accordance with the provisions of this Act as they stood before such commencement.*

Explanation - For the purposes of this sub-section the selection process shall be deemed to have been initiated where, under the relevant service rules, recruitment is to be made on the basis of, -

(i) written test or interview only, the written test or the interview, as the case may be has started, or

(ii) both written test and interview, the written test has started.

(2) The provisions of this Act shall not apply to the appointment to be made under the Uttar Pradesh Recruitment of Dependent of Government Servant Dying in harness Rules, 1974."

8. In the instant case the advertisement itself was issued after U.P. Act No.6 of 1997 had come into force, therefore, the selection process was not initiated as provided by section 5 of the amending act. Commission is a statutory body. It is bound by the law of the State. Once the U.P. Act No.4 of 1993 was amended by U.P. Act no.6 of 1997 which came into force on 9.7.1997 the State Government was under a legal duty to modify its requisition dated 8.4.1997 sent to the Commission. Even the commission could have sought a clarification from the State Government in view of changes made in law providing horizontal reservation to physically handicapped candidates. Both have failed in their legal duty for which the petitioner cannot be made to suffer. The State Government as well as the Commission have committed an error apparent on the face of the record in not providing 3% reservation to physically handicapped candidates in the aforesaid selection. Therefore, one more vacancy was to be filled from physically handicapped candidates and since the petitioner had secured 599 marks equivalent to to the marks secured by Sri Anil Kumar who was selected at serial no.2 under the physically handicapped candidates category, therefore, the petitioner was also entitled for selection and appointment as physically handicapped candidate on the post of Child Development Project Officer. It is not the case of respondents that any other candidate of the first two categories of disabilities provided in the Act were available, therefore, the petitioner who belonged to the third category of disability is entitled for selection and appointment.

9. Both Sri M.A. Qadeer, learned counsel for the Commission and Sri Vikas Tripathi, learned standing counsel have vehemently urged that recommendations have been sent by the Commission in the year 1998 and after lapse of about nine years no vacancy is available on which the petitioner could be appointed. We have considered the submissions of learned counsel for the respondents. In our considered opinion, since the writ petition was filed by the petitioner raising his grievances in March 1999 itself and the petition remained pending for disposal before this court, therefore, the petitioner cannot be made to suffer due to the pendency of the writ petition and he is entitled to be appointed on the post of Child Development Project Officer and if no post is available a direction is liable to be issued to the State Government to create a supernumerary post and appoint the petitioner as Child Development Project Officer. However, we make it clear that on such appointment the petitioner shall not be given any seniority benefit w.e.f. the date of appointment of other candidates who had been selected and given appointment in pursuance of advertisement in question. The seniority of the petitioner shall be counted forthwith from the date of his appointment.

10. In the result, this writ petition succeeds and is allowed. A writ of mandamus is issued to the Public Service Commission, U.P. Allahabad to recommend the name of the petitioner under the physically handicapped category for appointment on the post of Child Development Project Officer within a period of one month from the date a certified copy of this order is produced before the Commission. State Government is also directed to issue appointment letter to the petitioner in the vacancy on the post of Child Development Project Officer if it is available within a further period of two months after getting the necessary formalities completed within the aforesaid period. However, if there is no post available then the State Government is directed to create a supernumerary post and appoint the petitioner as Child Development Project Officer within the aforesaid period.

Parties shall bear their own costs.

Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.04.2007

BEFORE
THE HON'BLE K.N. SINHA, J.
THE HON'BLE S.K. JAIN, J.

Criminal Appeal No. 3456 of 1999

Sanjay ...Appellant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri R.P. Singh
Sri Sunil Singh

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

Indian Penal Code-Section-Sentence of Life Imprisonment reduced to 10 years Rigorous Imprisonment -considering two daughters of marrigble age victim aged about 10-11 years girl-accused the real uncle-improbable for a mother to make false allegation of Sexual assault on her minor daughter against her own dewar.

Held: Para 16 and 17

Thus, we are of the opinion that the judgement, holding the appellant guilty, recorded by the Sessions Court, is based on evidence and sound reasoning. The conviction of the appellant is therefore, maintained.

However, keeping in view the law laid down by Hon'ble the Supreme Court in the case of T.K. Gopal alias Gopi (Supra) and the fact that the appellant has two daughters of marriageable age, we are inclined to consider the submission of the learned counsel for the appellant regarding reduction in the sentence. The appeal is hereby dismissed. The sentence of life imprisonment is reduced to a sentence of ten years' rigorous imprisonment.

Case law discussed:
2000 CAR 366 (S.C.) relied on.

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

1. This criminal appeal has been filed by the sole appellant Sanjay against the judgement and order dated 14.12.1999 passed by learned Additional Sessions Judge, XIII, Ghaziabad in sessions trial no. 70 of 1999 State Vs. Sanjay, where by the learned Sessions Judge found the appellant guilty of charges against him under section 376 Indian Penal Code and sentenced him to undergo imprisonment for life along with fine of Rs.5000/- and in default of payment of fine, to undergo

six months' rigorous imprisonment. It was further ordered by the learned Sessions Judge that out of the fine deposited by the appellant Rs.4000/- would be paid to the victim.

2. According to the prosecution story, Smt. Rajbala wife of Khilari Singh, resident of 519 Kirtan Wali Gali, Bazaria, Ghaziabad, on 11.11.1998 at 6.35 P.M., went to the police Station Kotwali, Ghaziabad and lodged an oral report (Ex. Ka-1). As per this report, Smt. Rajbala, as usual, on that date had gone in the Mohalla for doing menial job. Her younger daughter, the victim, aged about nine years, came back home at about 2.30 P.M. from school. Her elder daughter Km. Seema, aged about twelve years, was also present in her house. Her ***'Devar'*** Sanjay, who used to live in the adjacent house, came to the house and with an evil intention, he took the victim inside the room. Sanjay made the victim lie on Nivar cot. He took out underwear of the victim and after lifting her skirt raped her. The victim started crying. At that time Smt. Rajbala reached home and she along with elder daughter Km. Seema ran into the room and saw Sanjay committing rape upon the victim. This occurrence took place at 2.00 P.M. Smt. Rajbala and her daughter tried to catch the appellant but appellant Sanjay pushed them and succeeded in running. The clothes of the victim were soaked in blood. The blood was also found on the bed sheet. It was further stated by Smt. Rajbala in her report that her husband kept Thela of ***Chhole chawal*** on railway road. She went in search of him but in vain. She had also taken the victim to the police station.

3. P.W. 5, C.C. 999 Rajpal Tyagi wrote chik FIR (Ex. Ka-1) on the dictation of Smt. Rajbala and entered the details in G.D. as per the Ex. Ka-8.

4. S.I. Ajai Kumar Gautam (P.W. 4), after registration of the case took up the investigation, recorded the statement of the complainant and on 12.11.1998, arrested the appellant. He also recorded the statement of the victim and other witnesses. He also got the statement of the victim recorded under section 164 Cr.P.C. and after preparing the site plan (Ex. Ka-5), had taken into possession the underwear of the victim and prepared its memo (Ex. Ka-6). After investigation, he submitted the charge sheet (Ex. Ka-7) against the appellant.

5. Third Additional Chief Judicial Magistrate, Ghaziabad, vide order dated 12.1.1999, committed the case to the sessions and the charge against the appellant under section 376 Indian Panel Code was framed by XIII Additional Sessions Judge, Ghaziabad, on 26.3.1999. The appellant pleaded not guilty to the charge and claimed trial.

6. The prosecution, to bring home guilt of the appellant, examined victim Km. Priti as P.W. 1, Smt. Rajbala (P.W. 2), informant of the case and mother of the victim, Doctor Pushp Lata (P.W.3), who medically examined the victim on 11.11.1998, P.W. 4 investigating officer of the case Ajay Kumar Gautam and constable Rajpal Tyagi, who wrote the chik FIR on dictation of Smt. Rajbala as P.W. 5.

7. Victim P.W. 1 deposed before the court as under:
That she came back home after her school in the noon. She along with her elder sister and younger brother were at home.

Her parents were not at home. She was taking meal when her uncle Sanjay came to her house. Her uncle Sanjay is present in the court. Sanjay did not permit her to take meals. He made her to lie on the cot. At that time she was wearing school dress and her brother and sister had gone out of house to buy something. Her uncle took out her underwear, then opened his Tahmad and did *Badtamizi* with her urinary organ. When *Badtamizi* was done with her, she suffered pain. Her urinary organ started bleeding. The bed sheet was also spoiled. She raised alarm, hearing which, her mother and elder sister came. Her mother tried to catch her uncle but he pushed them and ran away. Thereafter she along with her mother went to the police station to make the report. She was medically examined in the hospital. The clothes, which she was wearing, were soaked in the blood. The clothes were given to the police. The police had enquired from her about the occurrence. She had earlier also made a statement before the court. Her leg was also soaked in the blood. When *Badtamizi* was done with her urinary organ, her mouth was gagged.

P.W. 2 Smt. Rajbala has supported the prosecution story.

8. P.W. 3 Dr. Pushp Lata, medical officer examined the victim at 7.45 P.M. On her external examination, she found no external mark of injury on her body but on internal examination of the victim, she found redness over vulva perineum torn and forchette torn at 6 O' clock position. Hymen was also torn at 6 O' clock position. Vaginal mucosa torn margins irregular bleeds on touch. Vaginal admits one finger with difficulty. She prepared the medical examination report (Ex. Ka-3). She referred advised for X-ray for ascertaining age of the victim. She also prepared slides of vaginal smear for confirmation of spermatozoa and gonococcal. After the report of X-ray and pathology, she prepared supplementary report (Ex. Ka-4). As per this report, age of the victim was found approx. 10 to 11 years and possibility of rape could not be ruled out though spermatozoa not seen.

9. P.W. 4, investigating officer has stated that he had conducted the investigation and submitted the charge sheet against the accused-appellant.

P.W. 5 Constable Rajpal Tyagi has proved the chik FIR.

The appellant, in his statement under section 313 Cr.P.C., denied the occurrence and stated that he had dispute with Smt. Rajbala over the house. Her daughter fell down from the roof resulting in vaginal injury and he has been falsely implicated in this case.

In his defence, the appellant has examined Natthu Ram as D.W. 1, who is real grand father of the victim and father of the appellant. D.W. 1 deposed before the court that on 11.11.1998 at 12.00 hrs. in the day when he came home to take his meals, he found that the victim was injured. He made an inquiry and the people present there, told him that the victim had fallen from roof. In the evening, when he came back home at 8.30 P.M., he found that the police had arrested Sanjay. He further stated that he had dispute with Smt. Rajbala over the house. Smt. Rajbala wanted to take alone his house due to which she had enmity with Sanjay. It has come in his cross

examination that at the time of occurrence, Sanjay was married.

The learned Sessions Judge, after perusal of the evidence, found that there was no reason to disbelieve the statement of the prosecutrix which was supported by the medical evidence on record. The appellant is real uncle of the prosecutrix and there is no reason to falsely implicate him in this case and relying upon the statement of the victim, her mother and doctor and the formal witnesses convicted the appellant as aforesaid.

We have heard learned counsel for the appellant Sri R.P. Singh and learned A.G.A.

Learned counsel for the appellant has submitted that the appellant has been falsely implicated in this case due to family dispute between the mother of the victim Smt. Rajbala and grand father of the appellant over the house. He has further submitted that the victim had fallen down from roof and suffered injuries and the appellant had been falsely implicated in this case due to enmity. It has also been submitted by the learned counsel for the appellant that the victim, in her cross examination, has specifically stated that her mother and sister arrived at the place of occurrence after the appellant had runaway. Therefore the statement of Smt. Rajbala, mother of the victim is untrustworthy. He has also argued that the sentence of life imprisonment given by the learned Sessions Judge is the maximum sentence prescribed under section 376 of Indian Panel Code. It has also been argued by the learned counsel for the appellant that the appellant has two daughters who have come of age and are to be married. The accused is in jail right from the time when the learned Sessions Judge passed the impugned judgement and order dated 14.12.1999 and has already undergone imprisonment of about seven and half years.

10. Learned counsel for the appellant has drawn our attention to the law laid down by ***Hon'ble the Supreme Court in T.K. Gopal alias Gopi Vs. State of Karnataka (2000 CAR 366)***, where Hon'ble the Supreme Court had issued a notice to the accused-appellant to show cause why his ten years' sentence should not be enhanced to life imprisonment where the appellant had committed rape on a girl of one and a half year. Hon'ble the Supreme Court having regard to the fact that the appellant had two daughters of marriageable age, discharged the notice.

11. Learned A.G.A. has submitted that the appellant, who is real uncle of the victim, has committed rape upon the victim, who is of a tender age of about eleven years and the fact that rape committed on the victim by the appellant is fully proved from the evidence and statement on record and in view of this, no lenient view in the matter can be taken.

We have given thoughtful consideration to the submissions made by the learned counsel for the parties.

12. We do not find any force in first submission of the learned counsel for the appellant that the victim suffered injury due to fall from roof. There is no such evidence on the record that the victim had fallen from roof. It is also improbable that if the victim had fallen from roof she suffered injury only in her vagina and on no other part of her body. The statement

of D.W. 1 Natthu Ram cannot be believed for the reason that he is father of the appellant and he himself did not see that the victim suffered injury due to fall from roof. He only stated that he was informed by the people that victim had fallen from the roof.

13. We also do not find any force in the argument of the learned counsel for the appellant that he has been falsely implicated by the mother of the victim over the dispute of the house. It is improbable for mother to make false allegation of sexual assault on her minor daughter against her own Dewar. Normally a girl or woman, in tradition bound non-permissive society, would be extremely reluctant to admit any such incident. No mother would take risk to make false allegation against the appellant, who is the real uncle of the victim, for sexual assault on her daughter for fear of social stigma.

14. From the perusal of the evidence on record and statement of the prosecutrix in particular, in our view, the statement of the prosecutrix inspires confidence. No girl would depose falsely against her own uncle. The mother of the victim, P.W.2 Smt. Rajbala, would also not do so for the future prospects of the victim getting married. From the statement of the victim it is revealed that the appellant, while the victim was all alone in her house and was taking meals, made her lie on a cot and committed rape upon her. The statement of the victim and her mother Smt. Rajbala is fully corroborated by the medical evidence on the record.

15. The doctor also opined that there was possibility that rape was committed on her. Even if mother and sister of victim arrived after the occurrence, as stated by the victim, still there is no ground to disbelieve the statement of the victim, which is corroborated by medical evidence on record.

16. Thus, we are of the opinion that the judgement, holding the appellant guilty, recorded by the Sessions Court, is based on evidence and sound reasoning. The conviction of the appellant is therefore, maintained.

17. However, keeping in view the law laid down by Hon'ble the Supreme Court in the case of T.K. Gopal alias Gopi (Supra) and the fact that the appellant has two daughters of marriageable age, we are inclined to consider the submission of the learned counsel for the appellant regarding reduction in the sentence. The appeal is hereby dismissed. The sentence of life imprisonment is reduced to a sentence of ten years' rigorous imprisonment.

18. The copy of this judgement be immediately sent to the court concerned for necessary compliance. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 12189 of 2007

Smt. Kiran Rai ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. B.N. Rai

Sri. N.K. Rai

Counsel for the Respondents:
Sri. P.K. Pandey

Constitution of India, Art.-226 Natural Justice- Cancellation of appointment-petitioners appointmented as Aanganwari worker-cancelled without any notice or opportunity of hearing-on the pretext of her educational certificates appears to be forged-held-wholly unjustified.

Held: Para 9

For the foregoing reasons, the order cancelling the appointment of the petitioner as Aanganwari Karyakatri for the village in question is wholly unjustified, having been passed without any proper enquiry and without complying with the principles of natural justice and as such the same is liable to be set aside

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

1. In response to an advertisement issued by the respondents for appointment of Aanganwari Karyakatri for the village in question, the petitioner as well as other candidates had applied. On the basis of the recommendations made by the Selection Committee, in terms of the Government Order dated 16.12.2003, the name of the petitioner was recommended for appointment and consequently by order dated 25.8.2006, the petitioner was given appointment as Aanganwari Karyakatri. By the impugned order dated 23.11.2006, the appointment of the petitioner has been cancelled on the ground that the income certificate of the petitioner appears to be doubtful and that it appears to be fabricated. Aggrieved by the said order, the petitioner has filed this writ petition.

2. I have heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents. Pleadings have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

3. The submission of the learned counsel for the petitioner is that the impugned order has been passed merely on conjectures and surmises and without there being any positive basis of arriving at the said conclusion. It has further been submitted that there was no complaint with regard to the income certificate of the petitioner and that no enquiry was ever got conducted in that regard. It has further been submitted that the enquiry, if any, was got conducted exparte without any notice to the petitioner, which was in gross violation of the principles of natural justice.

4. Learned Standing Counsel has, however, submitted that the impugned order has been passed on the basis of the enquiry which was got conducted on the complaints filed by several persons and as such the impugned order is fully justified.

5. Having heard learned counsel for the parties and considering the facts and circumstances of this case, in my view, the order impugned in this writ petition deserves to be set aside.

6. It is the categorical case of the petitioner that prior to the passing of the impugned order, no opportunity was ever given to the petitioner. It is well settled principle of law that in case if a right has accrued in favour of a person, the same can be withdrawn only in accordance with law, after giving opportunity to the person

concerned. In paragraphs 12, 13 and 14 of the writ petition, it has categorically been stated that no opportunity was given to the petitioner at the time of the conduct of the alleged enquiry; nor any notice or opportunity of hearing was ever given prior to the passing of the impugned order, and that the impugned order has been passed for malafide reasons only to accommodate certain persons of the choice of the respondents.

7. There is no specific reply given by the respondents to the aforesaid averments made in paragraphs 12, 13 and 14 of the writ petition except for merely denying the same and stating that after the passing of the impugned order dated 23.11.2006 the petitioner did not file any reply. A perusal of the impugned order clearly shows that by the said order, the appointment of the petitioner as Aanganwari Karyakatri has been cancelled. The order does not contemplate any further action nor does it require the petitioner to file reply to the same.

8. Alongwith the counter affidavit, a collective enquiry report with regard to the appointments in several villages has been filed. The said report only gives the conclusion, without any discussion, which is in the form of an order, which has been communicated to the petitioner vide letter dated 23.11.2006. The individual enquiry report in the case of the petitioner has not been filed. With the counter affidavit certain complaints have been filed to show the basis on which the enquiry was got conducted. A perusal of the complaints go to show that the same related to the authenticity of the educational certificates filed by the petitioner. There is no mention in the complaints with regard to the income certificate filed by the petitioner. The order, by which the appointment of the petitioner has been cancelled, is on the basis that the Income certificate appears to be doubtful and hence it is treated as fabricated. There is no mention of the educational certificates of the petitioner, regarding which complaints had been made. Although it has not been stated in the counter affidavit that the notice was ever given to the petitioner at the stage of enquiry, but an attempt has been made to show that there is an endorsement of the petitioner of having received the complaint dated 31.8.2006 filed as Annexure-C.A.5 to the counter affidavit. Even though this Court is not inclined to accept that copy of the said complaint was given to the petitioner but even assuming that the same had been given, then too since the said complaint is with regard to the educational certificates of the petitioner and not with regard to the income certificate, as such, it cannot be said that the petitioner had any opportunity to reply with regard to the the authenticity of the income certificate on the basis of which the impugned order has been passed. As such, this Court is of the firm opinion that the impugned order has been passed in gross violation of the principles of natural justice.

9. For the foregoing reasons, the order cancelling the appointment of the petitioner as Aanganwari Karyakatri for the village in question is wholly unjustified, having been passed without any proper enquiry and without complying with the principles of natural justice and as such the same is liable to be set aside.

10. Accordingly, this writ petition stands allowed. The order dated

23.11.2006 passed by the respondent no. 2 is quashed. The petitioner shall be entitled to continue to function as Aanganwari Karyakatri for the village in question in terms of her appointment given on 25.8.2006. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2007

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 9893 of .2007

Naseem Banoo and others ...Petitioners
Versus
Presiding Officer & others...Respondents

Counsel for the Petitioners:
Sri. Kaushal kant

Counsel for the Respondents:
Sri. Tarun Verma
Sri. K.M. Astahna

Constitution of India, Art-226- alternative remedy writ petition -arises out against the order passed by recovery officer-deemed to be order passed by recovery tribunal-appealable under section 20 of Recovery of Debts due to Bank and Financial Institutions Act,1993-dismissal of appeal by tribunal held-illegal-petition dismissed on the ground of alternative remedy.

Held: Para 15

Thus the above observation clearly indicate that forum of appeal to the Tribunal which has been provided against the order of Recovery Officer which is sufficient safeguard in the event the Recovery Officer acts in arbitrary or unreasonable manner.

Case Law discussed:
2004 Banking Cases-348(DB)
2002(2) Bank CLR 272(SC)
AIR 1963 SC 1503
AIR 1935 PC 5

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

1. Heard Sri Kushal Kant, learned counsel for the petitioners and the learned counsel appearing for the respondents 1 and 3.

2. By this writ petition the petitioners have prayed for quashing the order dated 3-9-2002 passed by the Recovery Officer, Debt Recovery Tribunal, Allahabad and order dated 30.11.2006 passed by the Debt Recovery Tribunal dismissing the appeal No.224 of, 2002 filed against the order of the Recovery Officer.

3. Learned counsel appearing for the respondents raised a preliminary objection with regard to entertainability of this writ petition. Learned counsel for the respondents submitted that the petitioners have statutory remedy of filing an appeal before the appellate tribunal Under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 against the order dated 30.11.2006 passed by the Debt Recovery Tribunal hence the writ petition need not be entertained by this Court under Article 226 of the Constitution. Reliance has been placed on Division Bench judgement of Delhi High Court reported in II (2004) Banking cases 348 (DB) **Continental Construction Ltd. & Ors** Versus **State Bank of India & Ors.**

4. Learned counsel for the petitioners refuting tho preliminary objection of learned counsel for the respondents contended that no remedy of appeal is available to the petitioners

against the order dated 30.11.2006 passed by the Tribunal. Learned counsel submitted that the order dated 30.11.2006 has been passed by the Tribunal in exercise of its appellate power Under Section 30 of the Act. He submits that no appeal is contemplated Under Section 20 against an order passed by the Tribunal in exercise of its appellate jurisdiction. Learned counsel for the petitioners in support of his contention placed reliance on the judgements of the apex Court on AIR 1963 S.C. 1503 **Roop Chandra** Versus **State of Punjab**. Another judgement relied by him on a judgement of the apex Court in 2002 (2) Bank CLR 272 (SC) **Union of India and another** Versus **Delhi High Court Bar Association and another.**

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

6. The question which has arisen in this writ petition is as to whether against the appellate order passed by the Debt Recovery Tribunal Under Section 30 of the Act, a further appeal can be flied Under Section 20 of the Act? For answering this question scheme of the Act has to be looked into. Section 2 (a) defines "Appellate Tribunal" as an Appellate Tribunal established under Sub-section (1) of Section 8. Section 2 (o) defines "Tribunal" means the Tribunal established under Sub-section (1) of Section 3. Section 20 provides for an appeal to the Appellate Tribunal. Section 20 (1) which is relevant in the present case is quoted below :-

"20(1) *Save as provided in Subsection (2), any person aggrieved by an order made, or deemed to have been made by a Tribunal under this Act, may prefer an appeal to an appellate Tribunal having jurisdiction in the matter.*"

A perusal of provisions of Section 20 (1) indicate that the appeal is provided against an order made, or deemed to have been made. by a Tribunal. Other relevant provision for purpose of this case is Section 30 of the Act. Section 30 of the Act has been amended by Act NO.1 of 2000. Prior to its amendment Section 30 provided:-

"30. *The orders of the Recovery Officer be deemed as orders of the Tribunal*:-

Notwithstanding anything contained in Section 29, the order made by the Recovery Officer in exercise of his power Under Section 25 to 28 (both inclusive), shall be deemed to have been made by the Tribunal and an appeal against such order shall lie to the appellate Tribunal."

8. Thus Section 30 as originally enacted provided an appeal against an order of Recovery Officer to the appellate Tribunal and the order of Recovery Officer was deemed to be an order of Tribunal. Section 30 was amended with effect from17.1.2000 and now amended section provides as under:-

"**30.** ***Appeal against the order of Recovery Officer***:-

(1) Notwithstanding anything contained In Section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal."

9. The amended Section 30 now provides an appeal within thirty days from an order of the Recovery Officer to the Tribunal. Thus the appellate power has also been conferred on the Tribunal against the order of the Recovery Officer which was not earlier with the Tribunal. Earlier the appellate forum against the order of Recovery Officer was also the appellate Tribunal.

10. The right of appeal is creature of statute. The Privy Council in A.I.R. 1935 Privy Council 5 **Ohene Moore** Versus **Akessch Tayee** long ago observed:-

"*After all, it is to be remembered that all appeals in this country and elsewhere exist merely by statute and unless the statutory conditions are fulfilled no jurisdiction is given to any Court of Justice to entertain them.*"

11. The question to be answered is that as to whether the appeal can be filed against an order of Tribunal which order is passed by the Tribunal in exercise of appellate jurisdiction Under Section 30. The appeal to the appellate Tribunal has been provided for against an order of Tribunal Under Section 20 (1) as noted above. Taking plain and simple meaning of words used in Section 20 (1) of the Act that right of appeal has been provided to any person aggrieved by an order .made or deemed to have been made by a Tribunal under this Act, the words are wide enough to give right of appeal to an aggrieved person against an order passed by the Tribunal under the Act. The order of Tribunal passed Under Section 30 is also an order of Tribunal under the Act. Section 20 (1) does not create any exception with regard to those orders of the Tribunal which have been passed in exercise of its appellate jurisdiction. All orders passed by the Tribunal under the Act are appealable before the appellate Tribunal by virtue of Section20(1). The order passed by the Tribunal in exercise of powers under sections 17 and 19 or order passed by the Tribunal deciding an appeal filed Under Section 30 or passing on order under Section 31 or Section 31-A are all appealable. Learned counsel for the petitioner has relied on the judgement of the apex Court in **Roop Chandra** Versus **State of Punjab and another** (supra). The apex Court in the said judgement had considered the provisions of Section 21 (4) and Section 42 of East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. Section 21 (4) provided that any person aggrieved by the order of the Settlement Officer (Consolidation) may within sixty days of that order appeal to the State Government. Section 41 of the Act provided that the State Government for administration of the Act appoint such person as it think fit and may by notification delegate any power or function under this Act to any officer either by name or designation. The State Government by notification has delegated its power under Section 21 (4) to Assistant Director of Consolidation exercising its power Under Section 41. An order was passed by the Assistant Director of Consolidation exercising delegated powers of the State Government. The question arose as to whether the appeal shall lie to the State Government against the order passed by the Assistant Director of Consolidation in exercise of delegated appellate power. The apex Court in the said judgement held that no appeal shall lie to the Government against the order passed by its delegate who exercised the appellate

power of the State Government. Following was laid down by the apex Court in paragraph 11:-

"***11***. *The question then arises, when the Government delegates its power, for example, to entertain and decide an appeal under S. 21 (4), to an officer and the officer pursuant to such delegation hears the appeal and makes an order, is the order an order of the officer or of the Government? We think it must be the order of the Government. The order is made under a statutory power. It is the statute which creates that power. The power can, therefore, be exercised only in terms of the statute and not otherwise. In this case the power is created by S. 21 (4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be, the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government.*"

12. The above case of the apex Court was on its own facts and has no application in the present case. In the present case Tribunal is not exercising any delegated power of appellate tribunal, right of appeal to the Tribunal against the order of Recovery Officer was consciously provided by amended Section 30. The appeal under Section 30 the Tribunal is not same thing as the appeal to the appellate Tribunal Under Section 20. There are several distinctions in both the appeals including that appeal Under Section 20 can be filed only against an order of Tribunal whereas the appeal Under Section 30 can be filed only against an order of Recovery Officer. Against the order of Recovery Officer the appeal is not directly maintainable to the appellate Tribunal since by deletion of Section 30 as it was originally enacted the order of the Recovery Officer cannot now deemed to be order of the Tribunal. The period of limitation provided for both the appeals is also different whereas the. appeal Under Section 20 of the Act can be filed within 45 days and the appeal Under Section 30 can be filed within thirty days.

13. From the scheme of the Act as noticed above it is found that both the appellate forum contemplate the different kind of appeals and neither there is any overlapping nor any conflict. Even though the tribunal passed the order Under Section 30 in the appellate forum an appeal to the appellate Tribunal Under Section 20 is very much available. There is no indication in the Act nor there Is any provision to come to the conclusion that the orders passed by the Tribunal in exercise of appellate jurisdiction are excluded from the ambit of appeal which can be filed before the appellate Tribunal Under Section 20.

14. The judgement of the apex Court in **Union of India and another** Versus **Delhi High Court Bar Association and another** (supra) is not on the issue which has arisen in the present writ petition. The following observation was made in paragraph, 30 of the judgement;

"*30.....Furthermore, Section 30, after amendment by .the Amendment Act,*

2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any orders of the recovery Officer which may not be in accordance with law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner. The provisions of Sections 25 and 28 are, therefore, not bad in law."

15. Thus the above observation clearly indicate that forum of appeal to the Tribunal which has been provided against the order of Recovery Officer which is sufficient safeguard in the event the Recovery Officer acts in arbitrary or unreasonable manner.

16. The Division Bench judgement of Delhi High Court in **Continental Construction Ltd. & Ors** Versus **State Bank of India & Ors.** (supra) relied by the counsel for the respondents fully support the contention of the learned counsel for the respondents The Delhi High Court has took the view that after the order of the Tribunal deciding an appeal Under Section 30 the forum of appeal under Section 20 is further forum of appeal. Following was laid down in' paragraphs21 and 22 ;-

"*21. The omission of the words " and an appeal against such order shall lie to the Appellate Tribunal" in Section 30 of the Act (as it now stands) is a necessary concomitant of the over·all amendment made in 2000 to section 30 of the Act which actually works to the advantage of a litigant in as much as it provides for an additional appelate forum. This was noticed by the Supreme Court in* ***Union of India & Another v. DeIhl High Court Bar Association & others*** *II (2002) SLT 552= 96(2002) DLT 726 (SC)=II (2002) Backward Class 194(SC)= (2002) 4 SCC 275. Prior to the amendment of the Act in 2000, only one appeal was provided for against an order of the Recovery Officer, and that appeal lay to the Appellate Tribunal; whereas since 2000, a first appeal is provided to the Tribunal and an appeal against the order of the Tribunal is provided to the Appellate Tribunal. This is a 'sufficient safeguard' as observed by the Supreme Court in Delhi High Court Bar Association in the event of Recovery Officer acting in an arbitrary or unreasonable manner.*"

"*22. Learned counsel for the petitioners then submitted , relying upon Sant Prasad v. Ashwani Prasad & another, (1921) I.L.R. , 43 All. 403, that since the Act did not provide for a second appeal against an order passed by the Tribunal (in the exercise of its original jurisdiction), no second appeal can be filed against an order passed by the Recovery Officer. While the general principle of law canvassed by learned counsel for the petitioners may be true, this question does not at all arise in this writ petition for the simple reason that the Act itself provides for a second appeal against an order of the Recovery Officer. A specific right having been conferred by a statute cannot, surely, be taken away by resort to a general principle. For a similar reason, other cases relied on by the learned Counsel, such as Hari Kishen v Amar Nath-(1950) 52 P.L.R. 13 and Ali Ahmed v. Roshan Das (1972) 8 DLT 429, are equally in opposite."*

17. In view of forgoing discussions it is held that the order dated 30.11.2006 passed by the Tribunal dismissing the appeal of the petitioner filed against the order of the Recovery Officer is appealable under Section 20 of the Act. The petitioner having statutory remedy of filing an appeal against the order dated 30.11.2006 the writ petition cannot be entertained and is thus dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2007

BEFORE
THE HON'BLE R.P. MISRA, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 39234 of 2002

Satya Deo Dikshit & another ...Petitioners
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioners:
Sri V.B. Upadhyay
Sri M. Prasad

Counsel for the Respondents:
S.C.

Uttar Pradesh Minerals (Prevention of Illegal Mining Transportation and Storage) Rules 2002-Rule 11-petitioner being traders of sand/morrum-stored for purpose of selling to customers-prior to the existence of Rule-whether liable to pay any Royalty? Held-'No'-in rule no such prohibition regarding disposal of sand/morrum after the enforcement of Rule.

Held: Para 15

In view of the aforesaid fact and circumstances of the present case, we are of the view that the minerals stored by the petitioners prior to second of September 2002 for the purposes of selling it to customers will not be a n offence or they are not liable to pay any royalty.

Case law discussed:
AIR 1987 M.P. 74

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

1. The present writ petition has been filed in the nature of mandamus declaring the Uttar Pradesh Minerals (Prevention of Illegal Mining Transportation and Storage) Rules, 2002, as prospective in its operation. Further a writ in the nature of mandamus directing the respondents not to interfere in the storage, selling and transporting of morrum, stored by the petitioners prior to coming into force of new Rules.

2. The brief facts of the case are that the petitioners are traders of sand/morrum and gitti. Petitioner No.1 stored minor minerals on plots No.105 and 106 in village Badanpur, Tehsil and District Hamirpur for the purposes of selling it in the open market. Petitioner No.2 has stored minerals on plots Nos. 76 and 77 belonging to one Sri Kamesh Chaurasiya in village Shitalpur, plots Nos. 78 and 333 belonging to one Sri Laxmi Narain Singh in Tehsil- Helapur and plot No.354/2 belonging to one Sri Ram Kishun in village Kanauta in Tehsil & District Hamirpur. The petitioners purchased the above mentioned minerals from the open market and also from various lease/permit holders in the district Hamirpur and Mahoba for selling to various customers who take into for the purposes of private consumption. The petitioners purchase the said minerals from the lease holders and transport it to the business places. On 22.2.2002, the petitioner No.1 received a notice from the mines officer by which

the petitioners were directed to clarify the position of genuineness of the stock of morrum. According to the notice under Section 4(1-A) of the Act, no person can stock or transport minerals without permission, otherwise action will be taken under Section 21 of the Act.

3. Since no rules were framed regulating the storage of minor minerals, petitioners filed a writ petition before this Court and a Division Bench of this Court passed the following orders:-

"Heard the learned counsel for the parties.
It has been alleged in para 9 of the writ petition that no rules have been framed under section 4 (1-A) of the Mines and Minerals (Regulation and Development) Amendment Act, 1999 and hence there is no ban to storage of sand.
In the circumstances, we direct that the respondents shall not interfere with petitioner's storage of sand unless some rules have been made under Section 4(1-A) of the Act prohibiting or regulating such storage in which case those rules have to be followed."

4. That subsequently on 23.8.2002, further direction was issued to the respondents not to interfere with the transportation and selling morrum except in accordance with law. Now the State Government in purported exercise of powers under Section 23-C of the Mines and Minerals (Development and Regulation), 1957 (hereinafter referred to as the Act), has framed the Uttar Pradesh Minerals (Prevention of Illegal Mining Transportation and Storage)Rules, 2002, which has been published in the official gazettee on 2.9.2002. After framing the aforesaid rules, the respondent No.2 the District Magistrate Hamirpur without giving any show cause notice to the petitioners had directed the mines officer, Hamirpur not to permit the petitioners to transport or sell the stock of minerals stored by them, prior to coming into force the new rules, since according to the respondent No.2, the stock of minerals stored by the petitioners have become illegal in view of the provisions of Rule 11 of the new Rules, which provides for obtaining a license prior to the storing of any mineral. The petitioners have been storing the minerals prior to the coming into force the new rules and the new rules does not provide for disposal of minerals stored prior to coming into force of the new rules, as such, the new rules are not applicable on the stock of the minerals already stored by the petitioners. Any person who commits a breach of the new rules and the provisions of Section 4(1-A) of the Mines and Minerals (Regulation and Development) Act, 1957, under which the new rules have been framed, shall be punished under Section 21 of the Act with imprisonment for a term which may extend for two years or with fine which may extend to Rs.25,000/- or with both . Section 4 (1-A) and Section 21 (1) are being quoted below:-

"Section 4(1-A) - *No person shall transport or store or cause to be transported or stored any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder.*

Section 21(1) - *Whoever contravenes the provisions of sub-section (1) or sub-section (1-A) of Section 4 shall be punished with imprisonment for a term which may extend to two years, or with*

fine which may extend to twenty-five thousand rupees, or with both."

5. Since storage of minerals without obtaining a license entails penal consonance under the provisions of the Act and the rules framed thereunder, the nature of new rules cannot be retrospective in operation and will not apply on minerals already stored by the petitioners, prior to the coming into force of new rules that is on 2.9.2002. The action of the respondents in preventing the petitioners from disposing of stock of morrum stored prior to the coming into force of the new rules is wholly illegal, arbitrary and without authority of law. The intention of the legislature while amending the aforesaid Section 4 was to safeguard its royalty, which was being evaded by the lease and permit holders by storing minerals within the mining area and removing them after expiry of mining lease or permit, without any payment of royalty.

6. The further submission has been made by the petitioners that the respondent No.2 District Magistrate, Hamirpur without giving any show cause notice to the petitioners, has directed the authority not to permit the petitioners to transport or sell the stock of minor minerals stored by them, prior to coming into force of the new Rules. According to the respondents the stock of minor minerals stored by the petitioners is illegal in view of the provisions of Rule 11 of the new Rules, which provides for obtaining a licence prior to storing of any mineral. Moreover, the new rules does not brought for disposal of minerals stored prior to coming into force of new rules, therefore, the new rules are not applicable on the stock of the minerals already stored by the petitioners. As the new rules, storage of minerals without obtaining a licence entails penal consequences, therefore, the nature of new rules cannot be retrospective in operation. The intention of the legislature while amending the aforesaid Section 4 is for the purposes of safeguarding its royalty which was being evaded by the lease and permit holders by storing minerals within the mining area. The substantive law is only prospective in its operation and will not apply retrospectively. The action of the respondents are in clear violation of principle of natural justice.

7. The writ petition was entertained and by order dated 13.9.2002, the learned Standing Counsel granted time to file counter affidavit and the respondents were directed not to interfere in transportation and sell of morrum by the petitioners stored prior to coming into force of the new rules.

8. The petitioners have placed reliance upon a judgement in ***M.P. Contractors Sangh, Indore and others Vs. State of Madhya Pradesh and others*** reported in AIR 1987, Madhya Pradesh 74. Taking support of the aforesaid decision, the learned counsel for the petitioners submits that admittedly, the minor minerals removed from the quarries is the property of the Government. There is no dispute to this effect that minerals excavated from the quarries cannot be removed therefrom without payment of royalty. It is the duty of the State Government to protect its property and to see that no theft of minor minerals is committed nor such minor minerals are removed therefrom without payment of royalty. The Division Bench of the Madhya Pradesh has held that in absence

of term in contract or rule framed thereunder, the Government cannot insist that contractor should produce royalty paid receipts before his bills are cleared for payment. It is the duty of the state Government to engage adequate staff to avoid thefts to minor minerals from the quarries. Reliance has been placed upon para 13 of the said judgement. The same is being quoted below:-

*"**13.** Admittedly the minor minerals removed from the quarries is the property of the Government. It is also not in dispute that such minor minerals excavated from the quarries cannot be removed therefrom without payment of royalty. The quarries also undisputedly belong to the Government. Therefore, it is the duty of the Government to protect its property and see that no theft of minor minerals is committed nor such minor minerals are removed therefrom without payment of royalty. It is the duty of the State Government to keep adequate staff at every quarry so that an effective control and check could be put up and the leakage could be avoided. We are surprised at the argument advanced by the learned Government Advocate that because only one Chowkidar is posted at the quarry to check the removal of the minor minerals from the quarries and that because at times he is not available on the spot that such thefts are being committed. Therefore, it is clear that the State Government is aware of the fact and in what circumstances minor minerals are being removed without payment of royalty. As a matter of fact the concerned Department in order to have an effective check should keep adequate staff and in fact call upon the quarry holder to pay royalty after the minor minerals are excavated and before they are removed from the place. But, in our opinion, this cannot be a valid argument that because the Government is not able to put up an effective check or control, for which they are alone responsible, the building contractors should produce the royalty paid receipts before their bills are cleared for payment at least in those cases where the minor minerals are supplied by such contractors through petty contractors or to her merchants. It is for the Government to engage more staff and see that no such thefts are committed, though it also cannot be and was not disputed that it is the duty of every citizen to help the Government in its laudable efforts. But , in our opinion, merely because the Government is not in a position to check such thefts, a doubt cannot be cast on the building contractors nor they could be blamed for that. If the Government wants to adopt such a measure so far as such building contractors are concerned, then the State Government ought to make such a provision in the contract entered into with such building contractors or they should make rules to that effect under the provisions of the said Act so that a building contractor who is given such Government contract will be duty bound to obtain the royalty paid receipt and submit the same or in such minor minerals from the quarry holders themselves directly. It is, therefore, difficult to agree with the submission made by the learned Government Advocate that, vide Annexure R2 or Annexures A and B the respondents have taken administrative steps to implement Annexure RI."*

9. A counter affidavit has been filed on behalf of the respondents. It has been submitted that the petitioners are not able to produce any certificate or any

document to this effect that from whom this mineral has been purchased. Whether the minerals which are stored by the petitioners for the purposes of selling to the customers is after payment of royalty or not. Under the U.P. Minor Minerals (Concession) Rules, 1963, according to rule 70 there is a restriction of transporting of minerals. The holder of mining lease or permit or a person authorised by him in this behalf may issue a pass or Form MM-11 to every person carrying a consignment of mineral by a vehicle, animal or any other mode of transport. Sub Clause 2 of Clause 70 clearly states that no person shall carry, within the State, a minor mineral by a vehicle, animal or any other mode of transport, excepting railway, without carrying a pass in Form MM-11 issued by Sub Rule (1). It further provides that every person carrying any minor minerals shall, on demand by any officer authorised under Rule 66 or such officer as may be authorised by the State Government in this behalf, show the said pass to such officer and allow him to verify the correctness of the particulars with reference to quantity of the minor mineral. Further it provides that any person found to have contravened any provision of this rule is liable for punishment.

10. The storage which has been done by the petitioners is in contravention of the provision of the Rules. The petitioners have not disclosed any source that from where they have purchased it, therefore, there is a clear possibility that they are selling the minerals without payment of royalty. The petitioners without obtaining any permission has stored the minerals without payment of royalty which is not permissible. As such, a notice was given but the petitioners have not submitted any reply to this effect specifying the reasons what they are stating before this Court. The petitioners were given notice under Section 70 of the Rules and in case the petitioners were aggrieved they should have filed an appeal under Rule 77 of the Rules. The petitioners have clearly violated the provision of Uttar Pradesh Minerals (Prevention of Illegal Mining Transportation and Storage) Rules 2002. If the stock which has been kept by the petitioners is prior to 2.9.2002, the liability of the petitioners is to specify the authorities regarding the stores of minerals that from whom they have purchased. As the petitioners have not submitted any document and has not produced form MM-11 therefore, the stock kept by the petitioners will be treated to be unauthorised and they are liable for payment of royalty. The petitioners have also not submitted any document to show that they have been registered or have been permitted to stock the minerals and they are registered traders. The storing the minerals is offence under Section 4 (1-A) of the Act. The petitioners have not produced any document to show that the storage of minerals is prior to 2.9.2002. The introduction of new rules of 2002 is not only to safeguard its royalty which was being evaded by lease and permit holders by storing minerals within the mining areas and removing them after expiry of mining lease or permit without payment of royalty. It has been introduced for that purposes also to those persons who are indulge in such business without any permission from the State Government.

11. In view of the aforesaid fact, the respondents submits that the petitioners

have got no case and the writ petition is liable to be dismissed.

We have heard Sri Mukesh Prasad, learned counsel for the petitioners and learned Standing Counsel and have perused the record.

12. From the record, it appears that the petitioners are involved in purchase and selling the minerals which are being purchased by the petitioners from various lease permit holders in the districts of Hamirpur and Mahoba for selling it to the various customers who take the minerals for private consumption. It appears that in spite of the restriction there was no check, therefore, the State Government think it proper to frame rules as Uttar Pradesh Minerals (Prevention of Illegal Mining Transportation and Storage) Rules 2002 which clearly provides that there will be a restriction for transport, carry or cause to be transported, carried any mineral by any means from its raising place to any other place without a valid transit pass issued by the holder of mining lease or the mining permit or prospecting license as the case may be. Therefore it is clear that after enforcement of the aforesaid rule, which was published in gazettee notification dated 2nd September, 2002 after the said date any person cannot transport, carry or cause to be transported minerals without obtaining any permit or valid transit pass. But prior to that there was a provision of Section 4 (1-A) of the Mines and Minerals (Regulation and Development) Act 1957, that no person shall transport or store or cause to be transported or stocked any mineral otherwise than in accordance with the provisions of this Act and the rules made thereunder. Rule 70 of the U.P. Minor Minerals (Concession) Rules, 1963 also puts a restriction of transporting of minerals which restricts that no person shall carry, within the State, a minor mineral without carrying a pass in Form MM-11. The submission of the learned counsel for the petitioners is that Section 4 (1-A) of the Mines, Minerals (Regulation and Development) Act, 1957 has been inserted by Amendment Act 1999 provides that no person shall transport or store or cause to be transported or stocked any minerals otherwise than in accordance with the provisions of this Act and the rules made thereunder. It was submitted by the petitioners that Section 4 (1-A) is enabling provision and cannot be enforced unless rules are made making it obligatory to obtain a license or permit to store or cause to be transported or stored any mineral by a person not being to lease or permit holder. The contention of the petitioners was that no such rules have been framed under the Act either by the Central Government or by the State Government which prohibits the storing and selling of the minerals by wholesale or retail dealers who are not lessee or permit holders and who are not carrying on their business outside the mining areas. The expression otherwise than in accordance with the provisions of the Act and rules made thereunder occurring in Section 4 (1-A) of the Act is significant in the sense that if both the Acts and Rules are silent about the procedure for transportation or storage etc. then Section 4 (1-A) of the Act may be challenged on the ground of vagueness and arbitrariness. From the perusal of the Act and Rules of 1957 and 1963, no rules have been framed either by the Central Government or by the State Government.

13. Admittedly, the legislature has framed rules which were notified in September, 2002. Now the question is for consideration by this Court is whether a person involved in selling the minerals after purchasing it from the lease holders and stored it in his go-downs for selling it to the customers whether it can be called as an offence in view of the provision of Section 4 (1-A) of Act, 1957 or in view of the provision of Rule 70 of 1963 Rules, because 63 rules clearly provides that immediately after excavation of minerals from the quarries, Form MM-11 is necessary and it cannot be sent outside the mining area unless and until the royalty is paid and unless and until the requirement given in Form MM-11 is complete. There is also a criteria that two counter filed by MM-11 form will be given to the person in charge of consignment, one of which will be removed by the Government servant for checking the pass. It clearly indicates that immediately when the minerals is excavated and it is shifted to other place the royalty has to be paid because if a person who is like petitioner in storing the minerals and selling it to the customers they will get only a receipt of purchase of the articles and they will not be able to get any royalty receipt. As the petitioners do not purchase these articles or excavate in whose favour the auction is knocked down by the government. As the government has fixed the rate of royalty which is to be paid before the goods are taken out by the purchaser from the quarries and the persons who purchase these articles from the quarries in terms to sale them to different persons. In this way these goods were coming to the market through several hands with the result that obviously the subsequent purchaser do not have and cannot have the royalty pay receipt relating to these articles.

14. Admittedly, after September, 2002, after coming into force of the Uttar Pradesh (Prevention of Illegal Mining Transportation and Mining) 2002 there is a requirement that no person will be involved in transport, carrying or cause to be transported any minerals without obtaining any license and if they violates the provisions of the aforesaid rules, they are liable for punishment. Sub Clause 2 of Clause 5 also provides that the holder of license for storage of minerals shall issue the transit pass in Form C for lawful transportation of minerals from the storage. The power has also been given in the aforesaid rules for inspection and seizure by him to the person from whose possession or control, it is seized. A procedure to this effect regarding obtaining license has also been provided. From the perusal of the aforesaid rules, it is also clear that it will be effective from the date of gazettee notification dated 2nd September, 2002 not prior to that date. Admittedly, the nature of the aforesaid rules are not retrospective then whether without framing any rules, whether the respondents can charge royalty of storage of minerals, cannot be sustained.

15. In view of the aforesaid fact and circumstances of the present case, we are of the view that the minerals stored by the petitioners prior to second of September 2002 for the purposes of selling it to customers will not be a n offence or they are not liable to pay any royalty.

16. In view of the aforesaid fact, the writ petition is allowed. The respondents are restrained from recovering any amount of the stock of minerals, stored by the petitioners prior to 2nd of September, 2002. It is open to the respondents to proceed according to the aforesaid rules in

case it is found that stock is subsequent to 2nd September, 2002.

No order as to costs.

Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.01.2007

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE R.N. MISRA, J.

Criminal Misc. Contempt Petition No. 34 of 2005

Sri Pradeep Singh, Addl. Civil Judge (S.D.), Allahabad ...Applicant
Versus.
Sri Jyoti Swaroop Singh, Advocate, Allahabad. ...Respondent

Counsel for the Applicant:
A.G.A.

Counsel for the Respondent:
Sri B.K. Pandey
Sri Jyoti Swaroop Singh (In person)

Contempt of Court Act 1971-Section-12-Criminal Contempt-Contemnor a practicing lawyer-being annoyed by order passed under section 156 (3) Cr.P.C. treating as complaint case-instead of directing the S.O. concern to register and investigate-intimidated the court to get favorable order-lowering the authority and interfering with due course of justice-amounts to criminal contempt-punishment for one month simple imprisonment and fine Rs.5000/- imposed.

Held: Para 16

The court cannot be intimidated to seek favourable orders. This conduct amounts to intimidating the court and lowering the authority and to interfere with the due course of judicial proceedings, which were being conducted by the Presiding Officer.
1991 (4) SCC-406
AIR 1988 SC-1395
1993 (1) SCC-529

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

1. Heard Sri Jyoti Swaroop Singh, Advocate, (Contemnor) in person and learned A.G.A. for the State at length and perused the written argument filed by the contemnor.

2. This reference for drawing contempt proceeding against Sri Jyoti Swaroop Singh, Advocate practicing in District Courts, Allahabad had been received on the report of Sri Pradip Singh, Additional Civil Judge (Senior Division), Allahabad, addressed to the Registrar General of this Court and forwarded by District Judge, Allahabad vide endorsement No. 1514/XV dated 24.9.2005. After receiving the letter of officer concerned, the office of this Court submitted a note dated 15.10.2005 for initiating contempt proceeding against the aforesaid contemnor and the above note was endorsed by Hon'ble Administrative Judge concerned on 26.10.2005 requesting Hon'ble the Chief Justice to order for initiation of contempt proceeding, who permitted so vide order dated 27.10.2005 and consequently this proceeding was initiated.

The letter of Sri Pradip Singh for initiating contempt proceedings against the contemnor reads as under:

From: Pradip Singh
Addl. Civil Judge (Senior Division), Allahabad.

To,

The Registrar General,
Hon'ble High Court of Judicature
At Allahabad.

Through the District Judge, Allahabad.

Subject: Reference under Section 15(2) of the Contempt of Courts Act, 1971 for the request of initiation of criminal contempt of court proceedings against Sri Jyoti Swaroop Singh, son of late Vanshpati Singh, Advocate, District Court, Allahabad.

Sir,

"Most respectfully it is submitted as under:

1. That the facts constituting the background are that Sri Jyoti Swarup singh, Advocate is a practicing lawyer at District Court Allahabad and junior of Sri Subedar Singh Advocate one of the alleged contemnor in criminal contempt Case No.25/04 Administrative Judge, Allahabad Vs. Jagat Pal Singh and others. The said Sri Jyoti Swaroop Singh is a trouble maker, quarrelsome and mischievious advocate who has always been pressurizing the judicial officers, in order to seek favourable orders by making false, frivolous concocted and baseless complaints against them and later on compromising the matters. He had made hundreds of such false complaints against various judicial officers court, officials and local residents out of which only a few came to my knowledge. He made false and frivolous complaints against Sri Sarvesh Kumar, Smt. Vani Ranjan Agarwal and Sri Vikas Saxena all the then Addl. Chief Judicial Magistrates, Allahabad in the years 2000, 2003 and 2005 respectively. As well as he is an accused and complainant in some of these cases viz, criminal cases Nos. 1088/04, 2094/04, 2212/04 under Sections 352, 504, 147, 506, 323 & 324 I.P.C and F.R. No. 214/04, 436/04 & 250/04 which go to show that the said Jyoti Swaroop Singh is habitual to make false complaint and misusing the law process being an advocate. (Copies of relevant documents of these cases & complaints are annexed herewith as Annexure 1,2, 3,4, 5,6, 7,8, 9.

2. That on 31.8.2005, while hearing cases in the court at about 12.45 PM, the said Jyoti Swaroop Singh advocate entered the court room in a very angry mood and losing control started shouting loudly saying:

तुमने प्रार्थना पत्र १५६ (३) सी आर पी सी पर उसे परिवाद के रूप मे दर्ज करने का आदेश क्यों पारित किया उसे स्वीकार क्यों नहीं किया मै तुम्हारी शिकायत करूंगा। तुम्हे नौकरी करना सिखा दूंगा तुम मुझे जानते नहीं ।

(Why have you not allowed application under section 156(3) Cr.P.C?. How have you dared to pass an order to register it as a complaint rather than allowing it in toto. I will make complaints against you and teach you the lesson. Perhaps you don't know my powers. I tried to pacify him but he was reluctant to be cool. The said counsel/contemnor has been asked to explain as to why not the matter be referred to Hon'ble Court for action against him. At this he became very furious and questioning the authority of the court said that he has already seen a lot of such contempt cases and he shall not bow down before anybody at any cost. Meanwhile some advocates accompanied him outside the court.

3. That the conduct of the said counsel Sri Jyoti Swaroop Singh, advocate has been to pressurize the court to seek favourable orders. The language spoken by the said counsel in the court is absolutely contemptuous and amounting to scandalizing, lowering and insulting the authority of the court as well as obstructing and interfering with the administration of justice and against the normal flow of the stream of justice in the pending matters which falls within the four corners of the meaning of the contempt of court.

Under the aforesaid facts and circumstances, it is requested Your Honour, that the matter may be placed before Hon'ble Court for appropriate action against the aforesaid contemnor under the contempt of court Act 1971".

3. Sri Jyoti Swaroop Singh, Advocate filed objection with affidavit against the reference made by the officer concerned. In his affidavit, he denied the entire story given in the said letter. He has alleged his false implication in this case. He has further alleged that he had made a complaint against this officer to District Judge, Allahabad and as a counter-blast, the officer concerned made this reference. He has further alleged that the officer concerned rejected his application under Section 156(3) Cr.P.C. in a malafide way whereas other applications of other counsels and parties on similar facts were being allowed by him in the past. He has also denied that he was ever junior to Sri Subedar Singh, Advocate. He has also denied that he had ever misbehaved with any officer named in the reference letter. Some annexures have been filed along with the affidavit.

4. On the basis of allegations made in the reference letter, the following charge was framed against the contemnor vide order dated 7.2.2006.

"That you on 31.8.2005, in the court of Sri Pradip Singh, Additional Civil Judge (Senior Division), Allahabad, who was hearing cases in the court at about 12.45 P.M., entered into the court room in a very angry mood and losing control started shouting loudly-.

"Tumne prarthna patra 156(3) Cr.P.C. par oose pariwad ke roop mein darj karne ka adesh kyon parit kiya, ouse swikar kyon nahin kiya, Mai tumhari shikayat karoonga, Tumhe naukri karna sikha doonga, Tum Mukhe jante nahin."

5. The Presiding Officer tried to pacify you, but you were reluctant to be cool and you were asked by the Presiding Officer to explain your conduct for referring the matter to the Hon'ble High Court for initiating action against you, you became very furious and questioned the authority of the court saying that you had seen a lot of such complaints in the past also and will not bow down before any body or authority at any cost.

Your above conduct was with the intent to scandalize and lower down the dignity of the court and amounted to interference and obstructions in the administration of justice constituting an offence under Section 2(c) of the Contempt of Court Act, 1971 and punishable under Section 12 of the said Act and you are charged accordingly.

You are hereby directed to be tried by this Court on the said charge".

6. Sri Pradip Singh appeared in the witness box and corroborated the contents of reference letter. He has stated that he joined in Allahabad Judgeship on 20.12.2003. The contemnor used to appear in his court as counsel, therefore, he was known to him. Prior to the incident in question, the contemnor had abused him twice in his court when the orders were passed against him, but to avoid tussle, he did not take any action against him. On 31.8.2005 at 12.45 P.M, when he was hearing a civil case, the contemnor appeared in his court. Earlier to this, the application under Section 156(3) Cr.P.C. moved by him had been ordered to be registered as complaint. He expressed his annoyance regarding said order, passed on his application and threatened him to make a complaint against him and to teach him way of doing service. The relevant word and sentence uttered by him are quoted below:

तुमने प्रार्थना पत्र १५६ (३) सी आर पी सी पर उसे परिवाद के रूप मे दर्ज करने का आदेश क्यों पारित किया उसे स्वीकार क्यों नहीं किया मै तुम्हारी शिकायत करूंगा। तुम्हे नौकरी करना सिखा दूंगा तुम मुझे जानते नहीं .....जिसमे पैसा मिल जाता है उसमें आर्डर कर देते हो।

7. The contemnor remained shouting in the court for 3-4 minutes and so many lawyers and litigants assembled there. When the Presiding Officer told him that he would initiate contempt proceedings against him, the contemnor said that he has seen so many contempt proceedings. The work of the court was paralyzed. Since the Presiding Officer was insulted in the court, this was set back to him.

8. A lengthy cross examination was made by the contemnor from Sri Pradip Singh. He has stated that civil case, in which hearing was being made at the time of incident in question was titled "Rajesh Singh Vs. Rajesh Pal Singh. There was some delay in making the reference which has been satisfactorily explained by Sri Pradip Singh. He has stated that after this incident, he got permission of District Judge and inspected some records, in which contemnor is himself litigant. He also inspected some earlier reports made by the other Presiding Officers against him with whom, he allegedly misbehaved. He has further stated that probably, the contemnor approached Sri Narendra Singh, the then Special C.J.M, Allahabad for making efforts for compromise. Sri Narendra Singh came to his chamber and the contemnor also reached there and talks for compromise were initiated by Sri Narendra Singh, but of no use. Sri Pradip Singh has further stated that the contemnor was so agitated in the court that some lawyers intervened and requested him to leave the court.

9. Alongwith reference letter, Sri Pradip Singh has annexed some papers which are complaints made by Sri Sarvesh Kumar, A.C.J.M., Allahabad and Smt. Vani Ranjan, A.C.J.M, Allahabad against the contemnor. In those letter also, misbehaviour of the present contemnor with the said Presiding Officers are alleged. However, those are not very relevant in the present matter because present matter is to be decided on merits regarding incident reported by Sri Pradip Singh. Sri Pradip Singh has stated that he has no knowledge about any complaint made by the contemnor to District Judge against him. Some other litigation of the contemnor are also pending in his court, but those are also not very relevant for the decision of this case.

10. The contemnor has produced Sri Vijay Kumar Mishra, Advocate in his defence, who has also supported the

contempt case. He has stated that in Original Suit No. 505 of 2005; Rajesh Singh Vs. Rajesh Pal Singh, he was counsel for the defendant. The case was pending in the court of applicant, Sri Pradip Singh, Addl. Civil Judge (S.D.) (Court no.13), Allahabad. On 31.8.2005, the case was listed for hearing in said court and he participated in the same. When after hearing of the case, he was just going out of the court, the contemnor, Jyoti Swaroop Singh, Advocate entered the court room of Pradip Singh. He was not present in the court at the time when altercations had taken place between the Presiding Officer and the contemnor. He came to know on the same day from some advocates that the contemnor was talking to the Presiding Officer loudly and some of the advocates who were present in the court at that time forbade him from doing so. He named Sri Vijay Shyam Pandey, Advocate, one of them who had told this fact to him. However, he could not remember the names of other advocates who had communicated the said altercations between the Presiding Officer and the contemnor in the court to him. They had also told him that they had advised the contemnor not to behave like this and persuaded the contemnor to leave the court. Thus, from the defence witness also, the charge against the contemnor gets support.

11. There was no enmity between the Presiding Officer and the contemnor on personal level. Even if this version of the contemnor that he had moved some applications against the Presiding Officer concerned is taken to be correct even then it was not justified to behave like this in the Court. There is no reason to disbelieve the testimony of Sri Pradip Singh, Addl. Civil Judge (S.D.), Allahabad. Since the result of application, under Section 156(3) Cr.P.C. was against the contemnor, therefore he wanted to pressurize the Presiding Officer to change his order in his favour and when the Presiding Officer expressed his inability to do so, the contemnor misbehaved with him.

12. There was some delay in referring the matter, but reason is very clear. Sri Pradip Singh has clearly stated that he had to inspect some record and get permission of District Judge for inspection of the records. Some time was spent in that process. Moreover, Sri Narendra Singh, the then Special C.J.M, Allahabad also wanted to intervene in the matter and some time was also spent in that process. Ultimately, the Presiding Officer referred the matter for initiating contempt proceedings. Much emphasis has been laid by the contemnor on the fact that the report submitted by the Presiding Officer for initiating contempt proceeding against him was not dated. No doubt, no date has been given on the reference application, but it was merely a clerical mistake. The application was received in the office of District Judge, Allahabad on 24.9.2005 and in the High Court on 28.9.2005. There was no chance of manipulation because this fact has been admitted by the contemnor also that before a few days of the incident in question, the application, under Section 156(3) Cr.P.C was ordered to be registered as a complaint by the Presiding Officer concerned and he was aggrieved by that order. According to him, he had made a complaint also to District Judge concerned. The defence witness has also corroborated this fact that on the same day, he had heard about the incident in question from brother advocates. The words uttered by the contemnor in the

court were highly contemptuous. Sri Pradip Singh has stated on oath that due to scene created by the contemnor in the court, the court work was fully paralysed and clearly constituted contempt of court.

13. In the case of **Delhi Judicial Service Association Vs. State of Gujrat, 1991 (4) S.C.C. 406**, the Hon'ble Apex Court has expressed its views as follows:

"The definition of criminal contempt is wide enough to include any act by a person which would tend to interfere with the administration of justice or which would lower the authority of court. The public have a vital stake in effective and orderly administration of justice. The court has the duty of protecting the interest of the community in the due administration of justice and, so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the Court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with. It is a mode of vindicating the majesty of law, in its active manifestation, against obstruction and outrage.

14. If the judiciary has to perform its function in a fair and free manner the dignity and authority of the court has to be respected by all concerned. Failing that, the very constitutional scheme and public faith in the judiciary runs the risk of being lost. Since the contemnor is also an Advocate, the matter has to be considered with little more seriousness. An advocate is not merely an agent or servant of his client, but he is the officer of the court. He owes a duty towards the court. There can be nothing more serious than an act of an advocate if it tends to obstruct or prevent the administration of law or destroys the confidence of the people in such administration. In the case of M.B. Sanghi Vs. High Court of Punjab and Haryana reported in 1991 (3) SCC 600, the Apex Court observed "The tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time that it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the judge into submission, it is all the more painful. When there is a deliberate attempt to scandalize which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the concerned judge but also to the fair name of the judiciary. Veiled threats, abrasive behaviour, use of disrespectful language and at times blatant condemnatory attacks like the present one are often designedly employed with a view to taming a judge into submission to secure a desired order. Such cases raise larger issues touching the independence of not only the concerned judge but the entire institution. The foundation of our system which is based on the independence and impartiality of those who man it, will be shaken if disparaging and derogatory remarks are made against the presiding judicial officers with impunity. It is high time that we realize that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society. Judicial independence was not achieved overnight. Since we have inherited this concept from

the British, it would not be out of place to mention the struggle strong-willed judges like Sir Edward Coke, Chief Justice of the Common Pleas and many others had to put up with the Crown as well as the Parliament at considerable personal risk. And when a member of the profession like the appellant who should know better so lightly trifles with the much endeared concept of judicial independence to secure small gains it only betrays a lack of respect for the martyrs of judicial independence and for the institution itself. Their sacrifice would go waste if we are not jealous to protect the fair name of the judiciary from unwarranted attacks on its independence".

15. In the case of **Ishwar Chand Jain Vs. High Court of Punjab and Haryana; AIR 1988 SC 1395**, it has been observed that "under the Constitution, the High Court has control over the subordinate judiciary. While exercising that control it is under a constitutional obligation to guide and protect judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If complaints are entertained on trifling matters relating to judicial orders which may have been upheld by the High Court on the judicial side no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a sine qua non for rule of law. If judicial officers are under constant threat of complaint and enquiry on trifling matters and if High Court encourages anonymous complaints to hold the field, the subordinate judiciary will not be able to administer justice in an independent and honest manner. It is therefore, imperative that the High Court should also take steps to protect its honest officers by ignoring ill-conceived or motivated complaints made by the unscrupulous lawyers and litigants".

16. The word uttered by the contemnor in the court "तुमने प्रार्थना पत्र १५६ ध्च्३ध्च् सी आर पी सी पर उसे परिवाद के रूप मे दर्ज करने का आदेश क्यों पारित किया उसे स्वीकार क्यों नहीं किया मै तुम्हारी शिकायत करूंगां। तुम्हे नौकरी करना सिखा दूंगा तुम मुझे जानते नहीं .....जिसमे पैसा मिल जाता है उसमें आर्डर कर देते हो" clearly indicate that being an advocate (the protector of law), the contemnor threatened the court to pass order in his favour. The Presiding Officer has stated on oath that the contemnor continued shouting for 3 or 4 minutes in the court and a huge crowed was assembled there. When he was asked by the Presiding Officer not to behave in such a manner as it amounts to contempt, he said that he has seen so many contempt proceedings. The law does not permit a lawyer to show disrespect to the court in any manner lowering its dignity. A judge has a duty to discharge and pass orders in the manner as he thinks fit to the best of his capability under the facts and circumstances of the case before him. No litigant, far less an advocate, has any right to take law in his own hands. The court cannot be intimidated to seek favourable orders. This conduct amounts to intimidating the court and lowering the authority and to interfere with the due course of judicial proceedings, which were being conducted by the Presiding Officer.

17. In the case of **Preetam Pal Vs. High Court of M.P. 1993 (1) SCC 529**, the following observations has been made by the Hon'ble Apex Court:

"To punish an advocate for contempt of court, no doubt must be regarded as an

extreme measure, but to preserve the proceedings of the courts from being deflected or interfered with and to keep the streams of justice pure, serene and undefiled, it becomes the duty of the court, though painful to punish the contemnor in order to preserve its dignity. No one can claim immunity from the operation of the law of contempt if his act or conduct in relation to court or court proceedings interferes with or is calculated to obstruct the due course of justice".

18. In the present case before us, the conduct of the contemnor being an advocate clearly comes under the definition of contempt of court as defined under Section 2(c) of the Contempt of Courts Act 1971 and is punishable under Section 12 of the said Act. The charge against the contemnor is fully proved.

19. Consequently, the reference is allowed and the contemnor Jyoti Swaroop Singh, Advocate, Allahabad is convicted under Section 12 of Contempt of Court Act and is sentenced to undergo simple imprisonment for a period of one month and to pay fine of Rs. 5000/(Five thousand only) and in default of payment of fine, he shall further undergo simple imprisonment of two weeks and in that case, both the sentences will run consecutively.

20. However, the punishment so imposed shall be kept in abeyance for a period of sixty days to enable the contemnor to approach the Hon'ble Supreme Court, if he so desires. He shall be taken into custody to serve out the sentences immediately after expiry of sixty days, if no stay order is obtained from Hon'ble Supreme Court in the meantime.

21. Let the matter come up before this Court on 4th April 2007 for ensuring compliance. Reference allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2007

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.
THE HON'BLE AJAI KUMAR SINGH, J.

Income Tax Reference No. 101 of 1991

Commissioner of Income Tax , Meerut ...Applicant
Versus
Seth B.D. Gupta ...Respondent

Counsel for the Applicant:
S.C.

Counsel for the Respondent:

Income Tax Act, 1961-Section 43-B-Exumption from Tax-claimed-the Employer on employees' contribution to Provident Fund, family pension-state insurance-if actually paid-but not on liability.

Held: Para 8

Thus our answer to the referred question is that the Appellate Tribunal was not right in saying that the employer's contribution to Provident Fund, Family Pension, State Insurance and deposit linked insurance was not disallowable under section 43 B. In fact, the said contributions, which may have been payable had not been actually paid during the relevant year, were liable to be disallowed.

Case law discussed:
1988 (173) ITR 708
(2006) 287 ITR-80

(Delivered by Hon'ble Sushil Harkauli, J.)

1. We have heard learned counsel for the Income Tax Department.

The question referred in this case is:-

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal is legally correct in holding that liability relating to the employeer's contribution to Provident Fund, Family Pension, State Insurance and Deposit Linked Insurance is not disallowable u/s 43-B of the I.T. Act, 1961?"

2. The issue precisely is whether the contribution payable, but not actually paid, is entitled to be claimed as deduction by the employer/assessee.

3. The words of Section 43 B in the title to that section, as also at the end of that section limit the allowing of deductions only to actual payments.

4. Reliance is placed in the Tribunal's order, upon a decision of the Andhra Pradesh High Court in the case of ***S.Subba Rao & Co and others Vs. Union of India (1988) 173 ITR 708***, for the conclusion that deductions can be made although actual payment has not been made, if the contribution is payable.

5. The Andhra Pradesh High Court has not held any such proposition in that decision and the Tribunal's order dated 6.10.1989 is based upon a total misreading and misapplication of that decision.

6. The view taken by the Karnataka High Court in the case of ***CIT Vs. Amco. Batteries (2006) 287 ITR 80*** at the end of para 7 of that law report lays down the correct law in the following words:-

"*Therefore, unless the aforesaid sums are paid, as a matter of fact, the employer/ assessee is not entitled to claim deductions."*

7. We approve the decision of the Karnataka High Court in respect of the contribution contemplated under Section 43 B of the Income Tax Act.

8. Thus our answer to the referred question is that the Appellate Tribunal was not right in saying that the employer's contribution to Provident Fund, Family Pension, State Insurance and deposit linked insurance was not disallowable under section 43 B. In fact, the said contributions, which may have been payable had not been actually paid during the relevant year, were liable to be disallowed.

9. Reference disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No23440 of 2007

Committee of Management, Sri Kachcha Baba Inter College, Jalhopur Varanasi and others ...Petitioners
Versus
Regional Committee Pancham Mandal, Varanasi and others ...Respondents

Constitution of India-Art. 226-Locus Standi-Petition challenging the validity of committee of management-by the

members of the socity-held-members of Society has no locus standi.

Held: Para 9

In Dr. P.S. Rastogi V. Meerut University, Meerut, (1977)1 UPLBEC 415 it was held that in individual member of the committee of management had no locus standi to file a petition. Similar view was held by a learned Single Judge in the case of Bhagwan Kaushik Vs. State of U.P. and others [supra]. A division bench in Anjani Kumar Mishra's case, [supra] in Special Appeal also held that the members of a society had no right to agitate the result of the elections, as they had no locus standi to challenge the result of the elections. In the present case, the petitioners are the members of the general body. It is not a rival committee of management as alleged by them in the writ petition, inasmuch as admittedly, the authorised controller was managing the affairs of the administration since the year 1996.

(B) Constitution of India-Art. 226-finding of facts-recorded by the authorized controller-regarding the membership of society-such finding are finding of fact-writ court can not interfere.

Held: Para 9

The petitioners are none other than the members of the general body of the society and, in view of the decisions of this Court, they have no locus standi to file the present writ petition. Further, in my opinion, the list of electoral college which has been finalised by the authorised controller and affirmed by the regional committee is based on findings of fact which cannot be interfered in a writ jurisdiction.

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

1. Heard Sri Awadhesh Kumar Singh, the learned counsel for the petitioners and Sri P.S. Baghel, the learned counsel appearing for respondent no.6 and the learned Standing Counsel appearing for respondent Nos.1,2 and 3.

2. Briefly stated, the facts giving rise to the present petition is, that Civil Misc. Writ petition No.43629 of 1998 and Civil Misc. Writ petition No.9089 of 1999, filed by the parties, was disposed of, by a common judgment dated 21.11.2002, in which it had come on record that the last election of the committee of management, Kachcha Baba Inter College, Jalhopur, Varanasi was held in the year 1996, and which was the subject matter in the said writ petitions. The Court, while disposing of the writ petition, by an order dated 21.11.2002, directed that since the authorised controller was continuing in the college, he would hold fresh elections after verifying the list of the members. Based on the aforesaid judgment, the rival parties submitted their list of the members before the authorised controller. The authorised controller, after considering the matter, passed an order dated 24.2.2003, rejecting the list supplied by the rival parties and, finalised the list of the members on the basis of the evidence brought on the record. Based on the aforesaid determination, the District Inspector of Schools, by an order dated 16.6.2003, granted permission to hold the election for the period 2003-2006. Based on the aforesaid direction, the authorised controller conducted the election on 31.12.2003. Before the result of the elections could be announced and, before the authorised controller could give charge to an elected body of the committee of management, Writ Petition No.28892 of 2003 was filed by the petitioners in which an interim order was passed, namely:

"In the meantime, if any elections are held by Prabandh Sanchalak, result of the same shall not be declared, except with leave of this Court."

3. The said interim order continued till the disposal of the writ petition. The Court in its judgment dated 16.5.2006 held that since the result of the elections had not been declared so far, the Court directed the regional committee to consider and decide the objections of the parties and further directed the regional committee to consider the list of members finalised by the authorised controller and thereafter take an appropriate decision with regard to the validity of the elections conducted by the authorised controller.

4. Based on the aforesaid directions of the Court, the regional committee, after considering the objections of the parties issued an order dated 18.4.2007, upholding the finalisation of the list determined by the authorised controller by its order dated 24.2.2003 and, also declared the result of the elections holding that the said election was valid and consequently, recognised the elections of Sri Dhananjay Singh as the Manager of the Committee of Management. The petitioners, being aggrieved by the aforesaid order, has filed the present writ petition.

5. The learned counsel for the petitioners submitted that the life of the committee of management, as per the Scheme of Administration was three years and one month and thereafter, the committee of management became functus officio. Admittedly, the elections were held on 31.12.2003 which term had expired on 30.12.2006 and consequently, the elections of Sri Dhananjay Singh could not continue beyond 30.12.2006. Consequently, the order of the regional committee recognising the elections of Sri Dhananjay Singh, which was held on 31.12.2003 was redundant and could not be given effect to. The learned counsel for the petitioners further submitted that the list of the electoral college, as determined by the authorised controller, and affirmed by the regional committee was wholly erroneous and was finalised without any application of mind. The objection raised by the petitioners was not considered and consequently, the said list was liable to be set aside and a fresh direction was required to be issued to the authorised controller for holding fresh election of the committee of management of the society.

6. On the other hand, Sri P.S. Baghel, the learned counsel for the respondents submitted that the writ petition was not maintainable. The learned counsel for the respondents submitted that the writ petition has been filed by a group of members of the General Body of the Society and that the writ petition was not maintainable at their instance. In support of his submissions, the learned counsel for the respondents has relied upon a decision of this Court in Writ Petition No.31886 of 2004, Bhagwan Kaushik Vs. State of U.P. and others, decided on 30.1.2006 as well as a judgment of a Division Bench of the Court dated 19.2.2007 passed in Special Appeal No.194 of 2007, Anjani Kumar Mishra Vs. State of U.P. and others wherein it had been held that the members of the society had no right to agitate the result of the elections since it had no locus standi to challenge the result of the elections. The learned counsel for the respondents further submitted that the election which was conducted by the

authorised controller on 31.12.2003 had not yet been completed, since, the result had not yet been declared, consequently, the term of the committee had not as yet begun. Therefore, the expiry of three years and one month in the present case on 30.12.2006 did not arise. The learned counsel further submitted that the starting point of the term of the committee of management would be when the committee of management was given charge and the period of three years would begin from that date.

7. In support of his contention, the learned counsel for the respondents placed reliance upon a decision of a Division Bench of this Court in **Committee of Management, Jangali Baba Intermediate College Garwar, district Ballia and another Vs. Deputy Director of Education, Vth Region, Varanasi and others(1991)2 UPLBEC 1183** as well as a decision of a learned Single Judge of this Court in **Committee of Management, Lakhori Inter College, Moradabad and another Vs. District Inspector of Schools, Moradabad and others, (2002)1 UPLBEC 199.**

8. Having given my thoughtful consideration in the matter this Court is of the opinion, that the petitioners are not entitled for any relief. The writ petition is not maintainable.

9. In **Dr. P.S.Rastogi V. Meerut University, Meerut, (1977) 1 UPLBEC 415** it was held that in individual member of the committee of management had no locus standi to file a petition. Similar view was held by a learned Single Judge in the case of Bhagwan Kaushik Vs. State of U.P. and others [supra]. A division bench in Anjani Kumar Mishra's case, [supra] in Special Appeal also held that the members of a society had no right to agitate the result of the elections, as they had no locus standi to challenge the result of the elections. In the present case, the petitioners are the members of the general body. It is not a rival committee of management as alleged by them in the writ petition, inasmuch as admittedly, the authorised controller was managing the affairs of the administration since the year 1996. The elections were conducted by the authorised controller. Consequently, the petitioners cannot be held to be the rival committee of management. The petitioners are none other than the members of the general body of the society and, in view of the decisions of this Court, they have no locus standi to file the present writ petition. Further in my opinion, the list of electoral college which has been finalised by the authorised controller and affirmed by the regional committee is based on findings of fact which cannot be interfered in a writ jurisdiction.

10. In **Committee of Management, Kisan Shiksha Sadan, Banksahi, Basti and another Vs. Assistant Registrar, Firms Societies and Chits, Gorakhpur Region, Gorakhpur, (1995) UPLBEC 1242**, a Division Bench of this court held

"The list of members determined by the authority was not open for a member of the society to challenge in a writ jurisdiction and the proper course open to him was to approach the Civil Court and seek an appropriate relief. In my view also, the appropriate remedy to challenge the determination of the list of the electoral college cannot be adjudicated in a writ jurisdiction under Article 226 of the Constitution of India and the appropriate

remedy for the petitioners is to file a civil suit."

With regard to the last submission of the learned counsel for the petitioners, this Court is of the opinion, that the election conducted by the authorised controller on 31.12.2003 had not yet been concluded. In my opinion, the election is concluded upon the declaration of the result. In the present case, the High Court, had issued an interim order staying the declaration of the result. The declaration was subsequently made by the regional committee by the impugned order dated 18.4.2007. Consequently, as per the Scheme of Administration, the term of the committee of management, being three years plus one month, would start from the date of the declaration of the result. Thus, the question of its expiry on 30.12.2006 does not arise, inasmuch as the election was concluded only upon the declaration of the result on 18.4.2007. Consequently, the term of the committee of management would only begin from 18.4.2007 onwards.

In **Committee of Management, Lakhori Inter College, Moradabad and another Vs. District Inspector of Schools, Moradabad and others, (2002)1 UPLBEC199**, this Court held :

"The principle laid down there is not in dispute. Looking to the Scheme of Administration which is annexed as Annexure-4 to the counter affidavit filed by the respondents it is clear that the period prescribed therein for the Committee of Management is three years and the earlier validly elected Committee of Management automatically comes to an end after one month thereafter. It is significant that the language used therein makes no option. The Scheme of Administration has been framed under the U.P. Intermediate Education Act and the language used therein for the life of committee of Management is mandatory and its ceaser is also automatic. However, the question still remains regarding the starting point for the computation of this period of three years. In none of the decisions relied upon this question has been gone into. The petitioners' argument is it would only start running from the date newly elected Committee of Management takes charge as such."

In **Committee of Management, Jangali Baba Intermediate College, Garwar District Ballia and another Vs. Deputy Director of Eduction, Vth Region, Varanasi and others, 1991(2) UPLBEC 1183** a division bench of this Court held :

"The purpose of prescribing period of three years is that elected Committee of Management to function. If for some reasons even after election, the newly elected Committee of Management is not made to take charge from the earlier Committee of Management or from the Prabandh Sanchalak the period of that Committee of Management would not start. However, the day such elected Committee of Management taken over charge and or starts functioning as such, then the period of three years starts running. By looking to the relevant clause of the Scheme of Administration we feel thereafter the period of three years is fixed and in no case extended even if intermittently such Committee of Management is not able to discharge its function on account of in fighting litigations between the parties, or on account of stay order passed by this

Court. It is thus necessary for the authority to come to the conclusion, in case of such dispute, of the date from which the elected Committee of Management has taken charge or started to function as such. In the present case the dispute raised by the petitioners is that even after the election on 7th July, 1985 on account of stay order of this Court as aforesaid it could neither take charge nor start functioning, thus the period of three years could not be from the date of election and thus the impugned order holding its period having come to an end is legally not justified."

In view of the aforesaid, this Court is of the opinion, that the period of three years has only begun from the date of the declaration of the result on 18.4.2007. Consequently, the term of the new committee of management of respondent no.6 has not as yet expired as it has only begun on 18.4.2007.

In view of the aforesaid, the writ petition fails and is dismissed summarily. In the circumstances of the case, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 43860 of 1998
With
Civil Misc. Writ Petition No. 43862 of 1998
Civil Misc. Writ Petition No. 43863 of 1998
Civil Misc. Writ Petition No. 43864 of 1998
Civil Misc. Writ Petition No. 43866 of 1998

New Okhla Industrial Development Authority (NOIDA) Sector-6, Ghaziabad Gautam Budh Nagar ...Petitioner
Versus
State Public Service Tribunal, Lucknow and another ...Respondents

Counsel for the Petitioner:
Sri S.G. Hasnain
Sri A.K. Mishra
Sri A.K. Roy
Sri Indra Raj Singh

Counsel for the Respondents:
Sri S.D. Kautilya
Sri Neeraj Agrawal
S.C.

U.P. Public Service Tribunal-Act 1976-Section 4 (1)-maintainability of claim petition-by daily wager-muster roll employee-having no contract of employment with NOIDA as workman under the definition of U.P. Industrial Tribunal Act-held-not maintainable.

Held: Para 24

The contesting respondents have clearly said that they are only muster roll daily wage employees. Being daily wage employees on muster roll the contesting respondents are admittedly workmen as defined under 1947 Act. Therefore on the pleadings of the contesting respondents before the Tribunal, it is evident that the said application was not maintainable due to the absence of grounds on which the application under Section 4 could have been filed.

Case law discussed:
W.P. No. 9216 (SS) 93 decided on 10.11.93, 1981 LLT (Service) 101, 1981 AWC-481, 1985 U.P.S.C. 212, W.P. No. 4580/75 decided on 27.1.77, 1980 (2) LLJ-48, ALR 1986 (6) 91, AIR 1955 SC-123, AIR 2001 SC-2699, 2006 SCC (2) 670, AIR 1960 SC-122, AIR 1960 sC-122, AIR 1964 SC-1230(1244), AIR 1969 SC-513, AIR 1975 SC-43, AIR 1991 SC-772, AIR 2002 SC-1351, AIR 1967 SC-997

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

1. All these writ petitions arise out of the common order dated 8.11.1998 passed by U.P. Public Service Tribunal (hereinafter referred to as the "Tribunal") involving common questions of law and facts and therefore as agreed by learned counsel for the parties have been heard together and are being decided by this common judgment.

2. For the purpose of giving facts in brief and with the consent of the parties the Writ Petition No. 43860 of 1998 has been taken as leading case. The respondent no. 2 Mishri Lal filed Claim Petition No. 338 of 1993 before the Tribunal claiming Regularisation and wages as admissible to regularly employed persons of New Okhla Industrial Development Authority (hereinafter referred to as "NOIDA"). Similar claim petitions were filed by other private respondents. The NOIDA authority putting appearance, raised a preliminary objection that the claim petitions have been filed by the persons who are workmen under U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "1947 Act") and also that they are not the employees of NOIDA authority. They have been engaged by private contractors who are carrying out the work undertaken from NOIDA authorities under various contracts and therefore claim petition is not maintainable. The Tribunal has allowed all the claim petitions vide order impugned in these writ petitions holding that since the claimants are not enforcing any right under the Industrial Disputes Act and therefore the claim petition is maintainable. Proceeding further it has directed the petitioners to consider the respondents/claimants for regularization and also for payment of salary as is payable to the other regular employees of NOIDA.

3. Learned counsel for the petitioner vehemently contended that in view of sub-section 4 of Section 1 of the U.P. Public Service Tribunal Act, 1976 (hereinafter referred to as the "Act"), claim petitions were not maintainable and therefore the order impugned in the writ petition passed by the Tribunal is wholly without jurisdiction.

4. Sri I.R. Singh, learned counsel appearing for the contesting respondents however supported the order of the Tribunal and contended that since the contesting respondents are working for a long period, even in equity, this Court should not interfere with the order impugned.

5. We have heard learned counsel for the parties and perused the record. Section 1 of the Act provides short title, extent, commencement and application of the Act and sub-section 4 thereof reads as under:-

"(4) This section and Sections 2 and 6 shall apply in relation to all public servants while the remaining provisions shall not apply to the following classes of public servants, namely-

(a) a member of a judicial service;
(b) an officer or servant of the High Court or of a court subordinate to the High Court;
(c) a member of the secretariat staff of any House of the State Legislature;
(d) a member of the Staff of the State Public Service Commission;

(e) a workman as defined in the Industrial Disputes Act, 1947 (Act XIV of 1947), or the United Provinces Industrial Disputes Act, 1947 (U.P. Act No. XXVIII of 1947).
(f) a member of the staff of the Lok Ayukta.
(g) the Chairman, Vice-Chairman, Members, Officers or other employees of the Tribunal."

Section 2 contains various "definitions" and "public servant" is defined under Section 2(b) which reads as under:-

"*2. (b) "public servant" means every person in the service or pay of-*

(i) the State Government; or
(ii) a local authority not being a Cantonment Board; or
(iii) any other corporation owned or controlled by the State Government (including any company as defined in Section 3 of the Companies Act, 1956 in which not less than fifty per cent of paid up share capital is held by the State Government) but doe not include-
(1) a person in the pay or service of any other company; or
(2) a member of the All India Services or other Central Services;"

Section 6 of the Act is in respect to bar of suits and reads as under:-

***"6. Bar of suits**- (1) No suit shall lie against the State Government or any local authority or any statutory corporation or company for any relief in respect of any matter relating to employment at the instance of any person who is or has been a public servant, including a person specified in clauses (a) to (g) of sub-section (4) of Section 1.*

(2) All suits for the like relief, and all appeals, revisions, applications for review and other incidental or ancillary proceedings (including all proceedings under Order XXXIX of the first schedule to the Code of Civil Procedure, 1908) (Act V of 1908), arising out of such suits, and all applications for permission to sue or appeal as pauper for the like relief, pending before any court subordinate to the High Court and all, revisions (arising out of interlocutory orders) pending before the High Court on the date immediately proceeding the appointed date shall abate, and their records shall be transferred to the Tribunal and thereupon the Tribunal shall decide the cases in the same manner as if they were claims referred to it under Section 4:

Provided that the Tribunal shall, subject to the provision of Section 5, recommence the proceedings from the stage at which the case abated as aforesaid and deal with any pleadings presented or any oral or documentary evidence produced in the court as if the same where presented or produced before the Tribunal.

(3) All appeals pending before the High Court on the date immediately preceding the appointed date arising out of such suits shall continue to be heard and disposed of by that court as heretofore as if this Act has not come into force:

Provided that if the High Court considers it necessary to remand or refer back the case under Rules 23 of Rule 25 of Order XXL of the First Schedule to the Code of Civil Procedure, 1908 (Act V of 1908), the order of remand or reference shall be directed to the Tribunal instead of to the subordinate court concerned and the

Tribunal shall thereupon decide the case or issue, subject to the directions of High Court, in the same manner as if it were a claim referred to it under Section 4."

6. From a perusal of sub-section (4) of Section 1 read with Section 2(b) of the Act it is evident that definition of "public servant" is very wide which includes every person in the service of State Government or a local authority other than cantonment board or any other corporation owned or controlled by the State Government including any Company as defined in Section 3 of the Companies Act in which not less than 50% paid up share capital is held by the State Government excluding a person in the pay or service of any other Company or a member of all India services or other central services. However, a person even if is a "public servant" under Section 2(b), but, if he belongs to a category which is in the exemption clauses of Section 1(4) of the Act, Sections 3, 4, 5, 7 and 8 shall not be applicable to such public servant. For example a member of judicial service though he is a public servant under Section 2(b) of the Act but he cannot file a claim petition under Section 4 of the Act in view of Section 1(4) which makes Section 4 inapplicable to such public servant. Similar is the position in respect to other "public servants" mentioned in clauses (b) to (g) of Section 1 sub-section 4 of the Act. Therefore, a person who is "workman" as defined under Industrial Disputes Act 1947 or 1947 Act, even though he is a public servant, he cannot file a claim petition under Section 4 of the Act for the reason that Section 4 has no application at all to such person. It is not disputed by learned counsel for the contesting respondents that all the contesting respondents are covered by the definition of "workman" under 1947 Act. In this view of the matter we have no hesitation in holding that in the case in hand the Tribunal had no jurisdiction to entertain the claim petition.

7. The Tribunal in order to justify the view taken by it that the Tribunal has jurisdiction to entertain the claim petition has placed reliance on a judgment of a Single Judge of this Court in **Writ Petition No. 9216 (SS) of 1993 (Amar Nath Gupta Vs. State Public Service Tribunal and others)** decided on 10.11.1993 wherein the learned Single Judge has taken the view that the public servant who is a workman, if is claiming enforcement of certain rights which are not based on the provisions of the Industrial Dispute Act, in such cases the Tribunal shall have jurisdiction to entertain his claim petition under Section 4 of the Act. We have considered the judgment of learned Single Judge. However, with great respect, we are unable to find ourselves in agreement with the view taken by the learned Judge in Amar Nath Gupta (Supra) and it is ex-facie contrary to specific provision of the Act. The Act does not make any difference amongst workman who are though public servants by permitting them to apply Section 4, if they intent to enforce their rights under rules and regulations other than those arising out of the provisions of the Industrial Disputes Act. This is nothing but sheer addition of so many words in the legislation which in our view is neither warranted nor permissible.

8. The learned Single Judge have placed reliance on a Full Bench judgment in **Ram Krishna Yadav and others Vs. U.P.S.R.T.C., and others, 1981 LLT**

(Services) 101=1981 AWC 481 and another judgment of Hon'ble Single Judge in **Sri Ram Vs. U.P. Public Service Tribunal and others, 1985 U.P.S.C., 212** in taking the aforesaid view. We propose to consider the said judgments also. To start with, we find that this issue came up for consideration in **Writ Petition No. 4580 of 1975 (Bhagwati Prasad Chaurasia Vs. U.P. Public Service Tribunal and others) decided on 27.1.1977** wherein the Tribunal decline to entertain claim petition on the ground that U.P. State Road Transport Corporation is an industry and therefore, the employees transferred to it from the government being workman, the Tribunal has no jurisdiction to entertain their claim petition in view of Section 1(4) of the Act. The matter came up before Division Bench of this Court and two separate judgments were delivered. Hon'ble H.N. Seth, J. (as his Lordship then was) held that Sri Chaurasiya was conductor in the roadways department of the U.P. Government prior to establishment of corporation and was workmen in the corporation. However, Hon'ble Mufti, J. did not agree with the said view and held that since he was on deputation with the corporation, therefore, retained his character of government servant and could not be said to be a workman. The matter was not referred to 3rd Judge since the case was disposed of on a different question over which there was no difference of opinion. Thereafter, a similar issue arising from the employees of U.P. State Road Transport Corporation in **Jagdish Prasad Gupta and others Vs. State of U.P. and others, 1980 (2) LLJ 48** and the Division Bench referred to **Bhagwati Prasad Chaurasia (Supra)** and expressed its agreement with the view of Hon'ble Mufti, J. holding that the employees of erstwhile roadways department of the State Government were government employees when they were on deputation with the corporation and they did not loose their status as government servant, therefore would not fall within the category of workman under Section 1(4) of the Act. Thus there was a dispute regarding the status of the employee of U.P. S.R.T.C. who were transferred from erstwhile roadways department of the U.P. Government as to whether during the period they were on deputation with the corporation they continue to be government servant or answer the definition of workman having become employees of the corporation. By not doing that they continued to be government servant, this Court thus excluded Section 1(4) of the Act in those cases. The same position continued in **A.K. Srivastava Vs. State of U.P. 1986 (6) ALR 91 and 253; U.P. State Road Transport Corporation Vs. State of U.P. and others, 1981 AWC 481.**

9. Noticing divergence in the opinion as to the status of such employees and the authority competent to take action against them in various judgments, a Division Bench of this Court in **Writ Petition No. 150 of 1980, Ram Krishna Yadav (Supra)** referred this issue before a Larger Bench which was decided by the Full Bench in **Ram Krishna Yadav (Supra).** There are two judgments delivered by the Bench one by His Lordship Hon'ble K.N. Goel, J. and another by T.S. Misra, J. for himself and Hon'ble Hari Swarup, J. The majority held that the employees of the erstwhile roadways department continue to be the government servant while on deputation to the corporation and therefore action against them can be taken only by the

State Government or the officers of the State Government who are also on deputation and not by the corporation. The majority judgment does not touch the issue of Section 1 sub-section 4 as to whether the claim petitions are maintainable before the Tribunal or not. However, His Lordship Hon'ble K.N. Goel, J. in para 20 of the judgment disagree with the view taken in **J.P. Gupta (Supra)** that the employees who are government servant are not workmen and held that since certain departments of the government can also be industry, there may be a number of government servants who answer the definition of workman. Thereafter, it further proceeded to observe that such employees, if they claim any relief arising out of their status and rights of government servant simplicitor, claim petition under Section 4 of the Act would be maintainable. Neither in **J.P. Gupta (Supra)** nor in any earlier judgment the question has been raised, argued and decided that a public servant, who is a workman in his case whether despite of Section 1, sub-section 4 of the Act, Section 4 would still be applicable and whether such a person can file a claim petition before the Tribunal based on the nature of relief and grounds. The application of the Act does not depend upon the nature of the relief or status of the opposite party or respondents but if the claimant belongs to any of the category which is exempted in Section 1 sub-section 4 of the Act, to such public servant, Section 4 of the Act is inapplicable and therefore, he cannot file a claim petition before the Tribunal irrespective of relief etc. The attention of the Court was neither drawn to this aspect nor this issue in so many words was raised and therefore, the Court had no occasion to deal with this matter.

10. It is true that in **Ram Krishna Yadav (Supra)** the counsel for the corporation raised this issue and Hon'ble K.N. Goel, J. in para 20 of the judgment held that if a government servant who is also a workman claims any relief in his status as government servant in that case Section 4 will be applicable and not otherwise. But this aspect has neither been considered by the majority judgment nor the correctness of the Division Bench in **J.P. Gupta (Supra)** case has been touched by the majority judgment. Unfortunately His Lordship Hon'ble K.N. Goel, J. subsequently in **Sri Ram (Supra)** took a view that his view expressed in para 20 of the judgment having not been disagreed by the majority, is liable to be treated as a view expressed on behalf of the Full Bench. We are constrained to observe that majority on the other hand also has not expressed its agreement of the other views of Hon'ble K.N. Goel, J. It is also worthy to notice that against the Full Bench judgment the matter was taken up in the Apex Court in **Jai Jai Ram and others Vs. U.P. State Road Transport Corporation, Lucknow and others, AIR 1996 SC 2289** and there in para 6 of the judgment the Apex Court crystallized the issue which was up for consideration before the Full Bench of the High Court as under:-

"Since the only question before the Full Bench of the High Court was whether the officers who had taken such actions were competent to do so in view of the protection afforded by Article 311 of the Constitution and as that is the only question which we have to decide."

11. Thus, it is evident from the above discussion that the Full Bench in **Ram Krishna Yadav (Supra)** is not an

authority as to whether a claim petition of a public servant who is a workman would be maintainable before the Tribunal or not since this was not the issue referred to and decided by the Full Bench. In order to constitute a binding precedent it is well settled that an issue must has been raised, argued and decided and mere observations here and there cannot make it a binding precedent.

12. On the contrary, we find that this issue straightway came up for consideration subsequently in **Surendra Pal Singh Vs. State of U.P. and another, 1988 (56) FLR 463** where a Division Bench of this Court held that in view of the Constitution Bench judgment in **Bangalore Water Supply and Sewerage Board Vs. Rajappa and others, 1978 (36) FLR 266** the Government Roadways is an industry and therefore its employee, even if they are government servant, would come within the expression of "workman" under the Industrial Disputes Act, 1947. Since a "workman" is not entitled to file a claim petition in view of Section 1(4)(e) of the Act, the claim petition at his instance is not maintainable. The Division Bench also held that the view expressed by Hon'ble K.N. Goel, J. in **Ram Krishna Yadav (Supra)** was a minority judgment on this issue and cannot be said to be a view of the Full Bench. The Division Bench clearly held as under:-

"The judgment of Hon'ble K.N. Goel, J. was a minority judgment. In the majority opinion delivered by Hon'ble T.S. Misra, J. as he then was, the question as to whether J.P. Gupta's (Supra) was rightly decided or not was not considered. In the circumstances, it cannot be said that the Full Bench decision has overruled J.P. Gupta's case. We agree with Hon'ble Goel, J. to the extent that he has held that the U.P. Government Roadways was also an industry, but we do not agree with the view that J.P. Gupta's case (Supra) was wrongly decided. In fact, in the case of J.P. Gupta (Supra), the Bench had not gone into the question as to what would be position in the case where an employee seeks a claim only against the State Government, who admittedly, is the employer of an employee on deputation. In the case J.P. Gupta (Supra), the claim was against the Corporation and having held that there was no relationship of master and servant between the Corporation and the employee on deputation, it was held that such an employee cannot come within the definition of workman. In our opinion, consequently, we agree with the view taken in J.P. Gupta's case (Supra), but as expressed above, we are further of the opinion that in the case of an employee on deputation, if he has a claim only against the Government, then he would come under the definition of "workman' both under the Central as well as the State Industrial Disputes Act and as such, he is entitled to seek an adjudication under these Acts.

The State Government in the impugned order dated 13th May, 1982 has stated that the petitioner can file his claim before the U.P. Public Service Tribunal. This observation of the State Government, in our view, is manifestly erroneous. Since the petitioner is a "workman' and he is seeking a claim against the Government, then he would come clearly under Section 1(4) (e) of the U.P. Public Services Tribunal Act, 1976 and as such, he cannot file a claim before the U.P. Public Service Tribunal." (Para-18)

13. After the Division Bench judgment in **Surendra Pal Singh (Supra),** in our view it was not open to the Hon'ble Single Judge in **Amar Nath Gupta (Supra)** to take a contrary view by referring to another judgment of the Hon'ble Single Judge in **Sri Ram (Supra).**

14. Moreover, if the logic of the Hon'ble Single Judge in **Amar Nath Gupta (Supra)** is extended and apply to other categories of public servant mentioned in Section 1 sub-section 4, we fail to understand as to how the category of the public servants enumerated in clauses (a) to (d) can be excluded from filing a claim petition before the Tribunal since it cannot be said that the categories of those employees are not government servant and whenever they would file a claim petition it would be in their capacity as government servant and would relate to a condition as government servant. Thus the status and the nature of work is wholly irrelevant. A plain reading of Section 1 sub-section 4 makes it clear that the definition of "public servant" under Section 2 (b) is very wide and the Act in general covers a very wide category of the employees defined as "public servant" but all such "public servants" cannot file a claim petition under Section 4 of the Act. In respect to limited category of public servant the entire Act has not been applied as such and only Sections 1, 2 and 6 have been applied. In other words by making Section 4 inapplicable to certain category of public servant under Section 1(4), the legislature has denied them a right to file a claim petition before the Tribunal though bar under Section 6 of the Act would apply to those public servants and therefore, they will not be entitled to file civil suit besides also unable to file a claim petition before the Tribunal. The remedy left to them is either such as specified under any special Act like 1947 Act and in the absence thereof by approaching this Court under Article 226 of the Constitution.

15. The Tribunal being a forum of limited jurisdiction, there is no reason or occasion to extend the scope of the Act when a plain reading of Section 1 sub-section 4 does not warrant any such interpretation. It would be useful to remind at this stage that where the language of statute is clear and unambiguous there is no room for reading or interpreting statute in a manner, which may add a few words therein on the assumption that the legislature has left a vacuum, needs to be bridged by judicial interpretation. It is not the function of the Court to read something in the provision of law, which is not there, or find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intention of the legislature might be. A Constitution Bench in **Behram Khurshed Pesikaka Vs. State of Bombay, AIR 1955 SC 123** rejecting to interpret a law on the supposed difficulty of prosecution in improving the case, observed as under:-

"The difficulty in the way of the prosecution proving its case need not deflect the Court from arriving at a correct conclusion. If these difficulties are genuinely felt it would be for the legislature to step in and amend the law. It would not be the function of the Court to read something in the provisions of the law, which is not there, or to find out a way of obviating the difficulties in enforcing the law howsoever meritorious the intentions of the Legislature might be. (Para-17)

16. It is settled principle of interpretation, where the words used are clear and unambiguous, the Court is bound to construe them in their ordinary sense and it is not the function of the Court to add words or expression for supposed assumption of what would have been the intention of the legislature. The Court is not entitled to go beyond, so as to supply an omission, as if, to play the role of a political reformer or counsel to the legislature. A Constitution Bench in **Dadi Jagannadham Vs. Jammulu Ramulu and others AIR 2001 SC 2699** in para 13 observed as under:-

"The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

17. 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 Vs. Richard Spooner, 4 MIA 179 (187) (PC):-**

"if the legislature did intend that which it has not expressed clearly; much more, if the Legislature intended some thing very different; if the Legislature 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 context)".

18. The Apex Court in **S.Gurmej Singh Vs. Sardar Pratap Singh Kairon, AIR 1960 SC 122** (at page 128) also held that the Courts are not to busy themselves with "supposed intention' or with "the policy underlying the statue 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) 5**. 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."

19. 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).

20. We are aware that the rules of the interpretation are not rules of laws and are not to be followed like rules enacted by legislature in Interpretation Act as observed by the Hon'ble Apex Court in **Superintendent and Remembrance of Legal Affairs, West Bengal Vs. Corporation of Calcutta, AIR 1967 SC 997**. The principles of interpretation serve only as a guide. A casus omissus 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 working 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."

21. The Hon'ble Apex Court in **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and others (Supra)** 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."

22. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real casus omissus, it is equally evident that it should not so interpret a statute as to create casus omissus when there is really none. Recently in **Vemareddy Kumaraswamy Reddy and another Vs. State of Andhra Pradesh 2006(2) SCC 670** the Court reiterated that while interpreting a provision the Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative casus omissus cannot be supplied by judicial interpretative process.

23. We have no hesitation in holding that judgment in **Amar Nath Gupta (Supra)** does not lay down a correct law.

24. Now coming to the another aspect of the matter we find that the Tribunal has further held that since the contesting respondents were not claiming any benefit or right under the Industrial Disputes Act and therefore claim petition is maintainable. In our view even this finding in order to usurp jurisdiction is not correct for the reason that it is evident from the copy of the claim petition filed

by the contesting respondents that they did not substantiate their claim for regularization or salary at par with regular employees on the basis of any statutory provision but set up their entire claim on the basis of various legal principles applies by the Apex Court in the cases of "workmen" of different bodies. Section 4 of the Act also shows that a person can file a claim petition before the Tribunal, if he has been dealt with by the employer in a manner which is not in conformity with any contract or in the case of a servant of a local authority or statutory corporation with Article 16 of the Constitution or the Rules and Regulations having force under any Act or legislature constituting such authority or corporation. The contesting respondents neither claim that they have any contract with the petitioners i.e. NOIDA and have not been dealt with in conformity with such contract nor have contended any violation of Rules and Regulations having force under any Act of Legislature constituting such authority or corporation. It is true that vaguely, for the purpose of regularization, violation of Article 14 and 16 has been pleaded but the said pleading is absolutely vague and has not been substantiated at all. The contesting respondents have clearly said that they are only muster roll daily wage employees. Being daily wage employees on muster roll the contesting respondents are admittedly workmen as defined under 1947 Act. Therefore on the pleadings of the contesting respondents before the Tribunal, it is evident that the said application was not maintainable due to the absence of grounds on which the application under Section 4 could have been filed.

25. In view of the aforesaid discussion, we hold that the claim petitions filed by respondents under Section 4 of the Act were not maintainable before the Tribunal and therefore the order impugned in the writ petition is wholly without jurisdiction and cannot be sustained. The writ petitions therefore succeed and allowed. The order of the Tribunal dated 8.11.1998 impugned in the writ petitions are quashed and the claim petitions consequently shall also stand dismissed. No order as to costs.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 35702 of 1996

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

Counsel for the Petitioners:
Sri Krishna Agarwal
Sri Satya Prakash

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

Constitution of India, Art. 226-Salary-after selection as Sub Inspector of Police-joined training-stipend given Rs.1000/- per month during training period-whether can salary be paid during training period, prior to appointment? held-'No' salary can be paid only after joining the service and not prior to that.

Held: Para 7

Salary can be paid only to such person who is appointed against some post, which can be only after completing the training. The payment of salary prior to

appointment is not conceived of in service jurisprudence. Only stipend or honorarium can be paid during such training period, and not salary.

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

1. The short question involved in this case is as to whether the candidates, who were selected and appointment on the post of Sub Inspector, would be entitled for payment of salary for the period during which they had undergone training for such appointment.

Heard learned counsel for the parties and perused the record.

2. The petitioners appeared in the selection process held in the year 1987-1988 for appointment on the post of Sub Inspector. Initially the petitioners were placed in the waiting list and thereafter they were sent for training only in the year 1994. During the period of training, they were paid stipend of Rs.1,000/-per month. After successfully completing their training, they were given appointment as Sub Inspectors under Regulation 406 of U.P. Police Regulations and only thereafter they were paid their regular salary. The petitioners had filed representations for payment of salary for the period of training. Since their representations were not decided, they filed a writ petition, which was disposed of with a direction to the respondent-authorities to decide the same. By the impugned order 30.4.1996, the representations of the petitioners have been rejected. Challenging the said order, this writ petition has been filed.

3. During the pendency of this writ petition, on 8.6.1998 the respondents had issued an order directing salary to be paid for the period of training for appointment to the post of Sub Inspector. The said order was prospective and not retrospective. However, subsequently by an order dated 17.9.2002 it was clarified that only stipend, and not salary, would be paid to a person who undergoes training. By means of an amendment application the petitioners have also challenged the subsequent order dated 17.9.2002.

4. At the outset, it may be stated that the order dated 17.9.2002 is not very material for the purpose of decision of this case as the earlier order was only prospectively applicable from 1998 onwards, and the petitioners had undergone training much prior to that in 1994.

5. The admitted position is that no appointment was given to the petitioners prior to being sent for training. An appointment is given only to such candidate who successfully undergoes training and then a seniority list is prepared on the basis of the marks obtained during the training period. There could be a situation where a candidate does not successfully complete his training and thus does not even get appointment as Sub Inspector. In such a case if the direction to pay salary for the period of training is made, it would be a case where he gets salary without being ever appointed as Sub Inspector. There could be another situation where a person does not successfully complete his training in the stipulated two years period and has to continue his training for another year or two. Then also it would be totally unjustified to direct for payment of salary for the training period in favour of a person who lacks merit and is unable to complete his training within time.

6. It is not disputed that the selection of Sub Inspector is made on existing and anticipated vacancies. Thus there could also be a situation where for 100 existing vacancies, there are 150 candidates selected, as such selection is also against anticipated vacancies. In such a case, if salary is directed to be paid for training period, then salary would have to be paid to more persons than the existing posts, which is not possible.

7. Salary can be paid only to such person who is appointed against some post, which can be only after completing the training. The payment of salary prior to appointment is not conceived of in service jurisprudence. Only stipend or honorarium can be paid during such training period, and not salary.

8. For the foregoing reasons, this Court is of the view that in the facts of this case, salary cannot be paid for the period of training, which is prior to appointment on the post of sub inspector, and as such, the order impugned in this writ petition does not call for interference.

9. Accordingly, this writ petition is dismissed.

No order as to cost.

APPEALATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2007

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

Special Appeal No.5 of 2097

The Controller of Examination ,Allahabad University and another ...Appellants
Versus.
Rajneesh Shukla ...Respondent

Counsel for the Appellants:
Sri A.B.L. Gour
Sri Saurabh Gour

Counsel for the Respondent:
Sri Amitabh Tripathi

Constitution of India , Art 226- Education -use of unfair means- chapter XXVIII clause 1.2(A) 1.2E- petitioner appearing L.L.B. Ist year examination- found- some numbers written on the back side of the admit card- may be phone number-but not said to be related to subject matter- decision of authorities- held- highly arbitrary and absurd.

Held: Para 11

Existence of material related to the subject of the examination is absent. When a candidate is found in possession of any unauthorized material which has no bearing or connection with the subject of examination, in that event it cannot be held that the material recovered from his possession is unauthorized.

Case law discussed:
1994(1) SCC 6,
2003(3) SCC 59,
Spl Appeal No. 1017-2006 decided on 18.09.06.
AIR 1970 SC 1269

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This special appeal, under the Rules of the Court, is preferred against the judgment dated 3.10.2006 of the Hon'ble Single Judge allowing the petitioner-respondent's Civil Misc. Writ Petition No.28603 of 2006.

2. Heard Shri A.B.L. Gaur, learned Senior Counsel appearing for the appellants and Shri Amitabh Tripathi, learned counsel appearing for the petitioner-respondent and also perused the· judgment under appeal.

3. It appears that the petitioner-respondent was caught while appearing in L.L.B. 1st year examination of 2006 of first semester on the ground that unauthorized material has been found from his possession. The alleged unauthorized material, which was recovered from his possession is some number written on the admit card. From a perusal of relevant record, produced for the perusal of the Court, it is apparent that some number, may be telephone number, is written at the top of back page of admit card.

4. Shri A.B.L. Gaur vehemently contended that the admit card does not permit any writing by the candidate except in the columns meant therein for filling his names etc during examination and the action taken by the University is in accordance with the provisions contained under Chapter XXVII of the Ordinances on the Use of unfair means and causing disturbances in examination (hereinafter referred to as the Ordinance). He further argued that the cost has been directed to be paid by the Controller of Examination although as per Ordinance he cannot be held responsible. In support of his contention he placed reliance on the judgments of the Hon'ble Apex Court as well as Division Bench 'of this Court in ***Central Board of Secondary Education v. Vineeta Mahajan(Ms) and another, (1994) 1 SCC 6, Chairman, J & K State Board of Education v. Feyaz Ahmed Malik and others, (2003) 3 SCC 59*** and ***Special Appeal, No.1017 of 2006, The Vice Chancellor, C.S.M.U., Kanpur & others v. Abhay Kumar Tripathi & others*** decided on 18.9.2006.

5. Having considered the aforesaid submissions we are of the view that the judgment under appeal warrants no interference. A candidate found using or attempting, abating or instigating to use the unfair means in the examination of University of Allahabad is liable to punishment in accordance with the provisions contained in Chapter XXVIII of the Ordinances. However, the term unfair means has been defined in Clause 1.2 (A) as under: -

(A) Unfair means: - A candidate shall be deemed to have used "unfairmeans" if the candidate transcribed any part or the whole of the unauthorized material or if he intimidates or threatens or manhandles or uses violence against any invigilator or person on duty in the examination or if he leaves the examination hall without surrendering his examination script to an invigilator or if he is found communicating with other examinees or anyone else inside or outside the examination hall."

6. In the case in hand the case of the University is that the petitioner-respondent was guilty of unfair means since unauthorized material was found in

his possession. The term unauthorized material is also defined under Clause 1.2(C) as under:-

"(C) Unauthorized Material: "Unauthorized material" shall mean any material whatsoever, related to the subject of the examination, printed, typed, written or otherwise, on paper, cloth, wood or material in any language - in the form."

7. Therefore, it is not any or every material, possession whereof would attract the mischief of the aforesaid provisions but only such material which is related to the subject of examination whether printed, typed written, or otherwise on paper, cloth, wood etc. or material in any language. The fact remains that such material must relate to the subject of the examination. The phrase "material related to the subject of the examination" is also defined in sub-Clause (E) of Clause 1.2 as under: -

(E) Material related to the subject of the examination:- 'Material related to the subject of examination' shall if the material is produced as evidence, mean any material certified as related to the subject of the examination by a teacher of the subject. If the material is not produced as evidence or any of the reasons referred to in (D) above, the resumption shall be that the material did relate to the subject of the examination."

8. Sub-clause (E) therefore makes it clear that the material, which is certified by a teacher of the subject, as related to the subject of the examination, shall be the requisite material, which is prohibited. In the case in hand, the petitioner-respondent is said to have been found with the admit card whereon a number is written by hand. The original record was also produced before us and we did not find any certification by a teacher of subject that the said number mentioned on the back of the admit card is a material related to the subject of the examination i.e. Environmental Law Paper of First Semester Examination of LL.B. 2006. Learned counsel for the University also could not point out as to how and in what in what manner the said number can be related by any stretch of argument or imagination to the subject of the examination. In these facts and circumstances, we have no hesitation to observe that the authorities have shown a total non-application of mind and have grossly erred in law in penalizing the petitioner-respondent on the charge of unfair means causing not only waste of his valuable time but also mental agony, loss of reputation amongst the friends and relatives, and has caused other serious inconvenience.

9. Coming to the argument that a decision of the educational authorities in the matter of unfair means shall not be interfered at all in any circumstance by the Court, we have no hesitation in observing that arbitrariness and total non-application of mind in any manner shall not prevail over the constitutional power of judicial review of this Court in exercise of jurisdiction under Article 226 and where this Court finds that a glaring illegality has been committed by an authority, it can always take steps to set it right, Arbitrariness is antithesis, to the doctrine of equality and any act,which is patently arbitrary, is violative of Article 14 of the Constitution of India. A student, victim of arbitrary act on the part of the University is right in contending that his fundamental right under Article 14 of the

Constitution of India has been violated and this Court being sentinel for protection of fundamental rights, whenever finds such a complaint to be correct, has to rise to the occasion for rescue of such person to set the things right. It is not disputed that the University is an authority and constitute "Sate" under Article 12 of the Constitution cannot act arbitrarily. Whenever any act or decision of the University or its agents and authorities is found to be arbitrary, this Court is well within its competence and authority to interfere with such illegal action of the University and its agents. Coming to the judgments relied by the learned counsel for the University, we find that in the case of **Vineeta Mahajan (Supra)** the student was admittedly found in possession of written material in the shape of three small pieces of paper kept in the pencil box which was related to the examination concerned but the High Court interfered with the decision of the educational authorities only on the ground that she had not used the said material while answering the question paper. Rule 36 (1) of the Rules for unfair means framed by the Central Board of Secondary Education provided that a person found in possession of the incriminating material shall be deemed to have used unfair means at the examination and in such circumstances it was held by the Apex Court that once candidate was found to be in possession of papers relevant to the subject, the requirement of the Rule was satisfied and there was no escape from the conclusion that the candidate has used unfair means. Whether the material was in possession of the candidate bona fide or mala fide was irrelevant and therefore the decision of the High Court in interfering with the decision of the educational authorities was set aside. On the face of it, this case is distinguishable and has no application to the facts of the case in hand since the possession of material related to the subject examination is lacking in the case in hand. Similarly in **Feyaz Ahmed Malik (Supra)** the regulations framed by the Board for dealing the cases of mass copying was challenged on the ground of the jurisdiction of the Board in framing such provisions, which was upheld by the Apex Court. The aforesaid judgment therefore has no application at all to the facts of the case. However it would be relevant to mention that in **Feyaz Ahmed Malik (Supra)** in para 18 of the judgment, the Apex Court referred to its earlier decision in **Bihar School Examination Board v. Subhas Chandra Sinha and others, AIR 1970 SC 1269** wherein it was held that while judging the authority or otherwise or the steps taken by the educational authorities in taking action against candidate resorting to unfair means, it should be borne in mind that the educational authorities are entrusted with the duty of maintaining higher standard of education and proper conduct of examination. It. is an expert body consisting of persons coming from different walks of life who are engaged or interested in the field of education and have wide experience and decision of such expert body should be given due weightage by the Courts. However in para 14 of the Judgment in **Subhas Chandra Sinha (Supra)** the Court held:

" **If there is sufficient material on which it can be demonstrated** that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the University's appreciation of the problem must. be respected....." (Emphasis added)

10. Thus, in the matter of judicial review it is true that this Court does not sit in appeal over the decision taken by the authorities provided the decision does not appear to be glaringly and patently absurd and arbitrary.

11. Similarly the facts of the case in **Abhay Kumar Tripathi** (Supra) are also different and have no application to the facts involved in the case in hand. A bare perusal of the, judgment shows that one printed page was found in possession of the candidate, which was related to the subject of examination, and. the possession of the such material was not denied. In the facts, the judgment in **Abhay Kumar Tripathi (Supra)** has no application and this Court rightly, held that such candidate could have been punished for unfair means and in such case no interference is warranted. However the present case has the facts otherwise and the very existence of material related to the subject of the examination is absent. When a candidate is found in possession of any unauthorized material which has no bearing or connection with the subject of examination, in that event it cannot be held that the material recovered from his possession is unauthorized. In the case in hand, some number has been found written on the back of the admit card, which probably may be telephone number. Thus, the Hon'ble Single Judge has rightly held that it is not unauthorized material and in the facts of the case, we do not find any factual or legal error in the judgment of the Hon'ble Single Judge.

12. Shri Gaur lastly submitted that imposition of costs of Rs.5000/-(Rupees Five Thousand only), which was directed to be recovered from the Controller, is not justified as he has no role to play in the matter and the entire action has been taken on the basis of the report of the invigilator and the experts. We cannot accept this submission because the invigilator and the examiner are the agents of the Controller of examination and thus, he is liable to pay costs. However it is provided that it would be open to the University or the Controller of Examination to make necessary inquiry in the matter identifying the person guilty of the said mischief and realize the cost from him.

With the aforesaid observation, this special appeal stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2007

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No.38716 of 2006

Ram Lal Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Shukla
Sri P.S. Paghel

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

(A) Constitution of India Art-226- Seniority of teachers working in recognized institutions-to be decided from the date of valid and substantive appointment–otherwise cannot be treated to be member of main stream of teacher.

Held: Para 24

Inter se seniority between teachers of particular cadre, has to be determined with reference to their date of valid and substantive appointment on their respective posts. Unless the teacher is lawfully appointed in a grade, he cannot be treated to be a member of the mainstream of teachers of the cadre, so as to claim a position in the seniority qua the cadre concerned.

(B) Constitution of India Art-226 Alternative remedy- writ petition pending since long time -Counter and rejoinder affidavits exchanged between parties -particularly the claim of seniority between substantive and adhoc appointed teachers- held- no bar.

Held: Para 29

Since the parties have exchanged their affidavits and have addressed the Court on merits, this Court is satisfied that it would not be fair, just and equitable in the facts of the present case to insist upon the petitioner to avail his alternative remedy after more than three years of his . having filed the first writ petition being Civil Misc. Writ Petition No. 53693 Of 2003, more so when upon the dispute of seniority, another issue qua the ad-hoc appointment on the post of Principal has intervened.

Case law discussed:
1988(8) SCC 529
1997(2) UPLBEC 1133
1991(1) SCC 544
1986 UPLBEC 44

(Delivered by Hon'ble Arun Tandon J.)

1. Heard Sri P.S. Paghel, Advocate on behalf of Ram Lal Tripathi, (petitioner), Sri G.K. Singh and Sri V.K. Singh, Advocates on behalf of Sri. Shiv Bashadur singh (respondent no.5), Sri M.K. Srivastava, Advocate on behalf of Sri Sangam Lal Shukla (respondent no.6) and learned Standing Counsel on behalf of other respondents.

2. Mahabeer Intermediate College, Bichhiya Bankat, Sant Ravi Das Nagar is an institution recognized under the provisions of U. P. Intermediate Education Act, 1921. The provisions of U. P. Secondary Education Services Selection Board, 1982 and Rules and Regulations framed there under are fully applicable to the said institution.

3. Ram Lal Tripathi (petitioner) filed Civil Misc. Writ Petition No 53693 of 2003 for quashing the seniority list dated 8th July, 4003 and further for a writ of mandamus commanding the State-respondents to declare the petitioner to be the senior most Lecturer in the institution.

4. Civil Misc. Writ Petition No. 38716 of 2006 has also been filed by Ram Lal Tripathi (petitioner) for quashing the order of the: District Inspector of Schools, Sant Ravi Das Nagar dated 30th June, 2006 where under Shiv Bahadur Singh (respondent no.5) has been appointed as the Officiating Principal in view of Section 18 of the U. P. Secondary Education Services Selection Board Act, 1982. It has been provided under the same order of the District Inspector of Schools that in case the petitioner has any grievance with regard to the seniority of Sri Shiv Bahadur Singh,(respondent no. 5) ,he may file his objection before the Manager. If the Manager decides against against him, he may file an appeal before the Regional Joint Director of Education. Region concerned. Petitioner has also prayed for a writ of mandamus commanding the respondents to give the charge of Principal to the petitioner.

Facts

5. Ram Lal Tripathi (Petitioner) claims to have been appointed as C.T. Grade teacher on 8th September, 1971 with the approval of District Inspector of Schools, thereafter he was promoted in LT Grade on 2nd January , 1984. Ram Lal Tripathi was granted ad hoc promotion as Lecturer on 26th September, 1991. Under an order dated 3rd November, 2003, he has been regularized on the post of Lecturer w.e.f. 7th September, 1993 with reference to section 33-C of UP Secondary Education Services Board Act, 1982. (Reference Annexure-1 to the writ petition).

6. Sri Shiv Bahadur Singh (respondent no. 5) claims that he was appointed as L.T. Grade teacher on 10th December, 1974. He was confirmed on the said post w.e.f. 10th December1975. Thereafter he was promoted on ad hoc basis as Lecturer (Sociology) on 25th October, 1983 against a newly created post of Lecturer Sociology.

7. The post of Lecture Sociology was, however ,requisitioned to the to the UP Secondary Education Services Selection Board, Allahabad and was accordingly advertised for direct recruitment on 17th December, 1988 being Advertisement No. 3/1988-89.

8. Sri Shiv Bahadur Singh (respondent no. 5) filed Civil Misc. Writ Petition No. 1294 of 1989 challenging the said selection. In the said writ petition an interim order was granted by this Court on 17th January, 1989,whereby it was provided that in the meanwhile no selection shall be made in pursuance to the Advertisement dated 17th December, 1988. The interim order continued upto 13th July, 1998, when learned counsel for the petitioner of the said writ petition, namely, Shiv Bahadur Singh made a statement that he does not want to press the writ petition. The writ petition was accordingly dismissed and the interim order of this Court dated 17th January, 1989 was vacated.

9. It is claimed on behalf of Shiv Bahadur Singh (respondent no. 5) that in between he was regularized on the post of Lecturer in view of section 33-A (1-A), (1-B) and (1-C) as added to the UP Secondary Education Services Selection Board Act, 1982 w.e.f. 6th April, 1991.

10. Sangam Lal Shukla (respondent no.6) claims that he was initially appointed as L.T. Grade teacher in the institution on 10th December, .1974. He was confirmed on the said post w.e.f. 10th December, 1975.Thereafter he was promoted on ad hoc basis as Lecturer (Hindi) on 25thOctober, 1983 against a newly created post of Lecturer (Hindi).

11. The post of Lecturer (Hindi) was also requisitioned to the U.P. Secondary Education Services Selection Board, ·Allahabad and was accordingly advertised for direct recruitment on 17th December, 1988 being Advertisement No. 3/1988-89.

12. Sri Sangam Lal Shukla (respondent no.6) was also one of the co-petitioners in Civil Misc. Writ Petition No. 1294 of 1989, whereby the advertisement was challenged. He was also the beneficiary of the order granted, whereby selection in pursuance to the said advertisement was stayed. The writ petition as recorded above was got dismissed as withdrawn. Sri Sang am Lal

Shukla claims that in between he was regularized on the post of Lecturer (Hindi) w.e.f. 6th Apirl, 1991 in view of the section 33-A (1-A), (1-B) and (1-C) as added to the U.P. Secondary Education Services Selection Board Act, 1982 w.e.f. 6th April, 1991, as per the order of the District Inspector of Schools dated 25th January, 1996.

13. Sri P.S. Baghel, learned counsel for the petitioner points out that the stand taken by respondent nos. 5 and 6 by means of the counter affidavit in the present writ petition runs contrary to their stand: taken in Civil Misc. Writ Petition No. 1294 of 1989, wherein it is claimed that respondent nos. 5 and 6 applied in response to the advertisement published by the Committee of Management for ad hoc appointment trough direct recruitment against the newly created posts of Lecturers in the institution. He refers to paragraph-13 of Civil Misc. Writ Petition No.1294, wherein it has been stated as follows:

"13. That all the three petitioners are working in the institution from their respective dates of appointment as Lecturers. The petitioners have been appointed on substantive posts by direct recruitment"

14. In these set of facts Sri P.S. Baghel, learned counsel for the petitioner submits that the seniority list published on 8th July, 2003 is patently illegal, inasmuch as respondent nos. 5 and 6 cannot be treated to be senior to the petitioner, the regularization, which has been offered in their favour on the post of Lecturers, was illegal as on the date the order of regularization was passed, respondent nos. 5 and 6 were being continued in the institution only because of an interim order dated 17th January, 1989, passed in their earlier Civil Misc. Writ Petition No. 1294 of 1989, whereby selection in pursuance to the advertisement dated 17th December, 1988 had been stayed and the petitioner- teachers were permitted to continue and paid salary.

15. The claim of respondent nos. 5 and 6 for regularization as Lecturers could not have been considered in view of the Judgment of the Hon'ble Supreme Court of India in the case of ***State of U.P. and others Vs. Raj Karan Singh,*** reported in 1998 (8) SCC 529 as well as in the case of ***Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur and another Vs. Sree Kumar Tiwary and another*** reported in (*1997) 2 UPLBEC 1133.* It has been further clarified that once the respondent nos. 5 and 6 have got their writ petition dismissed as not pressed on 13th July, 1998 and the interim order dated 17th January, 1989 having been vacated, their continuance in the institution also ceases by operation of law. The interim order emerges in the final order, therefore, it cannot be said that respondent nos. 5 and 6 were in continuous service in the institution as Lecturers, so as to claim benefit of regularization.

16. On behalf of respondents reliance has been placed upon the judgment of Hon'ble Supreme Court of India in the case of ***A.K. Bhatnagar and Others vs. Union of India and others*** reported in (1991) 1 SCC 544, as well as upon the judgment of this Court in. the case of ***Vijay Narayan Sharma Vs. District Inspector of Schools, Etawah and others*** reported in *1986 UPLBEC 44 specifically Paragraphs 25 and 26,* and in

the case of ***Rama Shanker Mishra Vs. Joint Director of Education, Varanasi Region, Varanasi and others*** reported in *2001 (43) ALR 650 specifically Paragraph 17*, for the purposes of alleging that validity of appointment and promotion already granted, cannot be challenged while questioning the seniority.

17. On the issue of seniority is dependent the right of the parties to be appointed as officiating Principal of the institution,the vacancy whereof has been caused on 30th June, 2006 with the retirement of earlier incumbent holding the office.

18. From the facts as recorded above, it is no more in dispute that respondent nos. 5 and 6 in their writ petition no. 1294 of 1989 specifically paragraphs 8 to 13, stated that they had applied in pursuance to the advertisement dated 17th December, 1988 published by the Committee of Management for the purposes of making ad hoc appointment by direct recruitment on the post of Lecturers in Sociology and Hindi respectively, which were newly created posts. The respondent nos. 5 and 6 were selected and offered ad hoc appointment in pursuance thereto. The continuance of respondent nos. 5 and 6 as ad hoc Lectures in the Institution subsequent to the publication of the advertisement dated 17th December, 1988, was based upon an interim order obtained by them in Civil Misc. Writ Petition No. 1294 of 1989. During the pendency of the writ petition, their claim for regularization could not have been considered, in view of the judgment of the Hon'ble Supreme Court of India in the case of ***State of U.P. and others Vs. Raj Karan Singh (Supra).*** The relevant portion whereof reads as follows:

"Besides, merely because a person continues under the interim orders of the Court, such continuance on the post cannot and, in this case, does not confer on him any right for continuance, it does not enhance his case for regularization. It is only an interim arrangement pending decision by the Court and cannot disturb the position in law or equities, as on the date of the petition."

19. The Hon'ble Supreme Court of India in the case of as well as in the case of ***Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur and another (Supra)***, has held as follows:

"But the crucial question is: whether the respondent was continuously serving the institution under Clause (c) of Section 33-B (i)? Admittedly, the service of respondent came to be terminated w.e.f June 30, 1988. Though he had obtained the stay order and continued to be in service, it was not by virtue of his own right under an order of appointment, he continued in the office with permission of the management."

20. The Hon'ble Supreme Court of India has explained that continuance under an interim order of the Court cannot confer any right for continuance nor can it enhance the cases of writ petitioners for regularization. In is only an interim arrangement pending decision by the Court, status on the date of the petition cannot be disturbed in law or equity.

21. The position has been made worst by respondent nos. 5 and 6 by their

own act of getting their writ petition no. 1294 of 1989 dismissed as not pressed, whereby the interim order dated 17th January, 1989 was also discharged. The Hon'ble Supreme Court of India in the case of ***M/s Shree Chamundi Mopeds Ltd. Vs. Church of South Indian Trusts Assn. CSI Cinod Secretariat, Madras*** reported in ***1992 (3) JUDGMENT TODAY 98*** has specifically held that once the interim order is discharged/vacated writ petition is dismissed, it is to be presumed such an order was never granted in the eye of law.

22. In view of the aforesaid legal consequences flowing from continuance in employment of respondent nos. 5 and 6 because of the grant of the interim order and ultimately vacation of the same, cannot be held to be in continuance service in the Institution in the eye of law, so as to claim benefit of Section 33-A of the U. P. Secondary Education Services Selection Board Act, 1982.

23. As a logical consequences, this Court is inclined to hold that regularization offered to respondent nos. 5 and 6 as has been done in the facts of the present case, cannot confer any legal right upon respondent nos. 5 and 6 to claim to be the lawful members of the cadre of Lecturers.

24. Inter se seniority between teachers of particular cadre, has to be determined with reference to their date of valid and substantive appointment on their respective posts. Unless the teacher is lawfully appointed in a grade, he cannot be treated to be a member of the mainstream of teachers of the cadre, so as to claim a position in the seniority qua the cadre concerned.

25. The legal position in that regard has been settled by the Hon'ble Supreme Court of India in the case of ***Shitala Prasad Shukla vs. State of U.P. & Others,*** reported in *1986 UPLBEC 473 specifically paragaraph 9* has held as follows:

"9. *An employee must belong to the same stream before he can claim seniority vis-a-vis others. One who belongs to the stream of lawfully and regularly appointed employees does not have to contend with those who never belonged to that stream. they having been appointed in an irregular manner. Those who have been irregularly appointed belong to a different stream. and cannot claim seniority vis-a-vis those who have been regularly and properly appointed till their appointments became regular or or regularized by the appointing authority as a result of which their stream joins the regular stream. At the time of confluence with the regular stream, from the point of time they join the stream by virtue of the regularization, they can claim seniority vis a vis those who join the same stream later. The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue."*

26. In such circumstances it is held that respondent nos. 5 and 6 are not members of the mainstream of lecturers in the institution, they cannot claim consideration of their right of appointment as Ad-hoc Principal under section 18 of the U.P. Secondary Education Services Selection Board Act, 1982 against a vacancy which has been caused on 30th June, 2006.

27. In view of the said legal position as explained by the Hon'ble Supreme

Court of India the judgments relied upon by the respondents can be of no help and are distinguishable on facts.

28. At this stage this Court may also deal with the issue/objections raised on behalf of respondents to the effect that the petitioner has an remedy by way of an appeal against the determination of the seniority before the Regional Joint Director of Education concerned and therefore, the writ petition may be dismissed on the ground of statutory alternative remedy.

29. Since the parties have exchanged their affidavits and have addressed the Court on merits, this Court is satisfied that it would not be fair, just and equitable in the facts of the present case to insist upon the petitioner to avail his alternative remedy after more than three years of his . having filed the first writ petition being Civil Misc. Writ Petition No. 53693 Of 2003, more so when upon the dispute of seniority, another issue qua the ad-hoc appointment on the post of Principal has intervened.

30. In view of the aforesaid the seniority list issued by the Authorized Controller of the institution dated 8th July, 2003 as well as the order 30th June, 2006 issued by the District Inspector of Schools, Sant Ravi Das Nagar, Bhadohi offering appointment to Sri Shiv Bahadur Singh (respondent no.5) on the post of officiating principal cannot be legally sustained and are hereby quashed.

31. Both the writ petitions are accordingly allowed. Respondents are directed to offer ad-hoc appointment on the post of Principal, strictly in accordance with Section-18 of the U.P. Secondary Education Services Selection Board Act, 1982 and in light of the observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2007

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 23722 of 2005

Sunil Kumar Yadav ...Petitioner
Versus.
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Om Prakash Srivastava
Sri S.C. Srivastava

Counsel for the Respondents:
S.C.

Constitution of India, Art-226- Education- petitioner appeared in High School examination- in Science I, II and III paper awarded 19, 0, and 24 marks- similarly in Social Science I and II paper awarded 30 and 0 marks- result of Scrutiny communicated as " no change"- despite of repeated time granted no counter affidavit filed- officers appeared in person- informed to Court as the answer sheet of both subjects missing- average marks awarded- nothing about action taken against such negligent and guilty officer- held- the student who passed in I st division wrongly informed to be passed in second division- for mental shock and agony- Board to pay compensation of Rs.50,000/- with liberty to recover the same from the person held liable for such negligence.

Held: Para 4

A student, who had actually passed with good first division marks, was declared pass with second division marks, and he

was even misinformed by order dated-19.1.200 that there was no change after scrutiny. Because of such action of the Board, the petitioner must have suffered mental agony, for which he would be entitled for compensation. This Court finds that in the present circumstances, an amount of Rs.50,000/- would be appropriate compensation which may be paid as costs for the loss caused to the petitioner on account of gross negligence on the part of the respondent-Board.

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

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents. Despite time having been granted, no counter affidavit has been filed. Today an affidavit has been filed by the respondents annexing therewith the inquiry report, which is being taken on record. In such circumstances, this writ petition has been heard and is being disposed of at this stage.

2. The petitioner appeared in High School Examination 2004 and was declared pass with. second division marks. In Science Papers I, II and III he was awarded 19, zero and 24 marks respectively and in Social Science Papers I and II he was awarded 30 and zero marks respectively. The petitioner thereafter applied for scrutiny of Science Paper II and Social Science Paper II, in which he had been awarded zero marks. The Assistant Secretary of the Board, by his letter dated 19.1.2005, communicated to the petitioner that after scrutiny there was no change in the marks awarded to him. Challenging the said order, this writ petition has been filed, with a further prayer that if the copies of the petitioner had been lost, then average marks be awarded.

3. Today an affidavit has been filed by the respondent-Board annexing a copy of the inquiry report dated 27.5.2005, wherein it has been held that the answer copies of the aforesaid papers of the petitioner had been lost because of which he had been awarded zero marks, and action against three persons found responsible has been recommended to be initiated. However, in the affidavit it has nowhere been stated as to what action has yet been taken against the said persons who have been found guilty on the basis of inquiry report which was submitted more than 18 months back. This is a clear example of gross negligence on the part of the respondent-Board; firstly by awarding zero marks to the candidate in such papers, the copies of which had been lost; and secondly, communicating to the petitioner on his application for scrutiny, that there was no change of marks· after scrutiny, as when the answer copies of the petitioner had been lost, how could they have been scrutinized.

4. Learned Standing Counsel has made a statement that the relevant Rules provide that in case the copy of a candidate is lost, the candidate is to be awarded average marks. In the present case, the learned Standing Counsel has stated that the petitioner has now been awarded average marks on the basis of marks obtained by him in other papers, and fresh mark sheet has already been issued to him by the respondent-Board on 22.12.2006. This has been done only after the respondent-Board was granted time for producing the answer copies. The Court was not informed of any inquiry having been conducted by the respondent-Board in which it had already been found that the answer copies of the petitioner were lost. It is also note worthy that for

nearly two years, such facts were withheld from this Court, as no counter affidavit has been filed. Only when the Board was cornered and did not have any plausible reply to the averments made in the writ petition, that they then applied the Rule of awarding average marks, which had been recommended in the inquiry report submitted 18 months back. It has been stated that after awarding the average marks, the petitioner has now passed the High School Examination, 2004 with first division marks. This is nothing but a case of gross negligence on the part of the respondent-Board. A student, who had actually passed with good first division marks, was declared pass with second division marks, and he was even misinformed by order dated-19.1.200 that there was no change after scrutiny. Because of such action of the Board, the petitioner must have suffered mental agony, for which he would be entitled for compensation. This Court finds that in the present circumstances, an amount of Rs.50,000/- would be appropriate compensation which may be paid as costs for the loss caused to the petitioner on account of gross negligence on the part of the respondent-Board.

5. Accordingly, this writ petition stands allowed with costs. The order dated 19.1.2005 passed by the respondent-Board is quashed and the corrected mark sheet after awarding average marks in the two papers in which the answer copies of the petitioner had been lost, be issued to the petitioner forthwith, if not already issued. It is directed that the Secretary, Madhyamik Shiksha Parishad, U.P., Allahabad shall ensure that the cost of Rs.50,000/- is paid to the petitioner by way of Bank draft through the College from where he had appeared in the High School Examination 2004, within one month from today. It is further provided that the respondent-Board shall be at liberty to recover the said cost from the persons/officials found guilty of the negligence of losing the answer copies and further informing the petitioner that on scrutiny, there had been no change even when the copies were missing, but the same may be done only after giving adequate opportunity of hearing to the persons concerned.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2007

BEFORE
THE HON'BLE ANJANI KUMAR, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.20094 of 2007

Satish Chandra Yadav ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri I.N. Singh
Sri Ajay Yadav

Counsel for the Respondents:
Addl. Solicitor General of India

Kendriya Vidyalay Sangathan-Para 81 (b)-Dismissal without Departmental Enquiry-petitioner a P.G.T. teacher attempted to outrage modesty of a girl student-enquiry officer Prima facie found guilty-of moral turpitude including moral sexual behaviour-held-change very serious-a teacher should be model for his pupils-can not be a teacher of such conduct- No interference called for.

Held: Para 6

It is not disputed that before passing the order of termination a summary enquiry was conducted by the Education Officer and the Principal of the School jointly where in the version of the petitioner was also recorded and thereafter he was found prima facie guilty of moral turpitude including immoral sexual behaviour. The charge is very serious, that too against a person who is supposed to maintain an exemplary character, a role model for his pupils. Thus, in our view such a person cannot be allowed to continue as a teacher of the institution.

Case law discussed:
1973 (1) SCC-805

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

1. The writ petition arises out of order dated 5th January 2007 passed by Central Administrative Tribunal, Allahabad dismissing Original Application No.905 of 1999 preferred by the petitioner against order of his dismissal.

2. The petitioner was appointed as Post Graduate Teacher (Biology) in Kendriya Vidyalaya, I.T.I. Naini, Allahabad. A girl student, Km. Akansha Gupta through her father, made a complaint against the petitioner that he attempted to outrage modesty of his daughter whereupon the Principal of the School and Education Officer, Kendriya Vidyalaya Sangathan (Regional Office), Lucknow jointly made summary enquiry giving opportunity to the petitioner also and found the said complaint true. Exercising power under Para 81 (b)·of Education Code of Kendriya Vidyalaya, the Commissioner Kendriya Vidyalaya Sangathan, New Delhi terminated services of the petitioner vide order dated 24th December 1998 and his appeal has been rejected by the Chairman, Kendriya Vidyalaya Sangathan vide order dated 7.5.1999. The petitioner preferred an Original Application No.905 of 1999 which has been dismissed by the Tribunal vide judgment impugned in this writ petition.

3. Learned counsel for the petitioner vehemently contended that Para 81 (b) of Chapter VIII of Education Code of Kendriya Vidyalaya is pari materia with proviso to Article 311 (2) of the Constitution of India and without holding any regular enquiry, termination of petitioner is patently illegal, since it is on an allegation constituting serious misconduct, therefore, the termination amounts to punishment.

4. In our view the submission is thoroughly misconceived inasmuch as admittedly neither Kendriya Vidyalaya Sangathan or KendIiya Vidyalaya is a department of the Government of India nor the petitioner is holder of a civil post and, therefore, Article 311 as such is not applicable in the case. Considering the nature of institution and its different requirements, a provision has been made under the Education Code containing conditions of service of the teachers of Kendriya Vidyalaya Sangathan i.e. Para 81 (b) of Chapter VIII which reads as under:-

"81 (b). Termination of services of an Employee Found Guilty of Immoral Behaviour towards students.

Wherever the Commissioner is satisfied after such a summary enquiry as he deems proper and practicable in the circumstances of the case that any member of the Kendriya, Vidyalaya is

prima facie guilty of moral turpitude involving sexual offence or exhibition of immoral sexual behaviour towards any student, he can terminate the services of that employee by giving him one month's or 3 months' pay and allowances according as the guilty employee is temporary or permanent in the service of the Sangathan. In such cases procedure prescribed for holding enquiry for imposing major penalty in accordance with CCS (CCA) Rules, 1965 as applicable to the employees of the Kendriya Vidyalaya Sangathan shall be dispensed with, provided that the Commissioner is of the opinion that it is not expedient to hold regular enquiry on account of serious embarrassment to the student or his guardians or such other practical difficulties. The commissioner shall record in writing the reason; under which it is not reasonable practicable to hold such enquiry and he shall keep the chairman of the Sangathan informed of the circumstances leading to such termination of service."

5. It provides for termination of service of an employee found guilty of immoral behaviour towards students in order to maintain purity of educational institution and to create an atmosphere of confidence amongst students and parents regarding their safety of their wards. The power of termination has been conferred upon a high authority, namely, Commissioner, Kendriya Vidyalaya Sangathan and where he is satisfied that any member of the Kendriya Vidyalaya is prima facie guilty of moral turpitude or involved in sexual offence or exhibition of immoral sexual behaviour he can terminate such employee by giving one moth's notice or three months' pay and allowances if the employee is temporary or permanent as the case may be and procedure of enquiry shall stand dispensed with in such a case if the Commissioner is of the opinion that holding of enquiry of such case would cause serious embarrassment to the students or their guardians or there are some other practical difficulties. We cannot be oblivious of the fact that status of a teacher in Indian society is different. Here he has been elevated as God, namely, **'GURUR BRAHMA GURUR VISHNU GURUR DEVO MAHESHV ARAH:'**. A teacher creates knowledge, learning, wisdom and equip the students, girls or the boys with ability, knowledge, discipline and intellect to enable them to face challenges of their life. He is preserver of learning and destroys ignorance. Therefore as a member of noble teaching profession he should be a role model and either individually or collectively as a community of teachers should regenerate dedication with the bend of spiritualism in broader perspective to establish quality, competence, character and capacity of the students for successful working of democratic institutions and to sustain them in their later years of life as a responsible citizen in different responsibilities. Without a dedicated and disciplined teacher even the best education system is bound to fail. Therefore, it is the duty of teacher to take care of pupils as a careful parent would take of its children. In Indian society education amongst girls even after independence is wanton due to various factors including rural, culture and other factors. Education to the girls children is national asset and foundation of fertile human resources and disciplined family management apart from their equal participation in socioeconomic and

political democracy. Of late people have realized and started sending their girl children to co-educational institutions under the care of proper management to look after the welfare and safety of the girls. Therefore, greater responsibility is thrust on the management of the school and college to protect young children, in particular, the chastity of girls, bring them up in discipline and dedicated pursuit of excellence and to protect them from all kinds of evils in tile institution as well as outside. The teachers who are kept in-charge bear higher responsibilities and should be more careful. His character and conduct should be like *Rishi* and as *loco parentis*. It goes thus without saying where a teacher fails to maintain such high standard is not befitted to his status."

6. The Apex Court also considered the delicacy involved in such matters in ***Hira Nath Misra and others Vs. Principal, Rajendra Medical College, Ranchi, 1973 (1) SCC 805*** and it was observed that where there are allegations of misbehaviour with girl students it is a delicate matter. The police could not be called in because if an investigation is started, the female students out of sheer fright and harm to their reputation will not co-operate with the police nor an enquiry before a regular tribunal will be feasible since the girl students would not have venture to make their statements in the presence of miscreants for various reasons including fear of retaliation and harassment and also loss of reputation amongst fellow students and others. Authorities, therefore, in their wisdom, have devised a principle which is a reasonable principle in the form of Para 81 (b) and this is a condition of service which has been accepted by the petitioner while entering the service. It is not disputed that before passing the order of termination a summary enquiry was conducted by the Education Officer and the Principal of the School jointly where in the version of the petitioner was also recorded and thereafter he was found prima facie guilty of moral turpitude including immoral sexual behaviour. The charge is very serious, that too against a person who is supposed to maintain an exemplary character, a role model for his pupils. Thus, in our view such a person cannot be allowed to continue as a teacher of the institution.

7. We, therefore, do not find any error in the order of the Tribunal in rejecting petitioner's application. Even otherwise it is not a fit case where this Court, in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India, would like to interfere.

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

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2007

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal No.699 of 1994

Ram Nath and others ...Appellants
Versus.
The Spl. Land Acquisition Officer, Irrigation, District Azamgarh.and others ...Respondents

Counsel for the Appellants:
Sri. J.A. Azmi

Counsel for the Respondents:
S.C.

Land Acquisition Act–Interest on compensation- Land acquired for public purpose- possession taken prior to the date of publication of notice u/s 4(1)– whether the claimant entitled for interest ?- Held-Yes.

Held: Para 9

In view of the above discussion, the appeal is allowed in part to the limited extent. The matter is remanded back to the Special Land Acquisition Officer, Irrigation Department, Azamgarh to determine the amount of compensation towards the rent/damages to which the appellant may be entitled for the use of property as claimed prior to the date of acquisition. The Special Land Acquisition Officer will determine the dispute if so raised after notice to the State Government. The appeal with regard to the rest is dismissed.

Case law discussed:
2002 (1) SCC-142
2004 (4) SCC-79
1991 (1) SCC-262
2005 (12) SCC-443
AIR 1988 Karnataka-49
AIR 1997 SC 2981
AIR 1963 Punjab 411

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

1. The only point mooted in the present appeal is whether a land owner is entitled to get interest from the date of possession of the land acquired by the State Government where possession was taken by the State Government even before the issuance of notifications under sections 4 and 6 of the land Acquisition Act.

2. The facts in brief are as follows:-

Chak No.433 area 260 links situate in Village Katghar Lalganj, Tappa Haveli, Pergana Deogaon, Tahsil Lalganj, District Azamgarh was acquired by the State Government for construction of Tikargarh Minor Canal Division 23. The notification under section 4 of the Land Acquisition Act is dated 15.9.1984 and the notification under section 6(1) is dated 29th of September, 1986. The Special Land Acquisition Officer by his award dated 23rd of September,1986 determined the prevailing market value of the land acquired on the relevant date i.e. the date of publication of notification under section 4(1) of the Land Acquisition Act. The appellants herein were not satisfied with the award of the Special Land Acquisition Officer and the matter was referred to the Civil Court for determining the market value. The 5th Additional District Judge, Azamgarh in L.A.R. No.12 of 1988 found that the claimant appellants are entitled for compensation at the rate of Rs.50,000/-, per acre, solatium at the rate of 30 percent and the interest at the rate of 9 per cent by the award dated 16.5.1989. A review application No.29 of 1989 was filed by the claimant appellants for reviewing the aforesaid order on the ground that they are also entitled to 12 per cent additional compensation on the amount of compensation and the interest at the rate of 9 per cent per annum and thereafter 15 per cent per annum on the amount of compensation or apart thereof which has not been paid or deposited in accordance with the section 28 of the land Acquisition Act. The said review application has been allowed by the order under appeal on the ground that the claimant appellants are entitled to 12 per cent additional compensation and interest at the rate they claimed from the date of notification under section 4(1) of the Act Still being not satisfied the above appeal is at the instance of the claimant appellants.

3. Shri J.A. Kazami, learned counsel for the claimant-appellants in support of the appeal submits only one point. The argument is that the possession of the land in question was taken by the State Government in the year 1977 i.e. before the commencement of the acquisition proceedings under the Land Acquisition Act and therefore the interest on the compensation amount should be granted to him from the date of taking actual possession i.e. the year 1977. The learned standing counsel on the other hand contends that claimant appellants are entitled to get interest as per provisions of the Land Acquisition Act. On a true and proper construction of the Various provisions of the Land Acquisition Act the claimant appellant cannot get interest amount from the date of taking possession if the possession was taken prior to the initiation of land acquisition proceedings.

4. Considered the respective submission of the learned counsel for the parties. The point involved in the above appeal is no longer res integra and has been set at rest by various judgements of the Apex court, referred by the learned standing counsel.

5. In ***Siddappa Vasappa Kuri and another Vs. Special Land Acquisition officer and another (2002) 1 SCC 142*** it has been held that the land owner is entitled to additional compensation from the date of notification up to the date of award even if possession of the land was taken prior to the issuance of the notification under section 4 of the Act. Interpreting section 23 (l-A) it was held that starting point for the purposes of calculating the amount to be awarded thereunder, at the rate of 12 per cent per annum on the market value, is the date of publication of notification under section 4 of the Act. The terminal point for the purpose is either date of award or the date of taking possession, whichever is earlier. In that case possession of the land was taken prior to the publication of section 4 notification. It was held that, that terminal was not available and the only terminal that was available was the date of award.

6. In ***R.L Jain Vs. DDA and others (2004) 4 SCC 79*** the question involved in the present appeal directly came up for consideration therein. The possession was taken before notification issued under section 4 (l) of the Land Acquisition Act. The Apex Court after considering the scheme of the Land Acquisition Act held that taking possession before notification without authority cannot be recognised for the purposes of the Land Acquisition Act. It was held that there are only two sections in the Act which specifically deals with the subject of taking possession of the acquired land. It distinguished its earlier judgement delivered in Shri Vijay Cotton and Oil Mills v. State of Gujrat (1991) 1 SCC 262 and held as follows:-

"*In case the land owner is dispossessed prior to the issuance of preliminary notification under section 4(1) of the Act the Government merely takes possession of land but the title thereof continues to vest with the land owner. It is fully open for the land owner to recover the possession of his land by taking appropriate legal proceedings. He is therefore only entitled to get rent or damages for use and occupation for the period the government retains possession of the property. Where possession is taken prior to the issuance of the preliminary notification, in our opinion, it will be just and equitable that the Collector may also*

determine the rent or damages for use of the properly to which the land owner is entitled while determining the compensation amount payable to the land owner for the acquisition of the property. The provision of Section 48 of the Act lend support to such a course of action. For delayed payment of such amount appropriate interest at prevailing bank rate may be awarded."

7. The Apex Court in no uncertain terms has laid down that where possession is taken prior to the acquisition proceedings a party may have right to claim compensation or interest for the period prior to notification under section 4(1) of the Land Acquisition Act, but such a claim would not be either under section 34 or section 28 of the Land Acquisition Act. The interest under these sections can only start running from the date the compensation is payable. In view of the law as settled by the Apex Court as indicated above, there is no substance in the argument of the learned counsel for the appellants.

8. However, it has been further held in those decisions that the land holder will be entitled to get compensation/damages for the period commencing from the date of taking possession to the date of a notification under section 4(l) of the Act and the Apex Court remanded the matter to the District Magistrate for determination in the case of ***Land Acquisition Officer and another Vs. Hemanagouda and others (2005) 12 SCC 443.*** In para 8 of the report it has been held as follows:-

"In view of the fact that there was an apparent conflict of judicial decisions on the issue of the interpretation of Section 34 till it was resolved in R.L Jain case, we do not think it appropriate to deprive the respondents of their rights, if any, to receive rent or damages from use of the property prior to the date of acquisition. The issue whether the market rate granted under the award pursuant to the acquisition proceedings would amount to such compensation is not determined by us at this stage. Accordingly, we dispose of the appeals by setting aside the decision of the High Court on the ground that no interest on the awarded amount was payable under Section 34 in respect of possession taken prior to the notification under Section 4(1). However, we remand the matter back to the relevant Land Acquisition Authority in Karnataka (Haveri Division) before whom the respondents will be at liberty to raise a claim for rent or damages for any use of property as claimed prior to the date of acquisition. The Collector will determine the dispute if so raised after notice to the State Government."

The learned counsel for the appellant has placed reliance on the following cases:

1. **AIR 1988 Karnataka 49 Smt. Channarajamanni Vs. Union of India and others.**
2. **AIR 1997 SC 2981 D-Block Ashok Nagar (Sahibabad) Plot Holders Association Vs.State of U.P. and others.**
3. **AIR 1963 Punjab 411 Commissioner of Income-tax Vs. Dr. Sham Lal Narula.**

These cases need no discussion as they are besides point.

9. In view of the above discussion, the appeal is allowed in part to the limited extent. The matter is remanded back to the Special Land Acquisition Officer, Irrigation Department, Azamgarh to determine the amount of compensation towards the rent/damages to which the appellant may be entitled for the use of property as claimed prior to the date of acquisition. The Special Land Acquisition Officer will determine the dispute if so raised after notice to thc State Government. The appeal with regard to the rest is dismissed.

10. In the result appeal is allowed in part, as indicated above. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.07.2007

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

Crl. Misc. Application No. 15729 of 2007.

Tribhuvan Nath and others ...Applicants
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Applicants:
Sri. Rajendra Kumar

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

Code of Criminal Procedure –Section 156 (3) – Application for direction to S.O. concern for Registration of case- Magistrate treated the application as complaint by recording statements under section 200 and 202- Held – proper- call for no interference.

Held: Para 4

In view of above legal positions, I am of the view that learned Magistrate has exercised the correct option by treating the application under Section 156(3) Cr.P.C. as complaint. The learned Magistrate recorded the statement of the complainant and made suitable inquiry under section 202 Cr.P.C. and found a prima facie case against the applicant and summoned them for trail. No illegality in order appears.

Case law discussed:
2007(1) JIC 244
ALJ 2007 221, 2007 (1) JIC 44
2001 (3) Crimes 384
JT 2001 (2) SC. 81, 2001 (43) ACC- 50
1995 (2) JIC 1523
2007 (5) ADJ 560

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

1. This application under Section 482 Cr.P.C. was moved by the applicant for quashing the order dated 16.4.2007 passed by Chief Judicial Magistrate, Ghazipur in criminal case no. 493 of 2006, by which the applicants have been summoned for trial for the offence punishable under Sections 406, 498A, 504, 506 IPC and 3/4 Dowry Prohibition Act, police station Kotwali, district Ghazipur.

2. I have heard Shri Rajendra Kumar, learned counsel for the applicants and learned AGA for the State and perused the file.

3. The main point argued in this case by the learned counsel for the applicants is that the magistrate treated the application under Section 156 (3) as complaint and proceeded under Section 200 and 202 Cr.P.C. and according to him that procedure was illegal because the said application cannot be treated as complaint. He has cited the case of

Braham Singh Saini Vs. State of U.P. 2007 (l)JIC 244 in which Hon. Vinod Prasad, J. of this High Court has taken a view that such application cannot be treated as complaint. He has also cited the case of ***Masuman Vs. State of U.P. and another ALJ 2007 (1) 221***, in which the same Hon'ble Judge has taken the same view. But the legal position to my mind is different. In the case of ***Shiv Narain Jaiswal and others Vs. State of U.P. and another 2007 (1) JIC 44,*** Hon'ble R.K. Rastogi, J. of this High Court has also taken a different view. In the case of ***Joseph Mathuri @ Vishveshwarananda and another Vs. Swami Sachidanand Harisakshi and another 2001 (3) Crimes 384 (SC),*** the Hon' ble Apex Court has also taken a contrary view. In ***criminal misc. application no. 7484 of 2004 Mohan Shukla and others Vs. State of U.P. and another,*** Hon. Amar Saran, J. has also taken view that the application under Section 156 (3) Cr.P.C can be treated as complaint. In ***Criminal Revision No.1667 of 2006 Chandrika Singh Vs. State of U.P. Hon. Shiv Charan, J***. has sought to distinguish the case of ***Suresh Chand Jain Vs. State of MP, JT 2001 (2) SC page 81.*** The Full Court decision in the case of ***Ram Babu Gupta Vs. State of U.P. and others, 2001 (43) ACC 50*** has also clarified the matter and it is evident that the application under Section 156 (3) Cr.P.C. can be treated as complaint. Thus, the law laid down by the Division Bench of this Court in the case of ***Surajmal Vs. State 1995 (2) JIC 1523*** does not lay down the correct law. The decision taken by Hon'ble Vinod Prasad, J. in the Masuman 's case has been referred to the larger Bench by Hon'ble Mr. JusticeR.K.Rastogi in ***criminal Misc. Application No. 9297 of 2007, Sukhwasi Vs. State of U.P. 2007 (5) ADJ, 560.***

4. In view of above legal positions, I am of the view that learned Magistrate has exercised the correct option by treating the application under Section 156(3) Cr.P.C. as complaint. The learned Magistrate recorded the statement of the complainant and made suitable inquiry under section 202 Cr.P.C. and found a prima facie case against the applicant and summoned them for trail. No illegality in order appears.

The application under Section 482 Cr.P.C. is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2007

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Revision No. 1031 of 2007

Virendra Mishra and others ..Revisionists
Versus.
State of U.P. & another ..Opposite Parties

Counsel for the Revisionists:
Sri. G.P. Dikshit

Counsel for the Opposite Parties:
Sri Ramanand Pandey
Sri Pradeep Narayan Pandey
A.G.A.

Code of criminal procedure –Discharge by Magistrate–offence u/s 420,467,468–prima facie made out–sufficient material to protect–discharge order by Magistrate illegal–interference by District Judge–held- perfect and justified order.

Held: Para 9

In view of the above discussion and from the perusal of the material collected by the I.O. it appears that prima facie

offence is made out and there is sufficient material to proceed further against the accused. The learned Chief Judicial Magistrate erroneously discharged the revisionists. The order of the discharge dated 12.4.2001 is illegal, which has been rightly set aside by the learned Addl. Sessions Judge, Court No.1, Basti vide impugned order dated 22.3.2007. The impugned order dated 22.3.2007 is a perfect order, it has been passed after considering the legal position and facts of the case.

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

1. This revision has been filed by the revisionists Virendra Mishra, Vishwanath Dubey and Anil Kumar against the order dated 22.3.2007 passed by Addl Sessions Judge, Court no. Basti in Criminal Revision No. 208 of 2001 whereby the revision has been allowed by setting aside the order dated 12.4.2001 passed by the learned Chief Judicial Magistrate, Basti in Criminal Revision No. 440 of 2000 State Vs. Vishwanath Dubey and others whereby the learned Magistrate has discharged the applicants for the offence punishable under sections 419, 420, 467 and 468 IPC.

2. The facts in brief of this case are that in the present case the F.I.R. was registered in case crime no. 150 of 1996 under section 419, 420, 467, 468 IPC at P.S. Kotwali Basti, district Basti alleging therein that there was a racket active in district Basti which was indulged in preparing the forged certificates and marksheets of High School, Intermediate and B.T.C., on the basis of the same forged certificates the members of this racket used to get appointment in primary schools as a teacher in collusion with officials of the office of Basic Shiksha Adhikari and they used to grave money dishonestly from the persons who were curious for getting illegal appointments. The revisionists are the active members of this racket, they are related to each other. One Smt. Suman Devi, the daughter of Virendra Nath Misra who is married with revisionist Anil Kumar, the revisionists got the appointment of Smt Suman Devi, daughter of revisionists Virendra Kumar Mishra as a teacher in primary school, Barauli, district Basti by impersonating procuring the certificates and marksheets of High School, Intermediate and B.T.C. of one another girl Smt. Suman Devi, daughter of Prem Chandra Mishra, resident of village Barha, P.S. Kaundhiyara, district Allahabad, she is wife of Sri Vinod Kumar Tripathi, resident of village Pandey Ka Pura (Chhibaiya), P.S. Sarai Inayat, district Allahabad. The revisionists by playing a fraud and deceiving the D.I.O.S. Basti got the appointment of Smt. Suman Devi, the daughter of Virendra Nath Misra in a primary school, Barauli, Basti and the salary was drawn from the Government treasury, when the complaint was made regarding the aforesaid illegal appointment, her salary was withheld by the department concerned but the revisionists got the enquiry closed against Smt. Suman Devi by producing false affidavit and forged photocopy of Pariwar Register. On the basis of the complaint made against Smt. Suman Devi, she was terminated from the service by B.S.A. on 11.8.1995, with regard of the said allegation, a complaint was made by one Harish Pratap Singh, Advocate also.

3. After lodging the F.I.R. The matter was investigated by the police of P.S. Kotwali and after completing the investigation the charge-sheet was submitted against the revisionists on

1.6.1999 under sections 419, 420, 467, 468 IPC. On the basis of charge-sheet submitted by the I.O. the learned C.J.M. Basti has taken the cognizance and summoned the revisionists to face the trial but discharge the application filed by the revisionists has been allowed on 12.4.2001 and the revisionists were discharged for the offence punishable under sections 419, 420, 467 and 468 IPC by holding that there is no sufficient evidence against the accused persons for framing the charge in the aforesaid offences. Being aggrieved by the above order, the State of U.P. has preferred a revision No. 208 of 2001, the same was allowed and set aside the order dated 12.4.2001 passed by learned Addl. Sessions Judge, Court No.1, Basti on 22.3.2007 and the matter was remitted back to the Magistrate concerned to decide the case in accordance with law, it was also directed to decide the case expeditiously, if possible within a period of six months. The impugned order dated 22.3.2007 is under challenged in the revision in the hand

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4. Heard Sri G.P. Dixit, learned counsel for the revisionists, learned A.G.A. and Sri Ramanand Panday, learned counsel for O.P. No.2 Adya Prasad Tiwari.

5. It is contended by learned counsel for the revisionists that the impugned order dated 22.3.2007 is illegal, it is based on inadmissible evidence and the learned Addl. Sessions Judge, Court No. 1 Basti could not have allowed the revision on the question of fact. It is further contended that in the present case Smt. Suman Devi, the alleged impersonator who got the service on the basis of the forged documents has not been made accused and she has not been charge-sheeted. The I.O. has not interrogated Smt. Suman Devi, daughter of Sri Prem Chandra Mishra whose documents were used by Smt. Suman Devi, daughter of Virendra Nath Misra even her father has also not been interrogated and there is no material collected by the I.O. to show that any forged documents have been used and no material has been collected by the I.O. to show that the revisionists have hatched a conspiracy and impersonating of the same they got the appointment of Smt. Suman Devi, daughter of Virendra Nath Misra on the basis of certificates and marksheets of Smt. Suman Devi, daughter of Sri Prem Chandra Mishra. It is further contended that the material against the revisionists is not sufficient for the conviction of the revisionists. Learned C.J.M., Basti has rightly discharged the revisionists for the offence under sections 419, 420, 467 and 468 IPC by holding that matter is under enquiry and prior its result it is not proper to proceed further against the revisionists. No official of the office of Basic Shiksha Adhikari was interrogated and no such record has been collected by the I.O. during investigation even if it is assumed only Smt. Suman Devi can be made the accused but there is no evidence to show the involvement of the revisionists. If the Suman Devi was not charge- sheeted the present revisionists only being her relatives can not be charge-sheeted. The revisional court committed a manifest error in setting aside the order dated 12.4.2001 passed by learned C.J.M. Basti, the order of the revisional court is not passed after considering the material collected by the I.O. It is based on conjunctures and surmises. The order dated 22.3.2007 is illegal and liable to be set aside.

6. In reply of the above contentions, it is submitted by learned A.G.A. and learned counsel for O.P. No.2 that the proper investigation has not been done by the I.O. Even the statement of Smt. Suman Devi, daughter of Prem Chandra Misra was not recorded and under the influence of revisionists of Virendra Nath Misra, a main accused has not been charge-sheeted, but on the basis of material collected by the I.O. prima facie offence is made out and involvement of the revisionists in commission of the alleged offence is established. The learned C.J.M. has tried to weigh the truthfulness of the allegation and the material collected by the I.O. was meticulously analysed for which he was not legally permitted because, at this stage it is to be seen whether on the basis of material collected by the I.O. prima facie is made out or not. It is not a stage to draw any conclusion that the material is sufficient for conviction or not. The learned C.J.M. has passed erroneous order which has been rightly set aside by the revisional court. The revisional court has not committed any error of law in passing the impugned order which is a well reasoned. Therefore, the impugned order may not be quashed.

7. Considering the facts, circumstance of the case, submissions made by learned counsel for the revisionists, learned A.G.A. and learned counsel for O.P. No.2 and from the perusal of the record as well as the impugned order dated 22.3.2007 passed by learned Addl. Sessions Judge, Court No.1, Basti and the order dated 12.4.2001 passed by the learned C.J.M. Basti, it appears that learned Magistrate has taken the cognizance on the basis of the charge-sheet submitted by the I.O. against the revisionists though the investigation has not been properly done, the important material which could be collected by the I.O. has not been collected even the statement of Smt. Suman Devi, daughter of Prem Chandra Misra has not been recorded whereas the material collected by the I.O. is disclosing the involvement of the revisionists but the learned C.J.M. has discharged the revisionists as if he has decided the case on the basis of the evidence adduced in the court. The material collected by the I.O. was for the consideration before the learned C.J.M., Basti, who has tried to evaluate the evidence and to ascertain the truthfulness of the allegations adjudicating the evidence meticulously, for which, at this stage, he was not legally permitted because at this stage, the truthfulness, veracity and effect of the evidence can not be meticulously adjudicated. At this stage it can be adjudicated that the material is sufficient for prosecution or not, it can not be adjudicated whether the trial is sure to end in the conviction. *At this stage, if there is strong suspicion which leads the court to think that there is ground for presuming that accused has committed an offence then it is sufficient for prosecution* of the accused. At this stage it is obligatory for the Judge to consider in any detail and weigh in a sensitive this way the facts, if remain would be in compitable with the innocence of the accused or not. The standard of test and judgement which is to be in final applied before recording the findings regarding the guilt or otherwise or not, the accused is not exactly to be applied at the stage of framing the charge or discharge the accused.

8. It is also well settled law that strong suspicion against accused, if the

matter remains for the reason of suspicion, can not taken the place of proving of guilt at the conclusion of the trial but on the final stage if there is strong suspicion which leads the court to think that there is ground for presuming that accused has committed an offence then it is not open to the court concerned to say that there is no sufficient ground for proceeding against the accused, it has been held by Hon'ble Apex Court in the case of Superintendent of **Rememberancer , West Bengal Vs. Anil Kumar Bhunja and others 1979 SCC (Crl.) 1938 and in the case of State of Bihar Vs. Ramesh Singh 1977 SCC (Crl.)533.**

9. In view of the above discussion and from the perusal of the material collected by the I.O. it appears that prima facie offence is made out and there is sufficient material to proceed further against the accused. The learned Chief Judicial Magistrate erroneously discharged the revisionists. The order of the discharge dated 12.4.2001 is illegal, which has been rightly set aside by the learned Addl. Sessions Judge, Court No.1, Basti vide impugned order dated 22.3.2007. The impugned order dated 22.3.2007 is a perfect order, it has been passed after considering the legal position and facts of the case. The impugned order does not require any interference therefore, the impugned order is affirmed. The prayer for quashing the impugned order is refused.

Accordingly this revision is dismissed.

APPELATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2007

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal No. 134 of 2007

Manish Sirohi ...Appellant
Versus
Smt.Meenakshi ...Respondent

Counsel for the Appellant:
Sri. Divakar Rai Sharma

Counsel for the Respondent:
Sri. Amit Daga

Hindu Marriage Act, 1955 -Section 14- provision- appeal in continuation of original suit–Decree for Divorce can be passed by the Appellate court- dissolution marriage before expiry of one year- Considering the peculiar fact and circumstances of the case–when both husband and wife voluntarily inclined to withdraw their matrimonial life–continuance of litigation–Cause mental and physical harassment–Decree for divorce passed-by appellate Court instead of remitting the same before the original court.

Held: Para 6

Therefore, it is a fit case to apply the proviso to Section 14 of the Act by the High Court itself in appeal being continuance of original proceeding. Hence, by consent of the parties the appeal is disposed of by passing decree for divorce upon setting aside the order of the court below without remitting to that court unnecessarily in the above circumstances.

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

1. The fact of the case is that the appellant/husband was the petitioner in the court below in making an application in the nature of Section 12 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act') for the purpose of divorce since immediately after the marriage there was no relationship amongst themselves *i.e.* the husband and the wife. The respondent/ wife filed a written statement also specifically stating under paragraph 17 that she is not inclined to continue marital relationship with her husband.

2. Inspite of the same, the Court was not pleased to pass decree/order for divorce taking a plea that as per Section 14 of the Act Court cannot entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed from the date of the marriage.

3. Against this background an appeal was preferred. In the appeal learned /counsel appearing on behalf of the respondent/wife also made the similar submission, as made in the court below. However, the Court was inclined to know directly from the husband and the wife as to whether any chance of reconciliation is available or they are serious in respect of non-continuation of their marita1life.

4. Therefore, pursuant to the earlier direction both the husband and the wife become present before the court. They have given answers to the queries of the Court specifically. Firstly, both of them identified by their learned counsel. Secondly, they have submitted that they are not inclined to continue their marital relationship. Thirdly, they have submitted that they are not inclined to go for any reconciliation. Fourthly, they wanted decree of divorce from this court.

5. We have gone through the provision contained under the proviso to Section 14 of the Act and we find that the High Court can allow to present the petition before lapse of one year from the date of marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. It appears to us that when immediately after marriage no marital relationship developed amongst themselves and they are voluntarily inclined to withdraw relationship, their life should not be allowed to be deserted. When differences have occurred which can not be compromised if at this stage they are separated, they can be able to enjoy their happy marital life elsewhere. Continuance of the litigation will cause mental and physical harassment to them unnecessarily when both of them are not inclined to continue with the relationship at all. Both the parties have withdrawn their allegations and counter allegations against each other.

6. Therefore, it is a fit case to apply the proviso to Section 14 of the Act by the High Court itself in appeal being continuance of original proceeding. Hence, by consent of the parties the appeal is disposed of by passing decree for divorce upon setting aside the order of the court below without remitting to that court unnecessarily in the above circumstances.

However, no order is passed as to costs. Appeal disposed of.
