APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal 80 of 2007

State of U.P. ...Appellants
Versus
Mangal Prasad and others ...Respondents

Counsel for the Appellants:
Sri. R.V. Singh
Sri. Suresh Singh
Sri. P.K. Pandey

Counsel for the Respondents:
Sri. U.N. Sharma
Sri. P.N. Rai
Sri. Ravindra Kumar
Sri. Y.K. Saxena

Constitution of India-Article 226-Salary-work charge employee working for last 29 years-direction by Single Judge to create post and regularise them-so for the direction for creation of post by Single Judge -set aside-strict in accordance with seniority-regularisation may going on-salary as per regular employees-cannot be given keeping in view of latest Law of the Apex Court-however imposition of ceiling on dearness allowance-held-illegal.

Held: Para 22

We are of the considered opinion that in view of the judgment referred to above, all the work charged employees of the Corporation are entitled to the benefit of said judgment. There cannot be any ceiling of dearness allowance on the such work charged employees so long the judgment dated 13.09.2007 holds the field

Case Law discussed:
(1996) 11 SCC 77, AIR 1986 SC 584, (1995) 5 SCC 210; (1997) 3 SCC 632, AIR 1992 SC 2130, (1990) 1 SCC 361; AIR 2006 SC 845, AIR 2001 SC 706, (2005) 1 SCC 639, 2266(SS) of 2007.

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

1. Heard Sri U.N. Sharma Senior Advocate assisted by Sri P.N. Rai Advocate on behalf of the Bridge Corporation, Standing Counsel on behalf of the State of U.P. and Sri Ravindra Kumar Advocate on behalf of the employees.

2. These special appeals have been filed by the State of U.P. as well as the U.P. State Bridge Corporation, established by the State of U.P. against the common judgement of the learned Single Judge delivered in a bunch of 154 writ petitions. All the appeals have been clubbed and are being decided by this judgement. The relevant facts for the decision of these appeals are:

3. U.P. Bridge Corporation has been constituted by the State of U.P. basically for carrying on the construction work of Bridges etc. It is not in dispute that the power to create posts both Class-IV and above in the U.P. Bridge Corporation vest with the State Government. The aforesaid 154 writ petitions were filed by the persons, who were engaged by the Bridge Corporation as daily wager/work charged employees since 1975 onwards, with the prayer that the State Government/Corporation be directed to regularize the services of such petitioners who have completed requisite years of service in the Corporation and further to ensure that such employees are granted minimum of the pay scale admissible to regular employees, till such regularization.

4. Before the writ Court a stand was taken on behalf of the State Authorities/Bridge Corporation that there were no regular vacancies available and therefore no regularization can be directed. Prayer for salary at par with the regular employees working in the Corporation was also disputed on the ground that the nature of appointment of petitioners being different qua the appointment of regular employees, they cannot claim parity with any regularly appointed staff for the purposes of payment of salary.

5. The learned Single Judge, after hearing the counsel for the parties, by means of the impugned judgement and order dated 16th September, 2004 has allowed the writ petitions. It has been held that since the writ petitioners have been working with the U.P. State Bridge Corporation for last more than 29 years, it is patently arbitrary to keep such employees as daily wagers/work charged employee for such a long period. The Court proceeded to direct the State Government to create additional posts in order to ensure that writ petitioners are absorbed against the said newly created posts and are paid salary on regular basis. The Court further provided that till such regularization the interim order granted by this Court permitting the petitioners to continue in service and to be paid current salary as payable to regular workers would continue. It is against this order of the learned Single Judge that the present special appeals have been filed.

6. On behalf of the appellants it is vehemently contended that power to create posts is within the exclusive domain of the employer, in the facts of the case State Government. The State has to take care of its financial commitments and liabilities before creating additional Posts.

7. Today a letter issued by the State Government dated 27th August, 2007 has been brought on record. Under the said letter the total number of posts; both in the regular cadre as well as in the work charged establishment in the Bridge Corporation have been specified. The total number of posts sanctioned within the regular cadre are 1493, while those within the work charged establishment has been provided as 2934. The break up of the post category wise has also been enclosed along with the Government Order. Lastly reference has been made to the letter of the Secretary, State of Uttar Pradesh dated 24th July, 2008, wherein it is recorded that the writ petitioners shall be regularized as and when regular vacancies become available in the Corporation within the regular post created under the aforesaid Government Order dated 27th August, 2007. It is also recorded that seven out of such writ petitioners have already been regularized. The detail of special appeals referable to these writ petitioners has been specified. So far as remaining writ petitioners are concerned, it is mentioned that one of the petitioner has expired and six petitioners still remain to be regularized. The State Government has decided that as and when regular vacancy becomes available in the Corporation their claim for regularization shall also be considered as per the seniority.

8. In view of the aforesaid development, counsel for the writ petitioners-respondent contends before us that the State Government should have created necessary number of posts and in

case the State Government wants some time for creation of new posts, the direction issued for payment of salary at par with the regular employees be maintained and appropriate direction for the purpose be issued.

9. We have heard counsel for the appellants as well as counsels for the writ petitioners and have gone through the records.

10. It cannot be disputed that the power to create posts is within the domain of the employer, in the facts of the case the State Government. The Court while exercising powers under Article 226 of the Constitution of India cannot insist upon the employer to create additional posts so that regularization of daily wage employees can be effected. At best a direction can be issued for consideration of the matter and appropriate orders being passed by the State employer.

11. Having regard to the Government Order, which has been brought on record today, dated 27th August, 2007, we are of the considered opinion that the decision taken by the State Government to create/sanction regular post to the extent of 1493 and 2934 in the work charged establishment for the Bridge Corporation cannot be faulted with nor this Court has the expertise to examine as to whether such creation of posts is as per the requirement of the Bridge Corporation or not.

12. The Court has to rely upon the wisdom of the State Government and its officers who have the necessary expertise qua requirement of work force for an establishment. We, therefore, record that the order passed by the learned Single Judge for creation of additional posts cannot be approved. Any claim of the writ petitioners for regularization has to be considered within four corner of the post created and available with Bridge Corporation. We also take note of the letter dated 24th July, 2008 whereunder seven writ petitioners have already been regularized. The special appeals, with reference to such writ petitioners, who have been regularization, are Special Appeal Nos. 81 of 2007, 84 of 2007, 86 of 2007, 87 of 2007, 88 of 2007,89 of 2007 and 90 of 2007. In view of the aforesaid order of the State Government, the said special appeals have become infructuous so far as the issue of regularization is concerned.

13. So far as the right of writ petitioners, who have yet not been regularized, are concerned, we feel that substantial justice has been done by the appellants by providing that the claim of remaining writ petitioners shall be considered as and when regular vacancies become available within the regular post provided under the Government Order dated 27th August, 2007 (Reference letter of the Secretary dated 24.07.2007). We, however, direct that the claim of remaining writ petitioners for regular appointment shall be considered strictly in accordance with the seniority at the earliest from the date the post so become available.

14. So far as the plea for grant of regular pay scale at par with the regular employees working in the Corporation pending regularization is concerned, we notice that the Government Order itself create different category of the post on the regular side vis-a-vis those for work charge establishment. The pay scale

admissible to the various categories of the posts both on the regular cadre and work charge establishment has also been provided for.

15. It is settled law that any work charged employee cannot claim parity with the regular employees working in the establishment so far salary in the regular pay scale is concerned. At the best they are entitled to the payment of minimum of the wages provided under the statutes or the prevailing wages in the locality only.

16. The legal proposition in that regard has been settled under the judgement of the Hon'ble Supreme Court in the case of State of Haryana & Ors. Vs. Jasmer Singh & Ors., (1996) 11 SCC 77, the Hon'ble Supreme Court considered the provisions of Articles 39 (d), 14 and 16 of the Constitution and held that the principle of 'equal pay for equal work' is not always easy to apply. The Court further observed as under:-

"The respondents, who are employed on daily wagers cannot be treated as on a par with persons in regular service of the State of Haryana holding similar posts. Daily-rated workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfil the requirement relating to age at the time of recruitment. They are not selected in the manner in which the regular employees are selected. In other words, the requirements for selection are not as rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred, and his being subject to the disciplinary jurisdiction of the authorities as prescribed, which daily-rated workmen are not subjected to. They can not, therefore, be equated with regular workmen for the purposes for their wages. **Nor can they claim the minimum of the regular pay scale of the regularly employed."**

17. In Gujarat Agricultural University Vs. Rathod Labhu Bechar & Ors., AIR 2001 SC 706, the Hon'ble Supreme Court considered a similar issue of pay parity to the daily-rated workers working since long considering large number of its earlier judgments including Surinder Singh Vs. Engineer-in-Chief, C.P.W.D., AIR 1986 sc 584, Ghaziabad Development Authority Vs. Kikram Chaudhary, (1995) 5 SCC 210; Basudev Pati Vs. State of Orissa, (1997) 3 SCC 632; Jasmer Singh (supra); State of Haryana Vs. Piara Singh, AIR 1992 SC 2130; Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, (1990) 1 SCC 361; and held that for their absorption etc. the University may frame the Scheme for regularisation and as regularisation cannot be directed in absence of regular post and such employees can be entitled for minimum wages under the Statute, if any, or the prevailing wages in the locality but the question of claiming the minimum of the pay scale of a regular employee would not arise.

18. In State of Karnataka & Ors. Vs. KGSD Canteen Employees Welfare Association & Ors., AIR 2006 SC 845, after considering very large number of its earlier judgments and considering the provisions of Articles 14, 16 and 39 9(d) of the Constitution of India, the Hon'ble Supreme Court held that daily wagers cannot claim pay scale as that of Government employees. The Court again reiterated the law laid down by it in its

earlier judgment in Mahendra L. Jain & Ors. Vs. Indore Development Authority & Ors., (2005) 1 SCC 639, wherein it has been held that the daily wagers do not hold the post, therefore, they were not the employees of the State. Salary of a regular scale of pay, it is trite, is payable to an employee only when he holds a status.

19. In view of the above, the law can be summarised that daily wagers do not hold the post. They cannot claim parity with those who are working in the regular cadre as they earned a status, therefore, the question of parity with them would not arise. The pay scale may depend upon large number of factors including seniority, experience, educational qualification, mode of selection and it cannot be claimed by the persons unless they establish complete equality with those who are working in regular cadre. The daily wagers are entitled only for minimum of the wages fixed by the State Government or the wages prevailing in the locality.

20. In view of the aforesaid, the present special appeals are disposed of by providing that the claim of the remaining writ petitioners for regular appointment shall be considered strictly in accordance with the seniority by the appellants as early as possible on a regular vacancy within the regular cadre specified under the Government Order dated 27th August, 2007, becoming available.

21. At this stage counsel for the respondents- writ petitioners contended that despite the judgment and order of this Court dated 13th September, 2007 passed in Writ Petition No. 2266(SS) of 2007 (along with connected writ petitions) the Managing Director of Bridge Corporation has passed an order dated 26th June, 2008 whereby the ceiling earlier fixed qua payment of dearness allowance has been relaxed with regard to some of the daily wage employees only.

22. We are of the considered opinion that in view of the judgment referred to above, all the work charged employees of the Corporation are entitled to the benefit of said judgment. There cannot be any ceiling of dearness allowance on the such work charged employees so long the judgment dated 13.09.2007 holds the field.

23. Counsel for the State as well as Bridge Corporation in reply submitted that an special appeal against the judgment of the learned Single Judge dated 13th September, 2007 has been filed. However, no interim order has been granted.

24. We may clarify that any payment as directed under the judgment and order dated 13th September, 2007 shall abide the orders, which may have been or may be passed in the special appeal filed against the same

In view of the aforesaid, the judgment of the learned Single Judge is substituted by the directions issued above. All the special appeals are disposed of accordingly. Appeal Disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal No. 223 of 2008
Connected with:
First Appeal No. 222 of 2008

Bharat Petroleum Corp. Ltd ...Appellant
Versus
M/s. Amar Autos & others...Respondents

Counsel for the Appellant:
Sri Sudhir Chandra
Sri Prakash Padia.

Counsel for the Respondents:
Sri Shashi Nandan
Sri P.C. Jain

Code of Civil Procedure-Order XXIX Rule I-Rejection of Plaint-suit instituted on behalf of company plaint signed by holder of power of attorney-Trail court rejected the plaint on the ground that such deed power of attorney not verified by notary nor registered under Section 17 of the registration act-held-totally perverse-once suit instituted duly verified and supported by affidavit-it stand better than notary-more over the Trail court can ask the signature of plaint to file better affidavit expanding the authority-but rejection order held arbitrary- illegal-liable to set aside.

Held: Para 11

There is a thinner line in between authorization to sign and verify the pleadings, and to institute a suit on behalf of the corporation, company or a body corporate. Whenever a person is authorized to sign and verify the pleadings other than verification of plaint, written statement, memorandum of appeal, etc., it is doing so by filing affidavit in support of such contentions. Therefore, it stands on a better position than ordinary verification. But a person when verifies the plaint, written statement or memorandum of appeal, it is a verification simplicitor, meaning thereby that the verification part is also to be evidently proved unlike an affidavit, which itself is an evidence. Hence, authorization to institute a suit stands in the lower side than putting signature and verifying a pleading by way of an affidavit. On the other hand, signature and verification of the pleading of a plaint can not be made for the sake of signature and verification alone but for the purpose of filing of the same before the Court either by him or by his learned Advocate. As soon as it is filed, the same will be treated to be institution of such proceeding by the person who has signed and verified. It is automatic. Institution of suit and right to institute the suit are distinct and different. The argument of Mr. Shashi Nandan restricted only to the first part of Order XXIX Rule 1 of C.P.C. but not to the last part. If the suit is proceeded and the evidence is led and if any of the defendants want to challenge the verification of the plaint, he can call the deponent as witness for the purpose of examination. But Court can not prevent anyone from instituting a suit when his authority is apparently satisfactory. No body will be prevented from enforcing his legal right. It is a gross mistake on the part of the Court below to construe that the power of attorney should be registered and then only the suit can be instituted by a representative of the company or corporation. Moreover justification of filing the plaint by the authorised representative of the corporation or company will be considered from the practical point of view. If the Court below is not happy, it could have called upon the company to file an affidavit of competency, which is desirable under such circumstances, but not outright rejection of the plaint. Therefore, from any angle the order/s impugned appear to be perverse in

nature. Thus, in totality the orders impugned in both the appeals can not be sustained.

Case law discussed:

AIR 1997 SC 3, AIR 2006 SC 269, 2008 (36) PTC 210 (Del.)(DB), AIR 1991 Delhi 25

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

1. Both the appeals are arising out of the order/s passed by the learned Judge, Small Causes/ Civil Judge (Senior Division), Agra dated 24th January, 2008 in Original Suit No. 225 of 2007 and 23 of 2007, by which the suits have been dismissed under Order VII Rule 11 of the Code of Civil Procedure (hereinafter called as the 'C.P.C.') upon accepting the objection/s on the part of the respondents. Out of aforesaid two orders, impugned in the present appeals, only difference is in one of such orders it has been held that the argument of the plaintiff therein has no force to say that the case is not covered under the provisions of Order II Rule 2 of the C.P.C. However, both the appeals are taken together for analogous hearing on informal papers, to which neither of the parties have any objection.

2. Mr. Sudhir Chandra, learned Senior Counsel appearing for the appellant in both the appeals, contended that two suits have been filed by the appellant when one suit has been filed by the defendants in the Court below. Both of their suits are dismissed only on the ground that the power of attorney/s, as executed by the plaintiff-company in favour of one Sri Amit Garg through the Chairman & Managing Director, can not authorize such person to institute the suit since it/those is/are not registered. Court below is apparently prejudiced which necessitates transfer of the case.

3. So far as merit of the appeals are concerned, he contended that by a power of attorney dated 26th September, 2005, the Chairman & Managing Director was authorised on behalf of the company to act in this behalf inclusive of power to institute, defend and prosecute, enforce or resist any suit or other actions and proceedings, appeals in any Court anywhere within its civil, criminal and other jurisdictions etc. inclusive of power of delegation. Clause-19 of such power of attorney speaks as follows:

"From time to time to substitute and appoint any person or persons to act under or in the place of the said Attorney in respect of all or any of the matters and to revoke every such substitution at pleasure and appoint others."

At the end of such power of attorney it says as follows:

"AND the Company hereby ratifies and confirms and agrees to ratify and confirm hereafter all and whatsoever the said Attorney or his substitute or substitutes shall lawfully do or cause to be done in or about the premise by virtue of these presents and declare that these presents shall at all times be conclusively binding in favour of third parties, who have not received notice of revocation of this power."

4. Said Sri Amit Garg was appointed to be true and lawful attorney of the company by virtue of and in exercise of the power given to said Chairman & Managing Director to do the needful by a further power of attorney dated 30th October, 2005. One of the important clause of such power of attorney is as follows:

"To institute, prosecute, enforce, defend, answer or oppose all actions and other legal proceedings and demands touching any of the matters aforesaid or any other matters in which the Company is now or may hereafter be interested or concerned and also to refer to arbitration, submit to judgment or become non-suited in any such action or proceedings as aforesaid and for such purpose to appear before any Judges, Magistrates, Consuls or other Officers in any Court or Consulate."

Both the power of attorneys are notarized power of attorneys.

5. It appears from Section 85 of the Indian Evidence Act, 1872 that in case of filing of power of attorney, it should have some presumptive value. Therefore, we require to test the essence of Section 85 hereunder:

"85. Presumption as to powers-of-attorney.-- *The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated."*

6. Section 17 of the Registration Act, 1908 gives a list of documents, which are compulsorily registrable. No such provision is available in such section which speaks that a power of attorney is compulsorily registrable.

7. According to Mr. Sudhir Chandra, the principles of 'agent' as under Sections 182, 190 and 191 of the Indian Contract Act, 1872 are applicable in this case particularly in view of Clause 19 of the original power of attorney.

8. Mr. Chandra cited a judgement reported in **AIR 1997 SC 3 (United Bank of India Vs. Naresh Kumar and others)** to establish that it is not disputed that a company or corporation can sue and be sued in its own name. As a company is a juristic entity, it is obvious that a person has to sign the pleadings on behalf of the company. Even in the absence of any formal letter of authority or power of attorney having been executed a person under Order XXIX Rule 1 of C.P.C. can, by virtue of the office which he holds, sign and verify the pleadings on behalf of the corporation. A person may be expressly authorised to sign the pleadings on behalf of the company, for example, by the Board of Directors passing a resolution to that effect or by a power of attorney having been executed in favour of any individual. In absence thereof and in cases where pleadings have been signed by one of its officers a corporation can **ratify** the said action of its officer in signing the pleadings. Such ratification can be **expressed** or **implied**. The Court can, on the basis of the evidence on record, and after taking all the circumstances of the case, specially with regard to the conduct of the trial, come to the conclusion that the corporation had ratified the act of signing of the pleading by its officers. In **AIR 2006 SC 269 (Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and another)** the Supreme Court held, in a similar circumstance, that there is no scope of automatic rejection of any proceeding without affording an opportunity to the person concerned to rectify the defect. Procedure, a hand-maiden to justice, should never be made as a tool to deny

justice or perpetuate injustice, by any oppressive or punitive use. By citing a Division Bench judgement of Delhi High Court reported in **2008 (36) PTC 210 (Del.)(DB) (Eureka Forbes Ltd. and another Vs. Hindustan Unilever Ltd.)** Mr. Chandra said that the Division Bench held in a preliminary objection based on Order VII Rule 11 of the C.P.C., the averments made in the petition have to be assumed to be true. The Court has then to see whether said averments disclose a cause of action or triable issue.

9. Mr. Shashi Nandan, learned Senior Counsel appearing for the respondents, on the other hand, drawn our attention to Order XXIX Rule 1 of the C.P.C., which speaks as follows:

"1. Subscription and verification of pleading.-- *In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is liable to depose to the facts of the case."*

10. By showing such provision and relying upon the persuasive value of a Single Bench judgement of Delhi High Court reported in **AIR 1991 Delhi 25 (M/s. Nibro Limited Vs. National Insurance Co. Ltd.)** he stated that this provision only authorises a person to sign and verify the pleadings on behalf of the corporation but does not authorise to institute suit on behalf of the corporation. He said that unless a power to institute a suit is specifically conferred on a particular Director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of Directors only by passing a resolution in this regard. The question of authority to institute a suit on behalf of the company is not a technical matter. It has far reaching effects. It often affects policy and finances of the company. Therefore, there is no wrong on the part of the Court below in dismissing the suits under Order VII Rule 11 of the C.P.C., which the Court below is otherwise competent to pass when found from the statement in the plaint that the same is barred by any law.

11. Upon considering the pros and cons of the matter we are of the view that the learned Judge of the Court below has proceeded in a wrong premises and with hot-haste. According to us, a power of attorney or an affidavit of such nature is only required to prima facie satisfy the Court that a company or corporation or a body corporate has presumably proceeded with the suit under its seal and signature. It has nothing to do with the registration of the document unless it is compulsorily registrable. Persuasive value of **M/s. Nibro Ltd. (supra**) can not pursue us. There is a thiner line in between authorization to sign and verify the pleadings, and to institute a suit on behalf of the corporation, company or a body corporate. Whenever a person is authorized to sign and verify the pleadings other than verification of plaint, written statement, memorandum of appeal, etc., it is doing so by filing affidavit in support of such contentions. Therefore, it stands on a better position than ordinary verification. But a person when verifies the plaint, written statement or memorandum of appeal, it is a verification simplicitor, meaning thereby that the verification part is also to be evidently proved unlike an affidavit, which itself is an evidence. Hence,

authorization to institute a suit stands in the lower side than putting signature and verifying a pleading by way of an affidavit. On the other hand, signature and verification of the pleading of a plaint can not be made for the sake of signature and verification alone but for the purpose of filing of the same before the Court either by him or by his learned Advocate. As soon as it is filed, the same will be treated to be institution of such proceeding by the person who has signed and verified. It is automatic. Institution of suit and right to institute the suit are distinct and different. The argument of Mr. Shashi Nandan restricted only to the first part of Order XXIX Rule 1 of C.P.C. but not to the last part. If the suit is proceeded and the evidence is led and if any of the defendants want to challenge the verification of the plaint, he can call the deponent as witness for the purpose of examination. But Court can not prevent anyone from instituting a suit when his authority is apparently satisfactory. No body will be prevented from enforcing his legal right. It is a gross mistake on the part of the Court below to construe that the power of attorney should be registered and then only the suit can be instituted by a representative of the company or corporation. Moreover justification of filing the plaint by the authorised representative of the corporation or company will be considered from the practical point of view. If the Court below is not happy, it could have called upon the company to file an affidavit of competency, which is desirable under such circumstances, but not outright rejection of the plaint. Therefore, from any angle the order/s impugned appear to be perverse in nature. Thus, in totality the orders impugned in both the appeals can not be sustained. Hence, the orders dated 24th January, 2008 passed by the Court below in the above referred suits, impugned in the instant appeals, are set aside. Thus, both the appeals are allowed without imposing any cost.

12. The suits will be heard as expeditiously as possible. In case of any displeasure of the parties about particular Court, it is open for them to approach the learned District Judge, who is administrative head of the District, for transferring the matters from one Court to other but we should not judicially encroach upon such field to maintain the judicial restraint. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2008

BEFORE
THE HON'BLE (MRS) POONAM SRIVASTAV, J.

Second Appeal No. 452 of 2008

Late Sohan Lal and others ...Appellant
Versus
Sabhajeet ...Respondent

Counsel for the Appellant:
Sri. R.K. Mishra

Counsel for the Respondent:
Sri. V.K. Shukla

Code of Civil procedure-Section 100-Suit for cancellation of sale deed-plaintiff/appellant an old illiterate lady-denied the execution of document or receiving any amount towards compensation-allegation of fraud and misrepresentation also made-no specific issue framed-held-judgment and decree passed by Court below cannot sustain-accordingly quashed-remanded the case with direction to frame specific issue and give fresh finding.

Held: Para 11

A bare perusal of the two judgments, it transpires that the courts were in a hurry to dismiss the suit and appeal in a slip shod manner without framing proper issues. I refrain from giving any opinion on merits since the matter is remanded to the trial court to decide the suit afresh after framing proper issues. In a suit for cancellation of the sale deed on the ground of non-payment of consideration and fraud, specific issues are liable to be framed regarding which I have already indicated in the foregoing part of my judgment.

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

1. Heard Sri R.K. Mishra, learned counsel for the appellants and Sri V.K. Shukla, learned counsel for the caveator/respondent.

2. This is a second appeal against the judgment and decree dated 17.3.2008/26.3.2008 passed by the Additional District Judge, court no.1, Azamgarh, in civil appeal no. 278 of 1997, Ram Lal Vs. Sabhajeet, confirming the judgment and decree dated 25.7.1997/2.8.1997 passed by the Additional Civil Judge (Junior Division), court no.12, Azamgarh in original suit no. 1023 of 1992.

3. The suit was instituted claiming relief for cancellation of the registered sale deed dated 1.7.1992 in favour of the defendant/respondent on the ground that it was got executed by the defendant/respondent by practising fraud, mis-representation and misleading the appellant and without payment of any sale consideration. The plaintiff/appellant is owner in possession of the disputed plot. The plaintiff is aged about 75 years old and infirm. He is an uneducated person and that he had sufficient means to live and there was no necessity for him to sell the land in question. Copy of the plaint has been annexed as annexure no. 2 to the affidavit filed in support of the stay application. On perusal of the plaint, it transpires that there was specific pleadings that he had executed a power of attorney in favour of his son Chhotey Lal for looking after his property. The relationship between the son and the plaintiff became our and uncordial, also certain conflict arose between the father and son, which led to the plaintiff's decision to cancel the aforesaid power of attorney. The plaintiff apprehended that his son will take away his property.

4. The defendant availed this opportunity and on the pretext of getting the power of attorney cancelled took him to the office of the Registrar. The plaintiff was ill and suffering from high fever, he did not understand and the defendant taking advantage of his vulnerable situation, fraudulently got his thumb impression on the sale deed in respect of the land. The plaintiff never intended to sell his property in dispute whatsoever. The defendant belongs to the same caste and village and always pretended that he wanted to help the plaintiff as he was ill and infirm person. Later when the plaintiff came to know through certain acquaintances of the village that the defendant instead of getting the power of attorney cancelled, got the sale deed executed on which the plaintiff had endorsed his thumb impression believing it to be a deed of cancellation of power of attorney, he immediately instituted the suit. It was also pleaded that the plaintiff never handed over possession of the disputed

plot to the defendant and possession is still continuing with the plaintiff/appellants.

5. Recital of the plaint has been placed before me by the counsel for the appellants in support of his argument that the case set up before the trial court was clear and specific that the sale deed was got executed by the defendant without any consideration and by practicing fraud while he was very ill in the month of June, 1992. The plaintiff was misled and he believed that the defendant is only trying to extend a helping hand by accompanying him to the Tehsil for getting the power attorney in favour of plaintiff's son cancelled.

6. The trial court framed only two issues. First one whether the sale deed is liable to be cancelled for the reasons detailed in the plaint? Second issue is in respect of entitlement of the relief claimed by the plaintiff/appellants. The trial court dismissed the suit on the ground that there was no medical certificate in support of the contention of the plaintiff that he was ill at the relevant time and also that plaint allegation by the plaintiff is not worthy of reliance, since he admitted that the thumb impression on the disputed sale deed was that of the plaintiff himself. The plaintiff preferred a regular appeal before the District Judge, who confirmed findings of the trial court.

Learned counsel for the appellants has pressed following substantial questions of law, which are enumerated below:

"1. Whether the courts below have committed illegality in recording finding without framing proper issues on the pleading of the parties and as such the findings of the court below are illegal and without jurisdiction.

2. Whether the courts below have committed illegality in not recording the finding of delivery of possession as well as payment of consideration at the time of execution of alleged sale deed and alleged to have been executed in favour of the defendant, which is no sale deed under the law?

3. Whether in absence of recited in the sale deed with regard to transfer of possession by the vendor to the vendee and payment of sale consideration by the vendee to the vendor will amount to valid transfer under the law?"

7. Learned counsel for the appellants submits that the specific case of the plaintiff set up before the trial Judge was that he being an old infirm ailing person, he did not realize that he is being duped by the defendant to endorse his thumb impression on the sale deed, which the plaintiff believed it to be a deed of cancellation of power of attorney in favour of his son. The plaintiff specifically pleaded that he had no need to sell his land and also that he was misled by the defendant while he was in a condition when he could not understand the fraud practiced by the defendant taking advantage of his ill health, lack of education and understanding.

8. Learned counsel for the defendant/respondent has strenuously disputed arguments advanced on behalf of the appellants and has argued that findings of the fact arrived at concurrently by the two courts cannot be interfered in exercise of jurisdiction under Section 100 C.P.C.

9. However, learned counsels for the respective parties have agreed that the instant second appeal may be decided at this stage itself without summoning record of the lower court. Accordingly, I proceed to decide this appeal on the three substantial questions of law enumerated hereinabove.

10. After going through the two judgments, the plaint and written statement, it is apparent that the courts below have failed to frame proper issues such as specific pleadings in the plaint regarding infirmity of the plaintiff at the time of execution of the sale deed. Specific assertion in the pleading is that he was not able to understand the implication at the time when he was made to endorse his thumb impression on the sale deed by the defendant, he misrepresented it to be a deed of cancellation of power of attorney. It was incumbent on the courts below to have framed specific issue regarding payment of consideration. The question that despite the sale deed being executed in the year 1992, the possession continues to be that of the plaintiff as well as whether the plaintiff/appellants were entitled to the benefit available to a Pardanasheen lady while deciding the suit on a clear pleading which would entitle him to all the benefits given to a Pardanasheen lady, thereby a heavy burden lay on shoulders of the defendant.

11. A bare perusal of the two judgments, it transpires that the courts were in a hurry to dismiss the suit and appeal in a slip shod manner without framing proper issues. I refrain from giving any opinion on merits since the matter is remanded to the trial court to decide the suit afresh after framing proper issues. In a suit for cancellation of the sale deed on the ground of non-payment of consideration and fraud, specific issues are liable to be framed regarding which I have already indicated in the foregoing part of my judgment. Also age, infirmity and other aspects are liable to be taken into consideration where there is an unambiguous pleading that he was tricked by the defendant in endorsing his thumb impression on the sale deed in question.

12. I direct that the trial court shall permit the parties to lead evidence, and ensure that the suit is decided within a period of six months from the date a certified copy of this order is produced before him. The contesting parties shall co-operate with the trial court without causing any delay as the matter is already pending since the year 1992. I am of the considered view that the two judgments suffer from substantial error inasmuch as the courts below failed to frame proper issues on the basis of pleadings of the parties and this resulted in miscarriage of justice. Three substantial questions of law raised by the counsel for the appellants are obvious on the perusal of the two judgments.

13. The two judgments under challenge are hereby quashed. The second appeal is allowed. The matter is remanded to the trial Judge for deciding afresh. Cost on parties. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2008

BEFORE
THE HON'BLE DR. B.S. CHAUHAN, J.
THE HON'BLE R.D. KHARE, J.

Special Appeal 531 of 2002

Raj Kumar Yadav ...Applicant
Versus
The State of U.P. & others ...Respondents

Counsel for the Applicant:
Sri. H.S.N. Tripathi
Sri. S.K. Pandey
Counsel for the Respondents:
S.C.

U.P. Government Servant (Termination of Services) Rules 1975-termination-with stipulation no longer requirement of services-appointment purely on temporary basis under Rule 1975-without putting stigma-held-proper-temporary employee has no right to hold the post-another question regarding automatic confirmation after completion of probation period-in absence of appointment letter-period of probation can not be specified-even if period specified-No automatic confirmation-held-termination order perfectly valid.

Held: Para 22 & 30

In the instant case, the order impugned dated 14.09.1998 by which the services of the petitioner-appellant had been terminated, reveal that the petitioner appellant had been appointed on temporary basis under the provisions of the U.P. Government Servants (Termination of services) Rules, 1975. This case is squarely covered by the judgement of the Hon'ble Supreme Court in Kaushal Kishore Shukla (supra).

In view of the above, the appeal lacks merit and is accordingly dismissed.

Case Law discussed:
AIR 1992 SC 496; (1994) 5 SCC 177; (1994) 5 SCC 180; (1995) 1 SCC 638; AIR 1994 SC 1558; 1971 (2) All E.R. 1278; AIR 1992 SC 1593; AIR 1997 SC 2126; (1997) 2 SCC 534; JT 2000 (10) SC 199; AIR 2001 SC 102; AIR 1991 SC 1145; AIR 1992 SC 677; (1998) 5 SCC 450; (2001) 10 SCC 83; AIR 2003 SC 923; AIR 2003 SC 1175;. (2003) 3 SCC 485; (1994) 2 SCC 630; (1987) Supp. SCC 497; (1997) 3 SCC 194; (1996) 8 SCC 454; AIR 1992 SC 2070; AIR 1995 SC 768; 1987 Supp SCC 497; 1998 Supp SCC 428; AIR 1992 SC 2130; A.I.R. 1968 SC 1210; AIR 1985 SC 603; AIR 1986 SC 1844; AIR 1988 SC 286; 1996 FLR 258; 1994 Lab.I.C. 859; 1995 Suppl (3) SCC 364; AIR 1996 SC 750; AIR 1996 SC 2093; (1997) 7 SCC 443; AIR 1962 SC 1711; AIR 1966 SC 175; AIR 1966 SC 1842., (2008) SCC 653.

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

1. This Special Appeal has been filed against the impugned judgment and order dated 22.04.2002 passed by the learned Single Judge by which he has rejected the claim of the petitioner on the ground that he was merely a temporary employee and has no right to hold the post. The learned Single Judge further held that even if a person is appointed on probation and unless an order in writing is passed for confirmation and he is continuing beyond the period of probation provided under the rules, he would not be deemed to have been confirmed automatically, merely because the probation period is over.

2. The facts and circumstances giving rise to this case are that the petitioner-appellant was appointed as a Constable in Provincial Arms Constabulary (hereinafter called the 'P.A.C.') on temporary basis. No order of confirmation had ever been passed. The services of the petitioner-appellant were terminated after working for about seven

years on the ground that his services were no longer required, vide order dated 14.09.1998. Being aggrieved, the petitioner-appellant filed Writ Petition No. 42766 of 1998, which has been dismissed by the order impugned dated 22.04.2002. Hence the present Special Appeal.

3. It has been submitted by the learned counsel for the petitioner-appellant that under no circumstance, the petitioner-appellant could be removed from service merely on the ground that his services were no longer required, even if he was holding the post on temporary basis. Secondly, it has been submitted by the learned counsel for the appellant that the petitioner-appellant had been appointed on probation, though no confirmation order had been passed, he would be deemed to have been confirmed after the period of confirmation was over.

4. Learned Standing Counsel appearing for the respondents has vehemently oposed the Special Appeal contending that the petitioner-appellant could not claim any right on the post and if his services were no longer required, he had rightly been removed. More so, if he was appointed on probation period and had not been confirmed after the expiry of the period of probation, that does not mean that he was deemed to have been confirmed. Therefore, he submitted that the appeal lacks merit and is liable to be dismissed.

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

6. It is settled legal propositions that the person, who has been appointed on ad hoc basis with the conditions stipulated in his appointment letter, his services could be terminated in terms of the appointment letter The petitioner does not, have a right to claim any relief if his services are terminated in terms of the letter of appointment.

7. In State of U.P. & ors. Vs. Kaushal Kishore Shukla, 1991 (1) SCC 691, the Apex Court has categorically held as under:-

"Under the service jurisprudence a temporary employee has no right to hold the post and his services are liable to be terminated in accordance with the relevant service rules and the terms of contract of service."

8. In a case like the instant, the Court has to be satisfied as what is the legally justiceable right of the petitioner which has been infringed and for which the petitioner can resort to the discretionary relief under Article 226 of the Constitution of India. The Supreme Court in Parshotam Lal Dhingra Vs. Union of India, AIR 1958 SC 36, has held that" A person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier" and further held that" a Government servant holding a post temporarily does not have any right to hold the said post." In R.K Misra Vs. U.P. State Handloom Corporation, AIR 1987 SC 2408, the Apex Court has taken the same view.

9. A temporary employee has no right to hold the post and his services are liable to be terminated without assigning any reason either under the terms of the contract providing for such termination or

under the relevant statutory rules regulating the terms and conditions of temporary servants. Similarly, in Triveni Shankar Saxena Vs. State of U.P. & ors., AIR 1992 SC 496; Commissioner of Food & Civil Supplies Vs. Prakash Chandra Saxena, (1994) 5 SCC 177: Ram Chandra Tripathi Vs. U.P. Public Services Tribunal & Ors., (1994) 5 SCC 180; (i) Madhya Pradesh Hast Shilpa Vikas Nigam Ltd. Vs. Devendra Kumar Jain & Anr., (1995) 1 SCC 638; and Kaushal Kishore Shukla (supra), the Apex Court has categorically held that incumbent to a post who has been given appointment on temporary basis, terminable without notice, has no right to hold the post and he is not entitled for any opportunity of hearing before his services are dispensed with as his termination does not amount to forfeiture of any legal right.

10. In Ravi S. Naik Vs. Union of India, AIR 1994 SC 1558, the Hon'ble Apex Court held that in such cases even principles of natural justice do not require to be observed. The Court placed reliance on the observations made in Malloch Vs. Aberdeen Corporation, 1971 (2) All E.R. 1278, wherein it has been observed as under:-

"A breach of procedure, whether called a failure of natural justice or an essential administrative fault cannot give him a remedy in the courts, un-less behind it there is something of substance which has been lost by the failure. The Court does not act in vain."

11. In Life Insurance Corporation of India Vs. Raghavendra Seshagiri Rao Kulkarni, (1997) 8 SCC 461, the Apex Court explained the difference of a permanent employee and an employee holding the post on probation and held that the services of a probationer cannot be equated with that of a permanent employee who, on account of his status, is entitled to be retained in service and his services cannot be terminated abruptly without any notice or plausible cause. "This is based on the principle that a substantive appointment to a permanent post in a public service confers substantive right to the post and the person appointed on that post becomes entitled to hold a lien on that post." However, innterpreting/enforcing the terms of appointment which provided for discharge of the said probationer from service at any time during the period of probation or extended period of probation, without any notice or without assigning any cause, the Court held that as his termination was. in consonance with the terms and conditions of his appointment letter, he cannot be heard raising grievance.

12. In State of Punjab & ors. Vs. Surindra Kumar & ors. AIR 1992 SC 1593, the Apex Court has held that the court must seek the adherence to the terms and conditions of the appointment and there is no reason why terms and conditions of appointments cannot be enforced in a contract of service.

13. In Hindustan Education Society & Anr. Vs. SK Kalim SK Gulam Nabi, AIR 1997 SC 2126, the Apex Court has held that where the rules specifically provide for permanent appointment on probation for a specific period and an employee is appointed without stipulating any condition regarding probation, the inference is to be drawn that he was not appointed in substantive capacity. In Avinash Nagra Vs. Navodaya Vidyalaya

Samiti & ors., (1997) 2 SCC 534, the Apex Court has held that a society can terminate the services not only of a temporary employee but also of a permanent employee by giving him one month's notice or three months' pay and allowances in lieu thereof if the terms of appointment and rules so permit and such termination may be valid in a given cases even if the principles of natural justice have not been complied with.

14. In Chandradeo Gautam Vs. State of U.P. & ors., JT 2000 (10) SC 199 the Hon'ble Supreme Court held that the termination of services of temporary employee does not require interference on being removed on any ground as it does not cast any stigma or aspersion on him. In Nazira Begum Lashkar & ors. Vs. State of Assam, AIR 2001 SC 102, the Apex Court held that where appointment neither confers any right nor any equity in favour of the employee, as the appointment was purely temporary and could be terminated without notice, no grievance can be entertained by such employee. More so, he cannot claim any equitable relief from any Court.

15. Similar view has been reiterated in Ramakant Shripad Sinai Advalpalkar Vs. Unio of India & ors., AIR 1991 SC 1145; K.S.P. College Stop-Gap Lecturers Association Vs. State of Karnataka, AIR 1992 SC 677; Punjab State Electricity Board;and anr. Vs. Baklev Singh, (1998) 5 SCC 450; A.P. State Federation of Coop. Spinning Mills Ltd. & Anr. Vs. P.V. Swaminathan, (2001) 10 SCC 83; Union of India Vs. A.P. Bajpai, AIR 2003 SC 923; & Dhananjay Vs. Chief Executive Officer Zila Parishad, AIR 2003 SC 1175.

16. It has further been held in these cases that termination of the services of the temporary employees under the relevant Rules does not cast any stigma and it remains termination simplicitor.

17. In Dr. Chanchal Goyal (Mrs.) Vs. State of Rajasthan, (2003) 3 SCC 485, the Apex Court held that a person appointed on a tenure post or temporarily or on ad-hoc basis does not have right to hold the post even if the person who has regularly been appointed has not joined the post for the reason that the person next to him or from the waiting list in the regular selection would have a right to join the post and in all circumstances, a temporary or ad hoc employee has to vacate the post so that the regular selected candidate may join. Even if an employee continued for a long-time, that does not crystallize into any enforceable right nor such an employee can claim any lien over the said post unless he stands regularized.. While deciding the said case, a very heavy reliance had been placed on the earlier judgments in Jammu & Kashmir Public Service Commission & Ors. Vs. Dr. Narinder Mohan & Ors., (1994) 2 SCC 630; & Dr. A.K. Jain & Ors. Vs. Union Of India & Ors., (1987) Supp. SCC 497.

18. In Union of India & Ors. Vs. Harish Balkrishna Mahajan, (1997) 3 SCC 194, the Apex Court reiterated the law laid down in State of U.P. & Ors. Vs. Dr. Deep Narain Tripathi & Ors., (1996) 8 SCC 454, observing that mere continuation for long time by an ad hoc or temporary employee does not give him any legal right to hold the post.

19. In Nazira Begum Lashkar (supra), the Apex Court held that

temporary or ad hoc appointment does not confer any legal right nor such an appointee can claim equity in his favour nor the equitable relief can be granted to him by the Court. Even if, he has worked for unusual long period, even on humanitarian considerations.

20. A person holding .the post of temporary/ad hoc post is not a member of service in accordance with the statutory rules, therefore, he cannot have any right vested in the post. (Vide P.D. Aggarwal & ors. Vs. State of U.P. & ors., AIR 1987 SC 1676). Similar view has been reiterated in cases where the person was holding the tenure post by the Hon'ble Apex Court observing that by efflux of time appointment comes to an end automatically on expiry of the tenure of appointment, and such appointee cannot claim any relief either on the basis of equity, or human consideration, or in law. (Vide Director, Institute of Management Development, U.P. Vs. Smt Pushpa Srivastava, AIR 1992 SC 2070; and State of U.P. Vs. Dr S.K. Sinha, AIR 1995 SC 768). The only relief/protection in law an ad hoc appointee can claim is that he should not be replaced by another ad hoc as held by the Hon'ble Apex Court in Dr. A.K. Jain Vs. Union of India & ors., 1987 Supp SCC 497; Rajbinder Vs. State of Punjab & ors. 1998 Supp SCC 428; and State of Haryana Vs. Piara Singh, AIR 1992 SC 2130.

21. Therefore, the law on the issue can be summarised as under:-

"An ad hoc appointment means a stop gap arrangement. The appointment is defeasible, and thus, incapable to create any legal right in favour of the appointee for the reason that such an appointment is made in administrative exigency, pending regular appointment, in public interest. As ad hoc appointment is made in public interest considering the administrative necessity, temporarily, or to meet a temporary necessity for a specific purpose, an ad hoc appointee cannot have any grievance whatsoever as he is not deprived of any right or interest vested in the post. He cannot claim to be a member of the service in accordance with the rules. The only protection law gives to an ad hoc appointee is, not to be replaced by another ad hoc appointee. Thus, he has to make accommodation to the regular appointee whenever he comes to join."

22. In the instant case, the order impugned dated 14.09.1998 by which the services of the petitioner-appellant had been terminated, reveal that the petitioner appellant had been appointed on temporary basis under the provisions of the U.P. Government Servants (Termination of services) Rules, 1975. This case is squarely covered by the judgement of the Hon'ble Supreme Court in Kaushal Kishore Shukla (supra).

23. So far as the second issue is concerned, the appellant has not placed .the order of appointment and even if it is assumed that he was appointed on probation, he cannot be deemed to have been confirmed after the period of probation was over in the absence of any order of confirmation is passed.

24. The law on the issue is well settled that the question of deemed confirmation would arise provided there is a complete embargo to extend the period of probation. If an employee is not confirmed by specific order of confirmation, he shall not be deemed to

have been confirmed automatically. This law has been laid down by a Constitution Bench of the Hon'ble Supreme Court in The State of Punjab vs Dharam Singh, A.I.R. 1968 SC 1210.

25. Similar view has been reiterated by the Hon'ble Supreme Court in Dhanjibhai Ramjibhai Vs. State of Gujarat, AIR 1985 SC 603; Om Prakash Maurya Vs. U.P. Cooperative Sugar Factories Federation, Lucknow, AIR 1986 SC 1844; M.K. Agrawal Vs. Gurgaon Gramin Bank & Ors AIR 1988 SC 286; Mool Chand Vs. U.P. Food Corporation & Anr., 1996 FLR 258; Sri Chandra Vs. U.P. Financial Corporation, 1994 Lab.I.C. 859; Jai Kishan Vs. Commissioner of Police & Anr., 1995 Suppl (3) SCC 364; Satya Narayan Athya Vs. High Court of Madhya Pradesh & Anr., AIR 1996 SC 750; and State of Punjab Vs. Baldev Singh Khosla, AIR 1996 SC 2093.

26. In Dayaram Dayal Vs. State of M.P. & Anr., (1997) 7 SCC 443, a similar view has been reiterated observing that the deemed confirmation of a probationer depends on the order of appointment and the rules applicable in the case of said employee. Mere continuance in service of an employee beyond the maximum period up to which the probation period could be extended, shall not give entitlement to him to have been deemed confirmed. While decide the said case, the Hon'ble Supreme Court considered its earlier judgment in Sukhbans Singh Vs. State of Punjab, AIR 1962 SC 1711 wherein it was held as under:-

"A probationer cannot..... automatically acquire the status of a permanent member of a service, unless of course the rules under which he is appointed expressly provide for such a result. The rules governing the Provincial Civil Services of Punjab do not contain any provision whereby a probation at the end of the probationary period is automatically absorbed as a permanent member of the Civil Service."

27. The Supreme Court also considered the Constitution Bench Judgement of the Honb'le Supreme Court in G.S. Ramaswamy Vs. Inspector General of Police AIR 1966 SC 175; and State of U.P. Vs. Akbar Ali Khan, AIR 1966 SC 1842.

28. In C.V. Satheeshchandran Vs. General Manager, UCO Bank & Ors., (2008) SCC 653, the Hon'ble Supreme Court held that merely because the probation period is over his service cannot be deemed to have been confirmed as it require specific order directing confirmation and it will be only in special circumstances where the rules specifically provides for deemed confirmation, he will not be considered to have been confirmed.

29. In the instant case, the learned counsel for the appellant has not produced the relevant rules applicable in the case of the petitioner-appellant. Therefore, no finding can be recorded on the issue.

30. In view of the above, the appeal lacks merit and is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal (567) of 2008

State of U.P. and others ...Appellants
Versus
Krishna Murari Lal ...Respondent

Counsel for the Appellants:
Sri. G.C. Upadhay
S.C.

Counsel for the Respondent:
Sri Ram Mohan

U.P Retirement to Service Determination of Date of Birth Rules 1974-Rule-3-date of birth once recorded in service book-in absence of High School certificate-shall be final-concerned employee admittedly a High School fail-wholly irrelevant-before entering in service-High School pass certificate not in existence-held-authorities rightly rejected the plea of employee.

Held: Para 16

Thus, the date of birth recorded in the certificate of the year 1959, when he had failed in the High School does not fall within Rule-3 and no benefit can be drawn by the petitioner on the basis thereof. According to the Rule-3 the date of birth of such a government servant as recorded in the service book at the time of entry into service has to be treated to be the correct date of birth. Even if any correction was made in the date of birth by red ink to read as 31st May, 1945 by Settlement Officer of Consolidation, said change was unauthorised and contrary to the Statutory Rules. The Consolidation Commissioner has rightly taken the view that date of birth of the petitioner, which was initially entered into service i.e. 3rd December, 1943 has to be accepted.

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

1. Heard learned Standing Counsel for the respondents-appellants and Sri Ram Mohan, learned counsel for the respondent.

2. With the consent of the parties, this special appeal is being disposed of at this stage without calling for any counter affidavit specifically in view of the order proposed to be passed today.

3. This is an intra court appeal against the judgment and order passed by the learned Single Judge dated 20th December, 2007, whereby the writ petition filed by the respondent has been allowed and the impugned notice dated 17th April, 2003 has been quashed holding that the petitioner is entitled to continue in Service and to receive salary treating his date of birth as 31st May, 1995, it has also been provided that he would be entitled to his retiral benefits on that basis. State of U.P., not being satisfied by the direction so issued, has filed this appeal.

4. The brief facts necessary for deciding the special appeal are that the writ petitioner was initially appointed as a Tabulator on 7th February, 1967 in the Consolidation Department and subsequently he was granted promotions on next higher posts. While working as Lekhpal, he was retired treating his date of birth as 3rd December, 1943. This led to the filing of the writ petition no. 38857 of 2003, which has been allowed as indicated above.

5. The case of the petitioner was that on receipt of the notice of retirement, he came to know that his date of birth had been wrongly recorded as 3rd December, 1943 in place of 31st May. 1945 in his service book and on that basis the respondents were going to retire him after completion of 58 years service. He made an application on 13th October, 2001 before the District Deputy Director of Consolidation for correction of his date of birth as 31st May, 1945, as per the High School Certificate. On the directions of the District Deputy Director of Consolidation, a letter was written to the Settlement Officer Consolidation, Azamgarh on 22nd December, 2001 for clarification qua the date of birth of the petitioner as recorded in his service book. After various verifications, the Settlement Officer Consolidation, Maharajganj submitted his report on 7th March, 2002 stating therein that the correct date of birth of the petitioner was 31st May, 1945 and he accordingly sent a letter to the Consolidation Commissioner U.P. Lucknow dated 16th August, 2002 for approval of the correction of the date of birth of the petitioner as 31st May, 1945 in place of 3rd December, 1943. Subsequently an order was passed by the Consolidation Commissioner, U.P. Lucknow dated 17th April, 2003. The Consolidation Commissioner took the view that date of birth of the petitioner-respondent as recorded in the service book is 3rd December, 1943 be accepted as correct date of birth. Against the said order of the Consolidation Commissioner, writ petition no. 38857 of 2003; Krishna Murari Lal vs. State of U.P. & Ors.

6. The learned Single Judge summoned the original service book, G.P.F. Papers and the seniority list etc. vide order dated 14th August, 2007. The learned Single Judge after examination of records held that initially the date of birth of the petitioner was entered as 3rd December, 1943 in the service book, subsequently it was corrected by red ink and initialled by the Settlement Officer of Consolidation. The learned Single Judge while allowing the writ petition has observed as follows:

"In pursuance thereof, the records have been produced and it transpires that though earlier his date of birth was entered as 3. 12. 1943 in the service book, subsequently it was corrected by red ink and initialled by the Settlement Officer of Consolidation. In the seniority list and also in the G.P.F. papers the same date of birth is reflected. It is also not disputed that the petitioner had appeared in the High School Examination prior to joining the service where his date of birth is also entered as 31.5.1945, therefore, the contention of the learned Standing Counsel that the petitioner is estopped from challenging his date of birth entered in the service record on the eve of his retirement, cannot be maintained. Once an incumbent had a High School certificate before joining the service, the said date of birth shall be taken to be final. The petitioner had no opportunity to challenge the entry because in all his papers including seniority list etc., the same date of birth as entered in his High School certificate was reflected and it is evident that the aforesaid anomaly has come to his notice only at the time of his retirement. "

7. The learned counsel for the appellants challenging the order of the leaned Single Judge contends that before the learned Single it was stated by the

State authorities that the date of birth of the petitioner in the service book was 3rd December, 1943. The High School certificate of the year 1959 wherein the petitioner had failed, was not relevant. The appellants justify the order of Consolidation Commissioner contending that the date of birth of the petitioner recorded in the service book as 3rd December, 1943 has to be treated to be his correct date of birth.

8. Sri Ram Mohan, learned counsel for the respondent-petitioner submits that date of birth which was mentioned in service book i.e. 3rd December, 1943 was corrected by red ink and initialled by the Settlement Officer of Consolidation and 31st May, 1945 was recorded in the service book, it was as per the date of birth as mentioned in the High School certificate. He submits that in all other relevant papers, his date of birth has been mentioned as 31st May, 1945. The learned Single Judge, after summoning and examining the same, found that the correct date of birth of the petitioner was 31st May, 1945. Therefore, the order of the Hon'ble Single Judge be not interfered with.

9. We have considered the submissions made by the learned counsel for the parties and have perused the records.

10. The case of the appellant before the learned Single as well as before the Consolidation Commissioner was that at the time of entry into service, his date of birth was recorded as 3rd December, 1943. The learned Single Judge has also recorded as a finding fact that initially his date of birth was entered as 3.12.1943 in the service book and subsequently it was corrected by red ink and initialled by the Settlement Officer of Consolidation. Said finding of the learned Single Judge has been quoted above.

11. We proceed with the appeal accepting the finding recorded by the learned Single Judge that date of birth of the petitioner was initially recorded as 3rd December, 1943, and that the same was subsequently corrected in red ink as 31st May, 1945.

12. For determining the date of birth of a government servant, Rules have been framed, namely, U.P. Recruitment to Services Determination of Date of Birth Rules, 1974.

Rule-3 of Rules, 1974 reads as follows:

"(3) The date of birth of a government servant as recorded in the certificate of his having passed the High School or equivalent examination, or where a government servant has not passed any such examination as aforesaid, the date of birth or the age recorded in his service book at the time of his entry into government service, shall be deemed to be his correct date of birth or age, as the case may be for all purposes in relation to his service, including eligibility for promotion superannuation, premature retirement or retirement benefits and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever."

13. From the perusal of the said Rule-3, it is clear that date of birth of a government servant as recorded in the certificate of his having passed the High School or equivalent examination or where a government servant has not

passed any such examination as aforesaid, the date of birth recorded in his service at the time of his entry into government service shall be deemed to be his correct date of birth.

14. The aforesaid rule clearly indicates that date of birth of a government servant as recorded in the certificate of his having passed the High School or equivalent examination or where a government servant has not passed such examination, the date of birth recorded in his service at the time of his entry into government service has to be treated as correct date of birth of the government servant. In the facts of the present case, it is admitted on record that the petitioner-respondent has not passed the High School.

15. It is admitted to the parties that petitioner had appeared in High School examination in the year 1959, he failed. Rule-3 only refers to the high school or equivalent examination certificate, only where the Government servant has passed the examination.

16. Thus, the date of birth recorded in the certificate of the year 1959, when he had failed in the High School does not fall within Rule-3 and no benefit can be drawn by the petitioner on the basis thereof. According to the Rule-3 the date of birth of such a government servant as recorded in the service book at the time of entry into service has to be treated to be the correct date of birth. Even if any correction was made in the date of birth by red ink to read as 31st May, 1945 by Settlement Officer of Consolidation, said change was unauthorised and contrary to the Statutory Rules. The Consolidation Commissioner has rightly taken the view that date of birth of the petitioner, which was initially entered into service i.e. 3rd December, 1943 has to be accepted.

17. The learned Single Judge has noticed that initially the date of birth of the petitioner was recorded as 3rd December, 1943 in his service book. An error has been committed in allowing the writ petition without considering the relevant statutory provisions of U.P. Recruitment to Services Determination of Date of Birth Rules, 1974, which are relevant and applicable qua determination of date of birth of a government servant.

18. In view of the aforesaid, the judgment and order of the learned Single Judge allowing the writ petition filed by the petitioner cannot be legally sustained. We do not find any error in the order passed by the Consolidation Commissioner by which it was held that the date of birth of the petitioner-respondent shall be treated as 3rd December, 1943, as was initially entered in his service book.

19. In view of the aforesaid, we set aside the judgement and order passed by the learned Single Judge dated 20th December, 2007, we hold that the correct date of birth of the petitioner shall be treated as 3rd December, 1943. The appellant shall pay the post retiral benefits of the petitioner according to his date of birth as 3rd December, 1943. In view of the fact that the petitioner has continued to work till December, 2003, the salary if any already paid to him shall not be recovered. Post retiral benefits of the petitioner shall be fixed according to his date of birth as 3rd December, 1943 and the appellants shall take steps for finalizing the post retiral benefits of the

petitioner accordingly, preferably within three months from the date a certified copy of this order is filed before the authority concerned. On the delayed payment of gratuity/retiral benefits, petitioner shall be entitled to 6% interest from the date, it was due till the date of actual payment.

20 The special appeal is allowed subject to the observations made above.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2008

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

Special Appeal No. 696 of 2008

Mohd. Hashim ...Appellant
Versus
Board of Madarsa Education and another ...Respondents

Counsel for the Appellant:
Sri Ch. N.A. Khan
Sri M.A. Khan

Counsel for the Respondents:
S.C.

<u>High Court Rules-Chapter VIII Rule-5-Special Appeal-Maintainability</u>-No order passed on Stay Application-except grant of time for counter affidavit-argument that refusal to grant interim protection in the garb of time for counter-amount to judgment-held-wholly misconceived-Special Appeal not maintainable.

Held: Para 8

In the present case, there is no judgement whereby the petitioner-appellant has been aggrieved and, therefore, the present Special Appeal is not maintainable.

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

1. The present Special Appeal has been filed against an order dated 13-5-2008 passed by the learned Single Judge in Civil Misc. Writ Petition No. 23990 of 2008, whereby time for filing Counter Affidavit and Rejoinder Affidavit in the Writ Petition has been granted and the case has been directed to be listed after the expiry of the period mentioned in the said order.

2. No order appears to have been passed on the Stay Application filed along with the Writ Petition.

3. The grievance of the petitioner-appellant is that the order dated 13-5-2008 amounts to rejection of the prayer for stay made in the Stay Application accompanying the Writ Petition, and the same has resulted in making the Writ Petition infructuous.

4. Sri M.A. Khan, learned counsel for the petitioner-appellant submits that the order dated 13-5-2008 amounts to rejection of the prayer for stay made in the Stay Application accompanying the Writ Petition, and, therefore, the Special Appeal is maintainable against the said order.

5. Having considered the submissions made by the learned counsel for the petitioner-appellant, we find ourselves unable to accept the same.

6. No order has been passed on the Stay Application accompanying the Writ Petition either granting or refusing to

grant the stay order. By the order dated 13-5-2008, the learned Single Judge has only granted time for filing Counter Affidavit and Rejoinder Affidavit, and the petitioner-appellant cannot possibly be aggrieved by the said order.

7. Under Chapter VIII, Rule 5 of the Rules of the Court, 1952, Special Appeal lies against a "judgement" passed by a learned Single Judge.

8. In the present case, there is no judgement whereby the petitioner-appellant has been aggrieved and, therefore, the present Special Appeal is not maintainable.

9. Sri M.A. Khan, learned counsel for the petitioner-appellant submits that the examinations are scheduled to be held with effect from 31-5-2008.

10. He further submits that at the time of filing of the Writ Petition, the Examination- Schedule had not been announced and therefore, in paragraph 29 of the Writ Petition, it was, inter-alia, stated that the examinations were expected to be held in the last week of May, 2008.

11. It is submitted that the Examination-Schedule having now been announced, the fate of 200 students who have submitted their examination form through the institution in question, would be adversely affected.

12. It is open to the petitioner-appellant to move appropriate application in this regard before the learned Single Judge. We are not expressing any opinion on the merits of any such application.

13. Subject to the above observations, the Special Appeal is dismissed as not maintainable.

Appeal dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE A.P. SAHI, J.

First Appeal From Order No. 1130 of 1988

National Insurance Co. Ltd. ...Appellant
Versus.
Smt. Reeta Porwal & others ...Respondents

Counsel for the Appellant:
Sri Kuldeep Shankar Amist.

Counsel for the Respondents:
Sri R.K.Porwal
Sri. Sanjay Ratan
Sri. P. Srivastava.

Motor Vehicle Act 1939-Section 1102(A)-Section 170 of M.V. Act 1988 read with Section 96 of Old Act (149(2) of new Act)-maintainability of appeal-appeal by insurance Company-no permission granted to contest the case-whether the appeal maintainable-held-"yes" where breach of policy found-appeal cannot be denied on technicalities-from perusal of records/ the policy no extra premium given-Company has limited liability to the extent of Rs.1,50,000/- already deposited-direction to deposit the amount of interest within fortnight-matter remitted back to Tribunal for realisation of remaining amount from owner of vehicle.

Held: Para 4 & 5

We are of the view that the stand of insurance company is correct to say that

it has limited liability to the extent of Rs.1,50,000/-.

Learned counsel appearing for the claimants-respondents says that this arguable point could have been raised before the tribunal earlier or even now, upon notice to the owner so that the claimants should not be made to suffer under benevolent piece of legislation. This is an appeal of 1988. This Court cannot wait indefinitely. We have been told that the principal amount of Rs.1,50,000/- has already been deposited which has been withdrawn by the claimants, therefore, the rest amount on account of interest is directed to be deposited upon calculation within a period of fortnight from this date, which will be released in favour of the claimants within a period of one week thereafter.

Case Law discussed:
2007 (4) ADJ 101,
AIR 2002 SC 3350,
JT 2002 (1) SC 198.

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

1. This appeal has been preferred by the insurance company from the judgment and order dated 31st August, 1988 passed by concerned Motor Accidents Claims Tribunal, Agra. The contention of the appellant is that although the awarded amount is Rs.2,15,000/- but the insurance company has a limited liability in accordance with law i.e. the Motor Vehicles Act, 1939 (hereinafter referred to as the old Act) to the extent of Rs.1,50,000/-. Both, the insurance company and the claimants, are present before this Court but in spite of service of notice the owner is not present.

2. A preliminary objection has been raised by the learned counsel appearing for the claimants-respondents before this Court that the appeal is not maintainable in view of Section 110 (2A) of the old Act which is parallel to Section 170 of the Motor Vehicles Act, 1988 (hereinafter referred to as the new Act). In other words, no permission has been granted to the insurance company to contest the claim, therefore, the appeal cannot be maintainable, in view of the ratio of the recent judgment of this Court reported in **2007 (4) ADJ 101 (Oriental Insurance Company Limited Vs. Smt. Manju and others)** following the judgement of three Judge-Bench of Supreme Court reported in **AIR 2002 SC 3350 (National Insurance Co. Ltd., Chandigarh Vs. Nicolleta Rohtagi and others)**. On the other hand, argument as advanced by the learned counsel appearing for the claimants-respondents is that Section 96 of the old Act is equivalent to Section 149 of the new Act and as per Section 149 (2), if there is any breach of policy, in that case, the insurance company can prefer an appeal irrespective of right of contest, which point is also covered by both the judgements i.e. **Smt. Manju (supra) & Nicolleta Rohtagi (supra).**

3. Under such circumstances, we have called upon the lower court record to verify the scope and ambit of insurance coverage i.e. the insurance policy. We find that the insurance policy of the particular year, when the accident was occurred, is not available but of the previous year it is available, which is comparable with the cover note of the year when the accident took place. We also find that in both the years similar premium was paid covering the liability of the insurance company to the extent of Rs. 1,50,000/-. The additional premium, which has been received cannot seem to be unlimited from the plain reading of it.

Learned counsel appearing for the claimants-respondents contended before us that irrespective of such factum, particularly when the owner is not available and the long period has been elapsed, it is desirable that the insurance company will pay the amount and recover the same from the owner. It has been submitted by learned counsel appearing for the insurance company that five Judge-Bench judgment of Supreme Court reported in **JT 2002 (1) SC 198 (New India Assurance Co. Ltd. Vs. C.M. Jaya and others)** is squarely covering the field. Specific question in such judgment is as follows:

"The question involved in these appeals is whether in a case of insurance policy not taking any higher liability by accepting a higher premium, in case of payment of compensation to a third party, the insurer would be liable to the extent limited under section 95 (2) or the insurer would be liable to pay the entire amount and he may ultimately recover from the insured."

On this question a discussion is made in paragraph 10 which is as follows:

"In the absence of such a term or 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."

Ultimately the Court held as follows:

"In the case of insurance company not taking any higher liability by accepting a higher premium for payment of compensation to a third party, the insurer would be liable to the extent limited under section 95(2) of the Act and would not be liable to pay the entire amount."

4. We are of the view that the stand of insurance company is correct to say that it has limited liability to the extent of Rs.1,50,000/-.

5. Learned counsel appearing for the claimants-respondents says that this arguable point could have been raised before the tribunal earlier or even now, upon notice to the owner so that the claimants should not be made to suffer under benevolent piece of legislation. This is an appeal of 1988. This Court cannot wait indefinitely. We have been told that the principal amount of Rs.1,50,000/- has already been deposited which has been withdrawn by the claimants, therefore, the rest amount on account of interest is directed to be deposited upon calculation within a period of fortnight from this date, which will be released in favour of the claimants within a period of one week thereafter.

6. However, so far as the rest of the amount of principal sum awarded by the tribunal is concerned, the matter is remitted back for this limited purpose with a direction to the tribunal to consider such cause upon notice to the owner and giving adequate opportunity of hearing and dispose of the same preferably within a period of 2 months from the date of communication of this order with a formal application by the claimants.

7. The appeal is accordingly disposed of without imposing any cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal 1201 of 2003

Ram Awadh Tiwari ...Appellant
Versus
Sudarshan Tiwari & others ...Respondents

Counsel for the Appellant:
Sri. Veer Singh
Sri. S.C. Pandey

Counsel for the Respondents:
Sri. V.K. Goel
Sri. A.P. Srivastava
Sri. A.B. Srivastava
Sri. R.S. Mishra

U.P. Zamindari Abolition and Land Reforms Act, 1950-Section 286 read with Notification dated 17.01.1976-Sale of agricultural land-in auction proceeding held towards realization of loan-sale confirmed by the Sub Divisional Magistrate and not by Collector-held-S.D.M. Can exercise every power except confirmation of sale-direction issued to refund the amount of auction sale with 5% interest.

Held: Para 24, 25 & 26

Thus, after notification dated 17.1.1976 it has to be accepted that the power to approve the auction sale conducted under section 286 of the U.P.Z.A. & L.R. Act vest with the Collector and Sub Divisional Officer cannot exercise the power of approval.

In the present case it is admitted position that Collector has not approved the auction sale and learned Single Judge has rightly set aside the auction and also its confirmation by Sub Divisional Officer and all other consequential action on that ground.

In view of the aforesaid observations, we are of the considered opinion that the learned Single Judge has rightly allowed the writ petition. We do not find any error in the order of the learned Single Judge. The appeal is dismissed.

Case law discussed:
JT 2005(5) SC 467

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

1. Heard Sri Veer Singh learned counsel for the appellant and Sri A.P. Srivastava on behalf of the respondent.

2. This appeal has been filed against the judgment and order dated 11.11.2003 passed by the learned Single Judge allowing the writ petition filed by respondent no. 1.

3. The brief facts necessary for deciding the appeal are that the respondent no. 1 took an agriculture loan of Rs.59,000/- from the Chandauli Branch of Union Bank of India. The loan was repayable in 17 equal half yearly instalments. The respondent no. 1, who was writ petitioner, committed default in depositing the instalments, due to which recovery proceedings were initiated at the instance of the bank for recovery of the outstanding amount as arrears of land revenue. A citation to appear was issued on 25th November, 1995. In pursuance of the citation to appear, writ-petitioner was arrested and after deposited Rs.30,000/- he was released. Writ-petitioner thereafter represented the matter to the bank and also filed a writ petition in this Court challenging the recovery proceedings.

4. In the writ petition, under an interim order he was directed to deposit

50% of the amount and to furnish security for the balance amount. A sum of Rs.9,500/- was deposited by the writ-petitioner on 22.01.1996 and a security was also furnished. The interim order in the writ petition could not be extended, due to which the recovery proceedings revived and sale proclamation was issued fixing 06.01.1997 for sale. Ultimately auction took place on 12th March, 1997 and the appellant is stated to have offered the highest amount of Rs.60,400/-. The Tehsildar conducted the sale and the Sub Divisional Officer has confirmed the sale on 31st March, 1997.

5. Against non-extension/grant of interim order in writ petition, the writ petitioner filed an Special Appeal No. 260 of 1997. The Division Bench passed an order for deposit of the entire sale price with 5% interest. Pursuant to the order of the Division Bench in special appeal, the writ-petitioner deposited an amount of Rs. 63,420/- on 27.05.1997. In the meantime it appears that the Sub Divisional Officer also executed a sale deed in favour of auction, purchaser.

6. The learned counsel for the parties have submitted that amount deposited by the writ-petitioner i.e. Rs.64,420/- in the treasury is still lying there and has not been withdrawn by either of the party. The auction purchaser was subsequently impleaded as a party and he also filed his counter affidavit.

7. The learned Single Judge, after hearing the parties, allowed the writ petition vide its judgment and order dated 11.11.2003. i Learned Single Judge took the view that sale was never confirmed by the Collector as required by the rules and confirmation made by the Sub Divisional Officer was of no legal consequence. The writ petition was allowed. The auction sale, confirmation of sale and consequential sale deed have been set aside.

8. It is against this order of the learned Single Judge that the auction purchaser has filed this appeal.

9. Sri Veer Singh Advocate on behalf of the appellant, challenging the order, contended that the view taken by the learned Single Judge that Sub Divisional Officer was not competent to grant approval to the auction sale is not correct. He submits that Sub Divisional Officer by virtue of notification issued under Section 3(4) of the U.P.Z.A. & L.R. Act was fully empowered to exercise all functions of Collector under the U.P.Z.A. & L.R. Act, 1950. He has also relied upon the notification dated 11th June, 1953, published on 13th June, 1953 in the U.P. Gazette, whereby all Sub Divisional Officers in the whole State, except for four districts, were empowered to discharge all the functions of the Collector. He has also placed reliance upon the judgment of the Apex Court reported in *JT 2005(5) SC 467; Kedar Nath Dubey (D) By Lrs. & Ors. v. Sheo Narain Dubey (D) By Lrs. & Ors*.

10. Learned Counsel for the respondent supporting the order of the learned Single Judge that Sub Divisional Officer has no jurisdiction to approve the auction sale, is in accordance with law. He submits that the learned Single Judge after taking into consideration subsequent notification dated 17.01.1976 has rightly come to conclusion that Sub Divisional Officer has no power to confirm the auction sale.

11. The issue which has come up for consideration is as to whether the Sub Divisional Officer while conducting a sale has jurisdiction to approve the sale under Section 286 of the U.P.Z.A. & L.R. Act or not. Section 286 of the U.P.Z.A. & L.R. Act, 1950 which is relevant for the present purpose reads as follows:

"286. Power to proceed against interest of defaulter in other immovable property.-*(l) If any arrears of land revenue cannot be recovered by any of the processes mentioned in clauses (a) to (e) of Section 279, the Collector may realize the same by attachment and sale of the interest of the defaulter in any other immovable properly of the defaulter.*
(2) Sums of money recoverable as arrears of land revenue but not due in respect of any specific land, may be recoverer by process under this section from any immovable properly of the defaulter including any holding of which he is a bhumidhar or asami. "

12. In the present case there is no dispute to the fact that the recovery was initiated against the writ-petitioner on account of the agriculture loan taken from the bank. The auction of the agriculture property of the writ-petitioner was proceeded with under the relevant rules for conducting the sale of immovable property, which are contained in Chapter X of the U.P.Z.A. & L.R. Act, 1952. Rule 285-J, which is relevant for the present purpose is extracted below:

"285-.J. *On the expiration of thirty days from the date of the sale if no such application as is mentioned in Rule 285-H or Rule 285-I has been made or if such application has been made and rejected by the Collector or the Commissioner, the Collector shall pass an order confirming the sale after satisfying himself that the purchase of land in question by the bidder would not be in contravention of the provisions of Section 154. Every order passed under this rule shall be final."*

Section 3 (4) of the U.P.Z.A. & L.R. Act 1950 defines the Collector, which is extracted as below:
"3. Definitions. - *In this Act;. unless there is anything repugnant in the subject or context:*
(4) "Collector" means an officer appointed as Collector under the provisions of the U.P. Land Revenue Act;. 1901, and includes an Assistant Collector of the first class empowered by the State Government by a notification in the Gazette to discharge all or any of the functions of a Collector under this Act. "

The Sub Divisional Officer has been empowered to exercise powers of Collector vide notification published in Gazette, being: notification dated 11th June, 1953. The notification dated 11th June, 1953 is as follows:

"in exercise of the powers conferred by clause (4) of Section 3 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act;. 1950 [(Act 1 of (1951)], the Governor is pleased to empower all the Sub Divisional Officers in Uttar Pradesh except those in the districts of Almora, Garhwal, Tehri Garhwal and Rampur to discharge all the functions of a "Collector" under the said Act. "

13. Another notification which has been relied upon by the appellant is dated 05th December, 1968 under which Sub Divisional Officers were empowered to exercise all powers of Collector under the

U.P.Z.A. & L.R. Act except the power under Section 198 of the U.P.Z.A. & L.R. Act.

14. The third notification, which has been referred to by the learned Single Judge and has been quoted in the order, is dated 17.01.1976, is to the following effect:

"In exercise of the powers under clause (4) of section 3 of the U.P. Zamindari Abolition and Land Reforms Act 1950 (U.P. Act. No. 1 of 1951), the Governor is pleased to, empower all the Assistant· Collectors of the First Class, who are Incharge of the sub-division, to discharge the functions of a "Collector" under Section 286 of the said Act in respect of any, holding of a defaulter of which he is a Bhumidhar, Sirdar or Assami, subject to the condition that such sales are approved by the Collector."

15. The Hon'ble Supreme Court in its judgment in the case of *Kedar Nath Dubey* (supra), while considering the powers of the Sub Divisional Officer in the context of U.P.Z.A. & L.R. Act, 1952 and Rule 284 and 285 of the U.P.Z.A. & L.R. Rules, 1954, with reference to the notification issued on 11.06.1953, 05.12.1968 read along with the letter of the Secretary, Board of Revenue, Uttar Pradesh dated 07.07.1983, in paragraph 7 has specifically stated that it is not expressing any final opinion on the merits of the case. Paragraph 7 of the judgment of the Apex Court in the case of Kedar Nath Dubey (supra), which is relevant, is reads as follows:

"The Notification makes the position clear that in all the districts of Uttar Pradesh except districts of Almora, Garhwal, Tehri Garhwal and Rampur SDOs were authorized to discharge all the functions of the Collector under the Act. A bare reading of the Notification dated 11.06.1953 as published in the official gazette dated 13.6.1953 shows that it empowered all SDOs in Uttar Pradesh except those in the enumerated districts to discharge all the functions of the Collector under the Act. Letter of the Secretary, Revenue Board, U.P. dated 7.7.1983 also throws light on the controversy. It related to discharge of power under various provisions of the Act. It noted that by notification of 5.12.1968 Sub Divisional Officers have been authorized to discharge all functions of the Collector under the Act except Section 198. Prima facie the stand of the appellant is correct. It appears that these pleas were not considered by the High Court. We remit the matter to the High Court for considering it in accordance with law. We make it clear that no opinion has been expressed by us on the merits of the case. The High Court may dispose of the matter as expeditiously as possible as the writ petition is pending for more than a decade. It would be proper for the High Court to hear the matter afresh and take a decision on the various issues involved, as there are certain vital questions which were not considered by the High Court. The effect and relevance of the notification dated 11.6.1953 and the letter dated 7.7.1983 shall be considered."

16. Thus the Apex Court, after noticing the submissions of the parties and all the notifications, without expressing its final opinion remitted the matter for High Courts consideration afresh.

17. On being asked as to whether the High Court has decided the issue on remand under the judgment of the Apex Court, referred to above, the counsel for the parties are unable to inform the Court as to whether any decision has been given by the High Court or not.

18. Since the Apex Court has not itself finally decided the issue, this Court has to look into the notifications and consider the said issue which has arisen in the present case also and which is material for deciding this appeal.

19. Section 3(4) of the U.P.Z.A. & L.R. Act empowers the State Government to issue notifications empowering the Assistant Collector of first class to discharge all or any of the function of the Collector under the Act. The power to issue notification, given under section 3(4), can be exercised from time to time and power is also given to entrust all or any of the function according to the exigencies of administration.

20. The notification dated 11th June, 1953 empowered the Sub Divisional Officers to exercise all the powers of the Collector under the Act. By subsequent notification dated 5.12.1968 the powers given to Sub Divisional Officers were again confirmed with the exception of the power under Section 198. Thus the notification dated 5th December, 1968 takes away the power of Sub Divisional Officer, which was earlier exercisable by him by virtue of notification dated 11th June, 1953 with regard, to Section 198. By virtue of notification dated 5th December, 1968 the Sub Divisional Officer was no; more empowered to exercise the power under Section 198.

21. The subsequent notification dated 17.1.1976 contains the same scheme empowering the Assistant Collector first class, who is incharge of the division, to exercise the functions of the Collector under Section 286 of the said act in respect of any holding of a defaulter of which he is a Bhumidhar, Sirdar or Assami, subject to the condition that such sales are approved by the Collector. Thus, the empowerment of the Assistant Collector qua the powers under Rule 286 by notification dated 17.1.1976 is hatched by a condition that Sub Divisional Officer shall exercise all the powers except .the power to approve the sale, which shall be done by the Collector.

22. There is, no inconsistency in the various notifications referred to above. The notification dated 17.1.1976 does not alter the position as it was continuing, except with regard to approval of sale. It has been specifically provided that the same would be exercised by the Collector. The notification dated 17.1.1976 read with Rule 285-J thus makes it clear that power to approve the auction sale vest in the Collector alone.

23. Learned counsel for the appellant has also referred to and relied on the letter of the Secretary, Board of Revenue, U.P. dated 7.7.1983. The said letter has not been brought on record. However, learned counsel for the appellant has referred to paragraph 7 of the judgment of the Apex Court in the case of Kedar Nath Dubey (supra) where this letter has been referred. Reading of paragraph 7 indicates that the said letter dated 7.7.1983 records that by notification of 5.12.1968 Sub Divisional Officers have been authorized to discharge all functions of the Collector under the Act except Section 198. Thus letter dated

7.7.1983 only explain the position which was as per the notification dated 5.12.1968. A reading of paragraph 7 of the judgment does not lead to any other meaning. Moreover, the power is vested with the State Government to empower Assistant Collector by a gazette notification and the Secretary, Board of Revenue cannot alter the empowerment, which has been made by the gazette notification by the State in any manner. This letter dated 7.7.1983 does not improve the case of the appellant any further.

24. Thus, after notification dated 17.1.1976 it has to be accepted that the power to approve the auction sale conducted under section 286 of the U.P.Z.A. & L.R. Act vest with the Collector and Sub Divisional Officer cannot exercise the power of approval.

25. In the present case it is admitted position that Collector has not approved the auction sale and learned Single Judge has rightly set aside the auction and also its confirmation by Sub Divisional Officer and all other consequential action on that ground.

26. In view of the aforesaid observations, we are of the considered opinion that the learned Single Judge has rightly allowed the writ petition. We do not find any error in the order of the learned Single Judge. The appeal is dismissed.

27. However, the auction purchaser shall be entitled to refund of the amount of Rs. 60,400/-, which was deposited in pursuance of the auction sale, along with 5% interest as deposited by the writ petitioner. Appeal Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal From Order No. 1287 of 2008

Delhi Public School, Yamunapuram Colony ...Appellant

Versus

The Oriental Insurance Company Limited and others ...Respondents

Counsel for the Appellant:
Sri Vinod Sinha

Counsel for the Respondents:
Sri V.B. Kesharwani

Motor Vehicle Act, 1988-S-173-Claim Petition-accident by Maruti car-having compressive insurance policy-authorising for passenger-vehicle driven by the owner-Driver occupying side seat-whether the claim petition by the dependents of driver is maintainable?-held- yes. While driver not driving-his status become as passenger-necessary direction issued.

Held: Para 1

According to us, when a driver is not driving the vehicle, he can not be held to be driver but a lawful passenger, which is covered under the comprehensive policy. A comprehensive policy can be made by insured and insurance company as per the terms and conditions of the contract upon payment of higher premium unless prohibited by the statute. There is no prohibition now under the Motor Vehicles Act, 1988 unlike Motor Vehicles Act, 1939 where the liability of the insurance company was statutorily limited.

Case law discussed:
AIR 1995 All. 1

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

1. This appeal has been made by the owner of the vehicle making the insurance company as well as claimants as party respondents. The judgement and order dated 09th January, 2008 passed by the concerned Motor Accident Claims Tribunal, Bulandshahar is under challenge in this appeal. The owner has contended that the claim is covered by the comprehensive insurance policy. The insurance company itself contended before the tribunal that the policy is comprehensive. We have called upon the parties to show the policy. A photocopy of the insurance policy has been produced before this Court which is directed to be kept with the record. From the policy we find that four persons are allowed to travel by the Maruti Car i.e. the vehicle involved in the accident. On the fateful day at the time of accident the Car was being driven by the owner when the deceased driver was sitting by the side of the owner. The tribunal has taken a plea that since the driver seems to be the occupier, he should be covered under the insurance coverage by payment of an extra premium. We are of the view that fallacy lies with the judgement on that score. When the insurance company is comprehensively covering four persons and the driver was occupying the seat as fourth person, right of claim can not be denied. Learned Counsel appearing for the appellant relied upon a Division Bench judgement of this Court reported in **AIR 1995 All. 1 (New India Assurance Company Limited Vs. Smt. Raj Kumari and others),** which speaks on the similar line. According to us, when a driver is not driving the vehicle, he can not be held to be driver but a lawful passenger, which is covered under the comprehensive policy. A comprehensive policy can be made by insured and insurance company as per the terms and conditions of the contract upon payment of higher premium unless prohibited by the statute. There is no prohibition now under the Motor Vehicles Act, 1988 unlike Motor Vehicles Act, 1939 where the liability of the insurance company was statutorily limited.

2. Therefore, we are of the view that the appeal at the stage of admission can be treated to be disposed of with a liberty upon the appellant to make a rectification application in the tribunal in the selfsame proceeding and upon receipt of such application, the tribunal concerned will issue notice upon the insurance company and upon hearing both the parties, an appropriate order will be passed with regard to recovery of amount of the payable compensation. However, under no circumstances the claimants will be made to suffer. Therefore, the payment of compensation to the claimants under no circumstances will be deprived but will be paid by the appellant as per the direction of the tribunal and the order of the tribunal will be carried out not beyond a period of one week from the date of communication of this order. Thus, the appeal is disposed of without imposing any cost.

3. Incidentally, the appellant-owner prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal shall be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust with the amount of compensation to be paid to the claimants, however, such prayer is allowed. Appeal Disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2008

BEFORE THE HON'BLE VINOD PRASAD, J.

Criminal Revision 1580 of 1993

Mangalore Ganesh Beedi Works ...Applicant
Versus
Shri Gokalesh Pathak and another
...Opposite Parties

Counsel for the Applicant:
Sri. Sudhanshu Dhulliya
Sri. Himanshu Kane
Sri. Shashi Kant Shukla

Counsel for the Opposite Parties:
Sri. Prashant Agarwal
A.G.A.

Code of Criminal Procedure-Section 397-quashing of complaint case-offence alleged under Section 295-A, 298, 504 IPC-Revisionist Managing Director of Manglore Ganesh Beedi Works-complainant a follower of Hindu Religion-Lord Ganesh most sacred diety-accused depicting picture of Lord Ganesh on its beedi products-hurts the religious susceptibilities of Hindus-held-A trademark duly registered having picture of Lord Ganesha on rapper-cannot be termed as offence-impugned summoning order quashed.

Held: Para 20

From the discussions made above I am of the opinion that the revisionist was manufacturing Beedi with the trademark duly registered having picture of Lord Ganesh on its rapper and hence it cannot be said that they have committed any offence. They have got many judgments in their favour, which have been referred to above and once they are acting in accordance with law they cannot be anointed with any offence.

Case Law discussed:

Bombay High Court Criminal Writ Petition No. 1072 of 1991; ILR (Vol. XXIV) page 499

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

1. Challenged in this revision is the impugned summoning order dated 16.6.1993, passed by Judicial Magistrate I, Meerut in Complaint Case No. 32/9 of 92. Vaidya Gokalesh Pathak versus Managing Director Mangalore Ganesh Beedi Works u/s 295-A, 298 and 504 IPC, P.S. Inchauli, district Meerut. The grounds for challenge is that no offence at all is made out against the revisionist, the proceedings are actuated with malafides and the Magistrate without any application of mind has summoned the revisionist.

2. The facts, in brief, as are perceptable from the record of this revision are that Complaint No. 32/9 of 92 was filed by Vaidya Gokalesh Pathak against the Managing Director Mangalore Ganesh Beedi Works, Vinoba Bhavey Road Mysore, P.S. Mangalore, Kamataka for offences u/s 295-A, 298 and 504 IPC, P.S. Inchauli, district Meerut on 22.12.2003 in the court of Judicial Magistrate I, Meerut with the allegations that the complainant Gokalesh Pathak is a follower of Hindus religion and belongs to a Brahman family. He is a great devotee of Lord Ganesh who is a most sacred deity of Hindus. Before starting any work by Hindus, for a successful and uninterrupted completion of the same, Lord Ganesh is worshiped. Lord Ganesh is considered to be deity of wisdom and prosperity and he also diminishes miseries.

3. Smoking is considered to be a vice in Hindus and is a social malady. The

accused Mangalore Ganesh Beedi Works is depicting picture of Lord Ganesh at its Bidi product as a result of which the religious susceptibility of Hindus are being hurt. It is also alleged that the accused is utilizing the name of the said pious deity for his commercial benefit. It is further alleged that after smoking of Bidi the residue is thrown on the roads and on the other filthy places and the said residues are being trampled under the shoes, which hurt the religious sentiments of Hindus and brings disrepute to the deity. It is further alleged that complainant had given a notice to the accused but he has not stopped hurting the religious sentiments of Hindus by not removing depiction of Lord Ganesh from its bidi product therefore it has committed offences u/s 295-A, 298 and 504 IPC. With the aforesaid allegation the complainant prayed that the accused be summoned and be punished for committing aforementioned offences.

4. Judicial Magistrate I, Meerut vide his impugned order dated 6.6.1993 summoned the applicant u/s 298 IPC only and fixed 3.8.1993 for his appearance. Hence this revision.

5. I have heard Sri Sudhanshu Dhuliya, Senior Advocate and Sri Himanshu Kane Advocates in support of this revision and learned AGA in opposition. No body appeared to argue the revision on behalf of complainant though on 10.10.2006 time was sought by the counsel to seek instructions.

6. Controversy in this revision lies in a narrow compass as to whether depicting picture of Lord Ganesh at its beedi product by Mangalore Ganesh beedi Works hurts religious susceptibilities of Hindus or not for making out offence u/s 298 IPC?

7. Learned counsel for the revisionist contended that no offence 298 IPC is made out all, as the feeling of Hindus are not at all hurt. They submitted that in many a judicial pronouncements this question had been decided in favour of the revisionist by various High Courts including ours and there remains nothing in favour of the complainant for making out offence u/s 298 IPC against the revisionist. They further submitted that Mangalore Ganesh Beedi Works is a registered partnership Firm manufacturing Mangalore Ganesh Bidi at Vinoba Road Mysore, Kamataka. The firm is represented by Sri M Suresh Rao as one of his partner. The said firm is using the picture of Lord Ganesh on its product as its trade mark with expressions " Mangalore Ganesh Beedi" and numeral "501" since more than 50 years. This trademark with picture of Lord Ganesh is duly registered under the Trade And Merchandise Mark Act 1958 herein after referred as Act. They further submitted that the notice dated 29.9.1992 issued by the complainant was duly replied by the accused through his advocate Sri W.H. Kane of Solicitor Firm W.H. Kane and Company of Bombay on 14.10.1992 wherein it is clearly mentioned that the Trade Mark used by the accused is duly registered under the Act and that u/s 23 of the .Act there is no prohibition imposed by the Central Government from using the said mark having picture of Lord Ganesh. They further contended that the Magistrate after filing of the complaint did not conduct any inquiry as is contemplated u/s 200 Cr. P.C. and 202 Cr. P.C. and without holding such an inquiry, summoned the accused revisionist by

passing the impugned order, which is wholly illegal and is in the teeth of the procedure prescribed for the complaint case under Chapter XV Cr. P.C. They further submitted that none of the ingredients of section 298 IPC is made out from the bare perusal of the complaint and therefore, summoning order as well as whole prosecution against the revisionist are liable to be quashed.

8. Learned counsel for the revisionist further submitted that Madras High Court in a original petition no. 113/1987 A.T. Raja Madras Vs. Mangalore Ganesh Beedi Works had decided in favour of the accused that by depicting the picture of Lord Ganesh on their beedi product as well as using the name of Lord Ganesh, the firm do not offend any of the provisions u/s 9, 11(d), 56, 107 of the Act. They further contended that in the aforesaid judgment Madras High Court has held that smoking is not prohibited by religious of doctrines of Hindus. U/s 23 of the Act the Central Government has not prohibited depicting the picture of Lord Ganesh as a trademark. Learned counsel for the applicant further relied upon many other judgments in support of their contention, which shall be referred at their appropriate stage in this judgment.

9. Learned AGA on the other hand submitted that in this case depicting of picture of Lord Ganesh at Beedi by the revisionist was deliberate and intentional act and therefore the offence for which revisionist has been summoned is fully made out and the complainant must get a change to prove his version of allegations. He contended that at the stage of summoning only a prima-facie case is to be seen and once that is disclosed summoning order cannot be set aside. He further submitted that offence u/s 298 IPC is clearly made out and, therefore, this revision being merit less and deserves to be dismissed as the act of the revisionist accused was done with the intention of wounding the religious sentiments of Hindus.

10. I have considered the submissions raised by both the sides and have gone through the affidavit filed in support of this revision.

Before adverting to appreciate the contention raised by the revisionist, relevant provisions are referred.

11. Section 298 IPC provides that whoever with the deliberate intention of wounding the religious feelings of any person utters any words or make any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or both.

The question, that comes up for consideration is as to whether the revisionists have committed the said offence or not?

12. From the allegations levelled in complaint, it is nowhere mentioned that feelings of Hindus were hurt. Nothing tangible and specific has been levelled in the complaint. No stances have been quoted and only generalized statement has been made in the complaint, which cannot be taken as commission of any offence. It is to be born in mind that section 298 IPC is a penal provision, which requires strict interpretation. From the perusal of the

complaint, I am not at all satisfied that act of the revisionist was with deliberate intention to hurt the religious feeling and sentiments of Hindus. Thus the ingredients of section 298 IPC are not satisfied In this case, which is sine-qua-non for summoning of any person as an accused.

13. Further the record reveals that the Magistrate while summoning the revisionist has not observed whether he had at all followed procedure under Chapter XV of Cr. P.C. relating to complaint to a Magistrate. The summoning order is silent as to whether any statement u/s 200 Cr.P.C. of the complainant and that of his witness u/s 202 Cr. P.C. were recorded or not? The revisionist has taken a specific ground that they have been summoned without conducting any inquiry as is contemplated in Chapter XV Cr. P.C. Learned AGA also failed to bring on record any thing to rebut the said contention. On the contrary order sheet dated 10.10.2006 indicates that counsel for the complainant O.P. had made a statement before this court that he had got no instructions. In this view of the matter it is not clear as to whether the Magistrate conducted any inquiry on the complaint filed by the respondent no. 1 or not. In absence of any reference of the said inquiry in the impugned order, I am left with no option but to presume that the Magistrate has not conducted any such inquiry which was an indispensable necessity unless the complaint is filed by a public servant.

14. Moreover, learned counsel for the revisionist relied upon a judgment of Bombay High Court rendered in Criminal Writ Petition No. 1072 of 1991 K.R. Mallya versus Maulana Ayyub Kadri alias Baba Kadri and others decided by Hon. Mrs. Justice S.S. Parkar, on 24.8.1999. In the aforesaid judgment the very question, which is involved here was considered. After going into a detailed discussion and looking into the provisions of Trade and Merchandise Mark Act 1958, His Lordship held that no offence has been committed by the respondent no. 2 which was Mangalore Ganesh Beedi Works and was pleased to quash Criminal Case No. 772 of 91 pending before J.M. F.C. Court No.1 Pune and the process issued by the said court on 14.6.1991 against the respondents Maulana Ayyob Kadri alias Baba Kadri and Mangalore Ganesh Beedi Works in that case.

15. Learned counsel for the revisionist further relied upon a judgment rendered by Madras High Court in Original petition No. 113 /87 A.T. Raja Madras versus Mangalore Ganesh Beedi Works Mysore as respondent. After a detailed discussion and looking into various provisions of law under the Trade and Merchandise Mark Act, Madras High Court in the aforesaid judgment has observed as follows:-

"12. According to the petitioner, religious susceptibility of the petitioner and of the Hindus in general is affected by the use of picture of Lord Ganesh on the label used by the respondent. The petitioner has not adduced any evidence in support of his assertion. He also merely asserted that Lord Ganesh is worshipped by all Hindus in general, and the object of such reverence and worship cannot be allowed to be used as commercial mark for enabling the user to make profits with the use of the image of the God.

13. While considering this contention, it is necessary to note the fact that the

registered mark in this case was registered in the year 1942 and that during the course of these 52 years, no other person has questioned the validity of the registration on the ground that the religious susceptibilities of the Hindus are affected by using the mark for commercial purpose. The petitioner's claim that his religious susceptibility had been injuriously affected by the use of the impugned mark as also the pictorial representation cannot be given much credence. It is not as if the petitioner alone belongs to the class or section who worship Lord Ganesh. Though the vast majority of the population in this country worship Lord Ganesh, none had objected to the use of the mark for over half a century. Moreover, Hinduism is generous and tolerant, and does not easily take offence at the pictorial representation of the Gods or Goddesses who from part of the Hindu Pantheon Respondent has produced a list of registered trademarks containing the names of Lord Ganesh as also a list of marks incorporating the name of Lord Krishna.

14. In the directions issued by the Central Government under S. 23 (1) of the Act, setting out a list of marks which cannot be registered and which list includes Lord Budha, Sri Ramakrishna, Sri Sarada Devi, the Sikh Gurus, Lord Venkateshrvara, and Chatrapathi Shivaji, among others, Lord Ganesli is not mentioned. The Central Government is apparently of the view that registration of a mark containing the name or pictorial representation of Lord Ganesh is not per se objectionable."

16. Further in the present case, from the statement made in the complaint, claim of the petitioner seems to be very queer lacking in credibility so far as the hurting the religious susceptibility of Hindus are concerned. During the course of argument it was pointed out that the revisionist has been using the said trademark since 1942. For a period of half century no body had made any grievance against the said trademark but for the respondent complainant. In a such view I am of the opinion that the allegation of the complainant does not make out any offence of hurting religious sentiments of public at large. Moreover, it is to be noted that u/s 32 of Trade and Merchandise Mark Act, it is provided that after seven years of original registration a registered trademark shall be taken to be a valid trade mark in all respect unless it is obtained by fraud or is registered in contravention of section 11 of the Trade and Merchandise Mark Act. For a proper under standing section 32 of the Trade and Merchandise Mark Act is quoted below:-

"32. ***Registration to be conclusive as to validity after seven years***- Subject to the provisions of Section 35 and Section 46, in all legal proceedings relating to a trade mark registered in Part A of the register (including applications under Section 56), the original registration of the trade mark shall, after the expiration of seven years from the date of such registration be taken to be valid in all respects unless it is proved-

(a) that the original registration was obtained by fraud;

or

(b) that the trade mark was registered in contravention of the provisions of Section 11 or offends against the provisions of that section on the date of commencement of the proceedings; **or**

(c) that the trade mark was not, at the commencement of the proceedings,

distinctive of the goods of the registered proprietor.

17. Thus in the present case there is nothing on record to show that section 32 of the Act does not apply on the facts of the present case. On the contrary it was conceded by AGA that section 32 has got full applicability on the facts of the present case.

18. Learned counsel for the revisionist further relied upon a Judgement rendered by this court in Civil Misc. Writ Petition No. 25640 of 1994 Mangalore Ganesh Beedi Works versus District Judge, Meerut and others. In this case complainant Gokulesh Pathak was the respondent no. 3. After a detailed discussion and after going through various rulings, this court allowed the writ petition filed by the revisionist and had quashed the order dated 28.7.1994 passed by District Judge Meerut, by which order, First Appeal filed by the plaintiff Gokulelsh Pathak being FAFO No. 304 of 1993 was allowed by IV Additional District Judge, Meerut. The aforesaid court had allowed the interim injunction application of plaintiff Gokulesh Pathak (complainant) and had injected the present revisionists, which were the respondents in the aforesaid writ from publishing picture of Lord Ganesh on the rapper of their Beedi. The aforesaid judgment rendered by this court in the aforesaid writ petition completely demolishes the prosecution case and therefore it cannot be said that any offence has been committed by the revisionists and resultantly, the complaint filed by the respondents does not make out any offence against the revisionist.

19. Learned counsel for the revisionist further relied upon ILR (Vol. XXIV) page 499 Behari Lal and others V s. Ghisa Lal and others where in Hon'ble Justice Blair has held that cutting of a branch of a Peepal tree does not hurt the religious susceptibility of Hindus.

20. From the discussions made above I am of the opinion that the revisionist was manufacturing Beedi with the trademark duly registered having picture of Lord Ganesh on its rapper and hence it cannot be said that they have committed any offence. They have got many judgments in their favour, which have been referred to above and once they are acting in accordance with law they cannot be anointed with any offence.

21. In view of what I have said above, this revision is allowed. The impugned summoning order dated 16.6.1993 passed by Judicial Magistrate I, Meerut, in Complaint Case No. 32/9 of 92 is hereby set aside and the proceedings of Complaint Case No. 32/9 of 1992 Gokalesh Pathak versus Manager and Director Mangalore Beedi works U/S 298 IPC, pending before the Judicial Magistrate, I, Meerut are hereby quashed.

22. This revision is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2008

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Contempt Petition No. 1839 of 2007

Medi Lal ...Applicant
Versus.
Achala Khanna ...Respondent

Counsel for the Applicant:
Sri. Yogendra Pati Tripathi

Counsel for the Respondent:
Sri. M.C. Chaturvedi.
S.C.

Contempt of Court Act 1972-section-12-willful disobedience-direction issued by writ Court to decide representation-complied with after two months beyond the time allowed by writ Court-cannot be termed as willful disobedience-contempt-held-not maintainable.

Held: Para 8 & 11

Insofar as the delay in deciding the representation of the petitioner is concerned, it is settled law that even after issue of notice in contempt proceedings, if the opposite party complies with the directions to decide the representation of the petitioner, the courts would not insist that the delay was willful and deliberate defiance of the order of the High Court.

In the present case, it is not denied that the order dated 03.07.2007 has been passed by the opposite party deciding the representation of the petitioner and therefore, although notices in this contempt petition were issued on 09.05.2007, the decision has been taken by the opposite party in compliance of the order dated 10.07.2006 passed by this court in the writ petition. As such, this court is not inclined to accept the contention of learned counsel for the applicant that mere delay in deciding the representation of the petitioner would be a deliberate and willful disobedience of the directions issued by this court in the writ petition.

Case Law discussed:
(2000) 10 SCC 285,
(1996) 6 SCC 291,
(2007) 1 SCC 477.

(Delivered by Hon'ble. Sanjay Misra, J.)

1. Heard Sri Yogendra Pati Tripathi learned counsel for the applicant. Rejoinder affidavit has been filed by learned counsel for the petitioner. Let the same be taken on record.

2. This contempt petition has been filed against the opposite party alleging deliberate disobedience of the judgement and order dated 10.07.2006 passed by this court in WP No. 35134 of 2006. Notices were issued to the opposite parties on 09.05.2007.

3. A perusal of the order dated 10.07.2006 indicates that this court considered the contention of the petitioner that he is entitled to be sent for Special BTC Training Course and he had made a representation which is pending consideration before the authority concerned. This court disposed of the writ petition with a direction to the authority concerned to consider and decide the aforementioned representation of the petitioner by a reasoned and speaking order within two months from the date of production of a certified copy of the said order. According to the averments made in paragraph 7 and 8 of the affidavit supporting this contempt petition, it appears that the order of this court was served on the opposite party through various representations made by the applicant. However, when the opposite party did not pass any order on the representation of the applicant, this contempt petition has been filed.

4. An affidavit of compliance has been filed on behalf of Miss. Achala Khanna, Director - Basic Education, U.P. Lucknow to state that by an order dated

03.07.2007 (Annexure CA-1), the representation of the applicant has been finally decided. It has been stated in the affidavit that there has been some delay in deciding the matter. However, the same is not willful or deliberate on the part of the opposite party.

5. A rejoinder affidavit has been filed on behalf of the applicant wherein in paragraph 5 it has been stated that the representation of the petitioner was not decided by the opposite party and hence he was compelled to file the present contempt petition and the decision now taken is beyond the time granted by this court and also on merits the same is illegal, incorrect and wrong. In paragraph 7 it has been stated that the petitioner has completed his B.Ed Degree as a regular candidate and passed B.Ed examination in 1st Division in 1994. The cut off marks was 286.58% but intentionally the opposite party has not sent the applicant for Special BTC Training Course although he was selected for the course in the year 2005 as an OBC candidate and the name of the petitioner was placed at Sl. No. 9 of the select list published on 22.09.2005. It is therefore, stated that even the order dated 03.07.2007 has been passed against the factual aspects and hence is illegal and is not a compliance of the directions issued by this court on 10.07.2006.

6. Having considered the submissions of learned counsels for the parties and perused the records, it is not disputed that this court by the order dated 10.07.2006 passed in the writ petition required the representation of the petitioner to be decided within two months by a reasoned and speaking order. Admittedly, the representation of the petitioner has been decided much after two months. However, in the affidavit of compliance filed by the opposite party it has been stated that she has been posted as Director, Basic Education, U.P. Lucknow since 22.05.2007 and earlier she was posted as Director, Rajya Saikshik Anusandhan and Training Course, Lucknow.

7. A perusal of the order dated 03.07.2007 indicates that the opposite party has passed a reasoned and speaking order whereby it has been held that the petitioner is legally not entitled for admission to the Special BTC Training Course, 2004.

8. Insofar as the delay in deciding the representation of the petitioner is concerned, it is settled law that even after issue of notice in contempt proceedings, if the opposite party complies with the directions to decide the representation of the petitioner, the courts would not insist that the delay was willful and deliberate defiance of the order of the High Court.

9. It has been held by the Hon'ble Supreme Court in the case of Lalith Mathur vs. L. Maheshwara Rao (2000) 10 SCC 285 in paragraph 4 as quoted hereunder: -

"The High Court in the writ petition had issued a direction for the consideration of the respondent's representation by the State Government. This direction was carried out by the State Government which had considered and thereafter rejected the representation on merits. Instead of challenging that order in a fresh writ petition under Article 226, the respondent took recourse to contempt proceedings which did not lie as the order

had already been complied with by the State Government which had considered the representation and rejected it on merits."

10. In the case of G.S. Parihar vs. Ganpat Duggar (1996) 6 SCC 291, the Hon'ble Apex Court held that correctness of an order passed by a Statutory Authority on the directions of the writ court cannot be examined under contempt jurisdiction. The Hon'ble Supreme Court in the case of Rajasthan Housing Board and another vs. G.S. Investments and another (2007) 1 SCC 477 held in paragraph 12 as quoted under: -

"It appears that the respondent initiated contempt proceedings against the appellants in which a learned Single Judge passed an order on 04.04.2005 observing that the order passed by the Court on 04.08.2004 had not been complied with in letter and spirit and a further direction was issued to comply with the said order within two weeks. The material placed before us shows that Appellant 1 had issued a notice to the respondent on 15.03.2005 and after giving a personal hearing on the next day, had rejected its representation by the order dated 18.03.2005. In these circumstances, there was no occasion for initiating any contempt proceedings against the appellants"

11. In the present case, it is not denied that the order dated 03.07.2007 has been passed by the opposite party deciding the representation of the petitioner and therefore, although notices in this contempt petition were issued on 09.05.2007, the decision has been taken by the opposite party in compliance of the order dated 10.07.2006 passed by this court in the writ petition. As such, this court is not inclined to accept the contention of learned counsel for the applicant that mere delay in deciding the representation of the petitioner would be a deliberate and willful disobedience of the directions issued by this court in the writ petition.

12. Insofar as the merits of the order dated 03.07.2007 is concerned, learned counsel for the petitioner has argued that the conclusions and findings recorded in the said order are patently illegal, factually wrong and requires to be set aside. Such argument of learned counsel for the petitioner is being advanced in a contempt petition wherein this court has to see the disobedience of the order passed by the writ court. The writ court had directed the representation of the petitioner to be decided. There was no direction by the writ court regarding the merits of the claim made by the petitioner nor any observation or direction was made with respect to such claim by the High Court. Once the directions for deciding the representation of the petitioner was issued and such directions have been complied with by the authority concerned by passing a reasoned and speaking order, it cannot be said that if the said order is factually or legally incorrect or wrong, the opposite party would be liable to be punished under the Contempt of Courts Act. The petitioner, if he is aggrieved by the order passed by the authority in pursuance of such a direction issued by this court could avail the remedy available to him in law. This contempt petition cannot be proceeded with for the aforesaid reasons.

13. For the aforesaid reasons, there is no merit in this contempt petition. It is

accordingly dismissed. Notices, if any, issued to the opposite parties are discharged.

14. No order is passed as to costs.

Contempt Rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE VEDPAL, J.

First Appeal From Order No. 1911 of 2008

The New India Assurance Company Ltd.
...Appellant/Defendant
Versus
Smt. Kamla Devi and others
...Claimants/Respondents

Counsel for the Appellant:
Sri Anupam Shukla

Counsel for the Respondents:

Motor Vehicle Act 1988-Section-166-Just and proper compensation-monthly income of deceased-on oral evidence assessed by Tribunal as Rs.6,000/-after deduction 1/3-as per Rs.4,000 awarded Rs.2,40,000/- challenged on the ground-when there is no direct evidence about monthly income-in the garb of just compensation-can not be estimated-held-totally mis conceived-even oral evidence-no denied or contradiction-value of life can not be estimated in terms of money-No case for interference-appeal dismissed in limne.

Held: Para 4

Being so, we cannot interfere with the judgement and order impugned before us. Therefore, we are of the view that the appeal will be treated to be dismissed at the stage of admission. Accordingly, it has been done, however, without imposing any cost.

Case law discussed:
2003(3) TAC 569

{Delivered by Hon'ble Arnitava Lala, J.)

1. This appeal has been preferred by the Insurance Company challenging the judgement and order dated 2nd April 2008 passed by the concerned Motor Accident Claims Tribunal, Fatehpur awarding a sum of Rs.2,57,000/- as compensation along with interest @ 6% thereon.

2. The only one issue has been raised before us by the Insurance Company that there was no evidence with regard to the income of the deceased for a sum of Rs.6,000/- as accepted by the Tribunal. It appears to us that the claim petition was filed by the claimants under Section 166 of the Motor Vehicles Act, 1988. The Court had arrived at such figure of compensation of Rs.6,000/- on the basis of oral testimony and after the deduction of Rs.2,000/-, on being 1/3rd deduction of Rs.6,000/-, arrived at figure of Rs.4,000/- and the compensation was awarded for Rs.2,40,000/- along with the funeral expenses etc .. It is specifically recorded in the judgement itself that there was no denial or rebuttal on the part of the Insurance Company. The Insurance Company has relied upon a judgement delivered by the Supreme Court reported in **2003(3) TAC 569 (State of Haryana Vs. Jasbir Kaur)** and said that when there is no material before the Tribunal to arrive at monthly income for the purpose of considering "just" compensation, it cannot be estimated.

3. We are of the view that the argument, as advanced by the learned

counsel appearing on behalf of the appellant, suffers from misconception. The Supreme Court has categorically held that what be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. The Supreme Court held that the determination should be rational, to be done by a judicious approach and not outcome of whims, wild guesses and arbitrariness. The gentleman, who expired in the case before the Supreme Court, had the agricultural income as well as business with regard to milk etc. But the difference between such case and this case is that there was no material and the present case there was some material even being oral evidence but can not be overlooked. Therefore, when there is some material available before the Court, the Court would construe and come to an appropriate finding particularly in a situation when there is no denial or rebuttal. This distinguishing feature should not be escaped from the notice of the Court in arriving at a conclusion.

4. Being so, we cannot interfere with the judgement and order impugned before us. Therefore, we are of the view that the appeal will be treated to be dismissed at the stage of admission. Accordingly, it has been done, however, without imposing any cost.

5. However, it is open for the insurance company to make any application for recovery of the compensation in the tribunal in the self same proceeding when upon giving notice and adequate opportunity of hearing Court will consider the issue either way. But under no circumstances, the amount which has been directed to be paid to the claimants would be stalled.

6. Incidentally, the appellant-insurance company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimants, however, such prayer is allowed. Appeal Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2008

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

Government Appeal No.2031 of 1981
&
Criminal Revision No.978 of 1981

The State of U.P. ...Appellant
Versus
Narain & others ...Accused Respondents

Counsel for the Appellant:
Sri Amar Jeet Singh
A.G.A.

Counsel for the Respondents:
Sri P.C. Jhingan
Sri C.B. Dubey
Sri A.K.S. Bais

Governments Appeals-offence under Section 302 and 307 I.P.C.-Rejection of statement of two eyes witnesses on ground of close relations-testimony of both witness fully corroborated with medical evidence-FIR-can not be rejected-learned judge failed to appreciate evidence on record-impugned judgement set-aside.

Held: Para 23,24 & 25

No doubt he sided Janki in litigation between Ram Lal and Janki but his testimony stands corroborated by the testimony of injured witness PW 1 Ram Bahadur. Testimony of both the eye witnesses finds corroboration with medical evidence and F.I.R. of the occurrence lodged promptly at the police station without losing any time. Thus evidence of both the eye witnesses cannot be rejected even though they were close to the deceased and inimically disposed towards the accused. In view of above discussion this Court arrives at the conclusion that the learned trial judge failed to appreciate evidence on the record in its true perspective and discarded the evidence of two eye witnesses including one injured. For the above, the impugned judgement cannot be sustained in law and is liable to be set aside.

Government Appeal and Criminal Revision are, therefore, allowed and impugned judgement and order passed by V Additional Sessions Judge, Bareilly acquitting the accused respondents is set aside. Accused Narain and Chhadammi are convicted under sections 302 and 307 each read with section 34 I.P.C. and each of them is sentenced to undergo imprisonment for life and five years' rigorous imprisonment respectively thereunder. Both the sentences shall run concurrently. Both the accused respondents are in jail. They shall serve out the sentence imposed upon them.

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

1. This Government appeal has been preferred from judgement and order dated 6.3.1981 passed by V Additional Sessions Judge, Bareilly, in S.T. No.432 of 1980 acquitting accused Narain, Chhadammu, Pyare Lal and Ram Sahai under sections 302 and 307 I.P.C. each read with section 34 I.P.C. Ram Bahadur the first informant has preferred Criminal Revision No.978 of 1981 from the impugned judgement aforesaid.

2. Since accused respondents Pyarey Lal and Ram Sahay were reported having died, the State appeal filed against them stood abated vide order dated 6.2.2008.

3. Brief facts of the case giving rise to this appeal are that Ram Sahay had three sons Narayan, Chhadammi and Pyarey Lal and Ram Lal was saru of Ram Sahay. Ram Bahadur is the son of Het Ram, and Janki happened to be the uncle of Ram Bahadur. At about 8.00 A,M. on 24.9.1980 Ram Bahadur alongwith Janki Prasad was going- to their house from the Gher and as they reached in front of the Gher of Ram Sahai accused Ram Sahai shouted that Janki had removed the wooden log of his *Rahat*. Immediately Janki denied this fact and then at the exhortation of Ram Sahai his sons Narain, Chhadammi and Pyarey Lal assaulted him. Narain and Chhadammi caused injuries to Janki with knife and Pyarey Lal with lathis. On the alarm raised by Ram Bahadur the assailants gave him lathi blows. Hearing the shrieks of Janki his nephew Tika Ram, one Lal Karan and Brij Lal rushed to the scene of occurrence and as they challenged the assailants they made their escape good. Thereafter Ram Bahadur got report of the occurrence

scribed by Brij Pal son of Janki and went to Police Station Bhamora taking injured Janki in bullockcart and lodged F.I.R. of the occurrence on the same day at 11.05 A.M. Both the injured were sent to P.H.C. Bhamora Hospital for their medical examination and treatment.

4. Dr. S..S. Rawat medically examined Janki at 11.45 A.M. the same day and found following injuries on his body:

1. *A stab wound measuring 3cm x 1cm not probed to avoid surgical ground. Wound situated at thoracic 8-9 spine on back of chest. Fresh blood oozing. Coarse crepitation present.*

2. *A stab wound measuring 2cm x 1 cm just 3.5cm apart to injury No.1 (towards left side) on back of chest, fresh blood oozing and bubble of gas.*

3. *A stab wound 3cm x 1 cm on left side of back of chest 6cm below injury No.2. Breath sound absent on auscultation-left infra-scapular region. Fresh blood oozing from wound. Depth for injury no.2 and 3 not probed to avoid surgical complication. Pulse feeble. Patient gasping unconscious. Margins clean cut. Life saving drug given.*

4. *An incised wound 3cm x 0.5cm x skin deep on front aspect of right forearm just 3cm above the lower end of right radius. Fresh blood oozing.*

5. *An incised wound 5cm x 0.2cm on front aspect of right arm 1 cm above the injury no.4. Fresh blood oozing.*

6. *A lacerated wound size 4cm x 0.5cm x muscle deep on left side of head, 12cm above the right ear.*

5. Margins of injuries no. 1 to 5 were clean cut. Janki expired the same day at 11.55 A.M. Doctor sent a memo to Police Station Bhamora. In the doctor's opinion injury nos. 1 to 3 were grievous and injury nos. 4 to 6 were simple. Injury nos. 1 to 5 were caused by some sharp pointed cutting object and injury nO.6 was by some blunt object and fresh in duration. He also opined that death was caused due to thoracic haemorrhage resulting cardio respiratory failure.

6. The doctor examined Ram Bahadur also the same day and found lacerated wound 4cm x 1 cm x muscle deep on right side of head. Margins were lacerated and blood was oozing from the wound. The injury was caused by blunt object and fresh in duration.

7. Dr. D.S. Gangwar who performed post mortem on the dead body of deceased Janki on 25.9.1980 at 11.30 a.m. found following ante mortem injuries on the dead, body:

1. *Lacerated wound 3.5cm x 0.5 cm x scalp deep on right side of head 9cm above right eye brow.*
2. *Contusion 10cm x 4cm on back of chest left scapular region.*
3. *Contusion 12cm x 2cm on left side of back 12cm below lower end of scapula.*
4. *Incised wound (stitched) 9cm x 0.5 cm x cavity deep on left side of back 3cm from midline and 15cm below root of neck.*

5. *Stitched incised wound 1.8cm x 0.5cm x cavity deep left side of back 6cm below injury no.4.*
6. *Stitched (2) incised wounds 2.5cm x 0.5cm x cavity deep on back of chest at right side near middle line at the level of injury no.4.*
7. *Incised wound 2cm x 1 cm x skin deep on back of right forearm near wrist joint.*
8. *Linear abrasion 6cm long on the back of right forearm just above injury no. 7.*

On internal examination the doctor found pleura punctured under injuries nos. 4 and 5 and one litre blood was present in the cavity.

After completing investigation the police submitted charge sheet against the accused.

8. After framing of charge the prosecution examined PW 1 Ram Bahadur and PW 2 Lal Karan as eye-witnesses of the occurrence. PW 3 Constable Jagdish Singh, PW 4 S.1. Shyam Singh Sirohi, PW 5 Dr. S.S. Rawat and PW 6 Dr. D.S. Gangwar were also examined.

9. Accused-respondents disputed time, place and manner of occurrence alleging that occurrence did not take place near the Gher of accused but it had taken place at some other place in the early hours of morning and some unknown persons might have caused injuries to Janki. It is also alleged that accused Narain and Ram Sahai were assaulted by Ved Ram, Udhao, Hansi and Baljeet on 24.9.1980 at 5.00 A.M. because they were hurling abuses as two trees were lying cut in their field and they asked them not to abuse but they persisted in hurling abuses. Hearing the shrieks Chaman Lal, Ram Lal and others appeared there and saved them. Somebody had injured the victim and the accused respondents were falsely implicated in the crime.

10. On an appraisal of evidence on the record the learned trial judge passed the impugned judgement acquitting the accused. Feeling aggrieved by the impugned judgement the State preferred this appeal for redress.

11. Heard Sri Amar Jeet Singh, learned A.G.A. for the State appellant and Sri A.K.S. Bais, learned counsel for the accused respondents. None appeared for the revisionist. We have gone through the record.

12. It has been submitted by learned A.G.A. for the State appellant that the findings recorded by the trial court are faulty and perverse as the same are based on erroneous appreciation of evidence. Minor variations between the injury report and post mortem report are of no significance. Only one injury found on the body of accused Ram Sahai which was not proved would not confer right of private defence to the accused persons to cause fatal injuries to Janki.

13. Learned counsel for the accused respondents submitted that there are material contradictions in ocular testimony of eye-witnesses and post mortem examination report. Blood was not found on the spot by the Investigating Officer and there are many improbabilities in the prosecution version and therefore, the order of acquittal does not call for any interference by this Court and deserves to be confirmed.

14. In this case, two eye-Witnesses PW 1 Ram Bahadur and PW 2 Lal Karan, who are resident of the same village, were examined by the prosecution in its support. Both of them stated that on account of litigation the accused were inimical to them and caused fatal injuries with knife and lathi to Janki resulting in his death. Narain and Chhadammi who are alive are said to be armed with knives caused fatal injuries to Janki.

15. Learned Sessions Judge observed that according to the site plan the victim could go by shorter route from his gher or field to his house, but he adopted longer route and normally longer route is not adopted by a person. On this ground it has been doubted by learned trial judge if the incident occurred at the place alleged by the prosecution. In village area persons go through more than one path from his field to his house as the circumstances require. In instant case the victim adopted route which was 50 steps longer in distance than the shorter route. This distance is not of much significance as the distance was of only 40-50 steps.

16. The next ground on which the order of acquittal was passed was that no fodder cutting machine was found outside village abadi in the gher of Janki. PW 1 Ram Bahadur has stated that he was collecting fodder in the gher of Janki which was being cut on the grass cutting machine. The old machine which was in the gher of Janki was later on taken out from the gher and was fixed near the house of the victim. The site-plan shows that there is grass cutting machine of Shiv Lal near the gher of Janki. Investigating Officer had shown machine of Janki in his Khaprail gher and he had two paths to go to his house one from western side and another from eastern side. It was in the eastern side where the occurrence had taken place. There is statement that after occurrence, the grass cutting machine was taken from gher and it was kept at residence of Janki. Thus the finding of trial court that there was no possibility of Janki carrying fodder in front of door of Ram Sahai is not maintainable.

17. Learned A.G.A. has submitted that learned Sessions Judge held that place of occurrence is not proved because no blood was found on the spot. Learned A.G.A. submits that injury report as well as post mortem examination report which were proved by PW 5 Dr. S.S. Rawat and PW 6 Dr. D.S. Gangwar show that stab injuries were caused in which mainly infra-thoracic haemorrhage did take place inside the body and blood was found in the cavity. It was a broad day light occurrence. The occurrence did take place on the main pathway. Immediately injured Janki was taken to the hospital. In such circumstance there is nothing surprising if blood was not found on the spot as soon after the occurrence many persons assembled on the spot which was the main pathway and blood which would have fallen down at the place of occurrence would have been trodden due to assembling of several persons there and might not have been visible when the Investigating Officer visited the scene of occurrence. Moreover a perusal of the post mortem report goes to show that pleural cavity contained one litre blood. Learned A.G.A. submits that there is minor variations between the injury report and post mortem report, which would not be a ground to disbelieve the prosecution story.

18. In the injury report the doctor medically examining injured Janki mentioned three stabbed wounds and two incised wounds on chest, back and right forearm besides a lacerated wound on his head. However the doctor mentioned in the injury report that all the five injuries, three stabbed wounds and two incised wounds (Injuries no. 1 to 5) were clean cut. The doctor conducting autopsy on the dead body mentioned in the post mortem report that there were four ante mortem incised wounds on chest, back and forearm in addition to one lacerated wound on his head besides two contusions on back and one linear abrasion on right forearm. Thus virtually there is no material difference in the injuries found on the person of the victim and after his death on his dead body. In the injury report as well as in post mortem examination injuries found were caused by sharp edged weapon and blunt object as well. At the time of autopsy the dead body is minutely examined. It appears at the time of medical examination of injured Janki contusion might not have appeared as sometimes contusion take time to appear. Under the circumstances on account of minor variations in the injuries in both the medical reports, testimony of two eye witnesses can not be thrown over board.

19. Learned A.G.A. submits that one simple lacerated wound on the body of accused Narain is not sufficient to hold that injuries were caused in self-defence resulting in death of Janki. PW 4 S.I.S.S. Sirohi who investigated the crime found one lacerated wound on the body of accused Narain. He stated that there was bandage on the head of Narain accused. No F.I.R. was lodged from the side of accused persons. No doubt, prosecution has to explain the injuries sustained by the accused but time of injury sustained by the accused should correspond to the time of occurrence in which the persons on the side of prosecution sustained injuries. Non-explanation of injury of superfluous nature on the person of the accused would not shake the truth of the prosecution version. In *A.I.R.2006 SCW 5239 Sukumar Roy Versus State of West Bengal* it has been held by the Apex Court that if injury of the accused are of minor nature moreso when neither any injury report by the doctor was produced nor any doctor was examined by accused, non-explanation of such injury on the body of accused cannot be a ground to disbelieve the prosecution story. In instant case the Investigating Officer had simply seen bandage on the head of Narain but he was unable to explain as to what was the nature of injury and when it was caused nor the accused came with any explicit version. Thus plea of the defence that they caused injuries to Janki resulting in his death in exercise of right of private defence falls to the ground.

20. Learned A.G.A. submitted that Sessions Judge has disbelieved the statement of PW 1 Ram Bahadur and PW 2 Lal Karan on the ground that they are interested witnesses. In *2008 AIR Supreme Court Weekly 2319 Tuka Ram versus State of Karnataka* it has been held by Hon'ble the Apex Court that *"Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if a plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyze evidence to find out whether it is cogent*

and credible. The ground that the witness being a close relative and consequently being a partisan witness, should no be relied upon, has no substance."

21. In AIR 1953 Supreme Court 364 Dalip Singh Versus State of Punjab it has been held by Hon'ble the Apex Court that,

"A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule. Each case must be limited to and be governed by its own facts."

22. In 1974(3) SCC 698 Guli Chand Versus State of Rajasthan and AIR 1957 SC 614 Vadiveluthewar versus State of Madhya Pradesh the same principle as has been observed in Dalip Singh's case, has been laid down by Hon'ble the Apex Court.

In AIR 1965 Supreme Court 202 Masalti and others versus State of U.P. it was held by Hon'ble the Apex Court that;

"But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses…..The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice."

The same principle was laid down in AIR 1973 Supreme Court 2407 State of Punjab Versus Jagir Singh, 2002(3) Supreme Court 76 Lehana Singh versus State of Haryana and 2002(8) Supreme Court Cases 381 Gangadhar Behera Versus State of Orisa, 2005 (10) Supreme Court Cases 404 Babu Lal Bhagwan Versus State of Maharashtra.

23. Thus in instant case it is to be ascertained as to whether PW 1 Ram Bahadur and PW 2 Lal Karan are interested witnesses and their testimony deserves to be believed or discarded. It has come in evidence that Janki, the deceased was not real uncle of Ram Bahadur and he used to call him uncle on account of village relations. Sworn testimony of a witness cannot be discarded merely on the ground that he is either a partisan or closely related to the deceased if it is otherwise found to be trustworthy and credible. It only requires scrutiny with care and caution. On careful scrutiny, if the evidence is found to be reliable and trustworthy if can be acted upon and if it is found to be improbable or suspicious it should be rejected. In the instant case PW 1 Ram Bahadur was subjected to long and searching cross-examination but nothing tangible could be elicited to render his testimony doubtful. Soon after the occurrence he arranged a bullock cart and took injured Janki therein to the police station situate at a distance of

six miles from the village and handed over written report of the occurrence to the police there at 11.15 a.m. and then the injured was sent to the hospital where he was medically examined at 11.45 noon. PW 1 Ram Bahadur is an injured witness who sustained injury at his scalp which cannot be self-inflicted. Thus his presence at the scene of occurrence cannot. be doubted. Likewise PW 2 Lal Karan stated that he was cutting fodder in his field which is near the pathway where the occurrence took place. On the shrieks of the victim he rushed to the spot and witnessed the occurrence. Site plan which was prepared and proved by Investigating Officer shows that the field of Lal Karan where he was cutting fodder was situate near the scene of occurrence. He too was subjected to searching and gruelling cross-examination but his testimony was intact on material particulars of the case. No doubt he sided Janki in litigation between Ram Lal and Janki but his testimony stands corroborated by the testimony of injured witness PW 1 Ram Bahadur. Testimony of both the eye witnesses finds corroboration with medical evidence and F.I.R. of the occurrence lodged promptly at the police station without losing any time. Thus evidence of both the eye witnesses cannot be rejected even though they were close to the deceased and inimically disposed towards the accused.

24. In view of above discussion this Court arrives at the conclusion that the learned trial judge failed to appreciate evidence on the record in its true perspective and discarded the evidence of two eye witnesses including one injured. For the above, the impugned judgement cannot be sustained in law and is liable to be set aside.

25. Government Appeal and Criminal Revision are, therefore, allowed and impugned judgement and order passed by V Additional Sessions Judge, Bareilly acquitting the accused respondents is set aside. Accused Narain and Chhadammi are convicted under sections 302 and 307 each read with section 34 I.P.C. and each of them is sentenced to undergo imprisonment for life and five years' rigorous imprisonment respectively thereunder. Both the sentences shall run concurrently. Both the accused respondents are in jail. They shall serve out the sentence imposed upon them.

26. Office is directed to send copy of the judgement and record of the lower court to the court below immediately for necessary compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2008

BEFORE
THE HON'BLE BARKAT ALI ZAIDI, J.

Criminal Jail Appeal No.2841 of 2005

Shahid ...Accused-Appellant
Versus
State of U.P. ...Respondents

Counsel for the Appellant:
Sri Shiv Shanker Yadav
(Amicus Curiae)

Counsel for the Respondent:
A.G.A.

Narcotic Drugs and Psychotropic Substance Act 1985-Section 20 (B)(ii)(b)-sentence for small quantity of smack 200 gms.-maximum punishment 6 months and fine of Rs.10,000/- recover

of 490 gram charas comes 3 and ½ years-appellant already undergone 3 years 9 month R.I. with fine of Rs.30,000/-held-entitled for released-Appeal allowed.

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

1. Appellant-accused Shahid has been convicted in S.S.T. No. 73 of 2004, under Section 20 (B)(ii)(b) of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as N.D.P.S. Act) by Addl. Sessions Judge, Fast Track Court No. 1, Saharanpur by judgment and order dated 18.6.2005 and sentenced to 6 year R.I. and a fine of Rs.30,000/-, in default, further imprisonment for one year.

2. He has sent this appeal from jail.

3. Heard Sri Shiv Shanker Yadav, Amicus Curiae for the appellant and Sri Sanjay Sharma, Addl. Government Advocate for the State.

4. The counsel for the accused-appellant has confined his arguments on the question of sentence only.

5. It will be seen that the sentence for small quantity of smack provided under the 'Act' is maximum 6 months an a fine of Rs.10,000/-. The proper course to determine the quantity would be to enhance the sentence in proposition to the quantity recovered in excess of the small quantity. To explain the proposition, further if 200 gms. Charas is recovered, the sentence should be similarly enhanced to one year from 6 months and so on.

6. In accordance with the calculation, the sentence which the accused deserves, on basis of recovery of 490 gms. Charas comes, to two and a half year Rigorous imprisonment and a fine of Rs.50,000/-

7. The accused has been awarded a fine of Rs.30,000/- and the sentence in default of payment of fine, would come to seven and a half month because the sentence in default of payment of fine to be $1/4^{th}$ of the substantial sentence. Accused has, therefore, to undergo speven and a half month imprisonment, in default of payment of fine.

8. Calculating in this manner, the total, sentence which has to be awarded to the accused comes to two and a half year plus seven and a half month, which comes to three year and one and a half month.

9. The accused has already undergone a sentence of three year, nine months and twenty days in jail. He is, therefore, entitled to be released now.

10. The appeal is accordingly allowed, and the accused shall now be released.

11. The fee of the Amicus Curiae Sri Shiv Shanker Yadav is fixed at rupees five thousand. Appeal Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.05.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Revision No. 3431 of 2007

Daya Ram ...Revisionist
Versus
State of U.P and others ...Respondents

Counsel for the Revisionist:
Sri M.B. Mathur

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-397-Offence under Section 409/504/506 I.P.C.-final report submitted-Magistrate after hearing informant-summoned the accused persons to face the trail-challenged before High Court-summoning order set-a side with direction to pass fresh order on protest application-Magistrate again by impugned order rejected the application due to want of material-held-magistrate ought to have treated the protest application as complaint case-by giving opportunity to the complainant to lead evidence-order of Magistrate without following procedures under chapter XV of the Code held unsustainable.

Held: Para 8 & 9
In the instant case, the revisionist/complainant has already filed objections against final report which have been rejected by the learned magistrate vide impugned order dated 13.08.2007 without following the procedure laid down in Chapter XV Cr.P.C. as directed by the learned lower Revisional Court in its judgment dated 07.10.2006 passed in Crl. Revision No. 27 of 2006.

Consequently, the revision is partly allowed. The impugned order dated 13.08.2007 rejecting the objections of the complainant against final report is set aside and the case is sent back to the court of judicial magistrate Rampur with the direction to decide the objections/protest petition of the complainant afresh, treating the same as complaint and following the procedure laid down in Chapter XV Cr.P.C.
Case law discussed:
(2001(43) ACC 1096), (2001(43) ACC 1096), (2003 (46) ACC 182 (S.C.)

(Delivered by Hon'ble Vijay Kumar Verma, J.)

1. Challenge in this revision preferred under section 397 of the Code of Criminal Procedure (in short the 'Cr.P.C.') is to the order dated 13.08.2007, passed by Sri Susheel Kumar, the then Judicial Magistrate Rampur, in Case No. 19 of 2008 (Daya Ram vs. Shanti Prasad & others), whereby accepting the final report submitted by the police of P.S. Milak Khanam, District Rampur, in case crime No. 81/2005, under sections 409/504/506 IPC, the objections filed by the revisionist/complainant Daya Ram have been rejected.

2. Shorn of unnecessary details, the facts leading to the filing of this revision, in brief, are that the revisionist Daya Ram had lodged an FIR on 01.04.2005 at P.S. Milak Khanam, District Rampur, where a case under section 409/504/506 IPC was registered at crime No. 81/05 against Shanti Prasad and Mohd. Ahmad (respondents no.2 & 3 herein). It appears that after investigation, final report was submitted by the police. When notice of that final report was issued to the complainant, he filed objections in the court of Magistrate concerned on 04.01.2006. After hearing the counsel for the complainant and going through the case diary, the then judicial magistrate Rampur rejected the final report and summoned the accused Shanti Prasad and Mohd Ahmad to face the trial under section 409/504/506 IPC vide order dated 06.01.2006 passed in case No. 118/12 of 2005. That order was challenged by the accused persons in the court of Sessions Judge Rampur by means of Criminal Revision No. 27 of 2006, which was decided on 07.10.2006 by the Additional Sessions Judge, Court No. 5, Rampur,

whereby revision was allowed and after setting aside the order dated 06.01.2006, the case was sent back to the court of magistrate concerned for passing fresh order on the final report and objections of the complainant keeping in view the observations made in the judgement. Thereafter, the impugned order has been passed on 13.08.2007, which has been challenge in this revision.

3. I have heard Sri M.B. Mathur, learned counsel for the revisionist, learned AGA for the State and perused the record carefully. Since the accused persons have no right to contest the revision against the impugned order, hence notices have not been issued to them.

4. It was vehemently contended by the learned counsel for the revisionist that the impugned order has been passed by the learned magistrate in utter disregard of the order dated 07.10.2006 passed in Crl. Revision No. 27 of 2006, and hence the said order is liable to be quashed on this ground alone. It was also submitted that if in the opinion of the learned magistrate, the material in the case diary was not adequate to take cognizance against the accused and to summon them to face the trial, then the objections/ protest petition filed by the complainant against the final report ought to have been registered as complaint and after affording opportunity to the complainant to lead evidence under section 202 Cr.P.C., further order either under section 203 or 204 Cr.P.C. should have been passed. In support of these contentions, the learned counsel for the revisionist has placed reliance on the case of ***Pakhando and others Vs. State of U.P. and another (2001(43) ACC 1096)***.

5. The learned AGA on the other hand submitted that impugned order does not suffer from any illegality, as the magistrate can disagree with the conclusion drawn by the police after investigation and it was not obligatory for the magistrate to treat the objections against final report as complaint.

6. Having given my thoughtful consideration to the rival submissions made by learned counsel for the parties, I find force in the aforesaid contentions raised by the learned counsel for the revisionist. From the record it is revealed that summoning order dated 06.01.2006 passed by the then judicial magistrate Rampur was challenged by the accused persons in Crl. Revision No. 27 of 2006, which was decided on 07.10.2006 by the Additional Sessions Judge, Court No. 5, Rampur. While allowing that revision vide judgment dated 07.10.2006, it was specifically observed by the learned lower Revisional Court that if in the opinion of the learned Magistrate, the evidence in the case diary is not sufficient, then the learned Magistrate ought to have proceeded further after following the procedure laid down in Chapter XV Cr.P.C. while passing the impugned order, the learned Magistrate has totally ignored this observation made by the learned lower Revisional Court in its judgment dated 07.10.2006 passed in Criminal Revision No. 27 of 2006. Copy of this judgement is available on lower court, being **Paper No. 9 Kha/82 to 9Kha/87**.It is very surprising and unfortunate too that the learned Judicial Magistrate passing the impugned order did not care to pursue this judgement of lower Revisional Court, as there is no mention of this judgement in the impugned order dated 13.08.2007. The

objections of the complainant against final report have not at all been considered in the impugned order, although there was specific direction in the judgement dated 07.10.2006 of Crl. Revision No. 27 of 2006 that if the material in case diary is not sufficient to take cognizance, then the objections against the final report ought to have been treated as complaint and further action should have been taken after following the procedure laid down in Chapter XV Cr.P.C. Therefore, the impugned order which has been passed ignoring aforesaid observation, which virtually was a direction of the learned lower Revisional Court, is liable to be set aside.

7. The Division Bench of this Court in the case of ***Pakhando and others Vs. State of U.P. and another (2001(43) ACC 1096)*** had the occasion to consider the matter regarding the procedure to be adopted by the Magistrate/Court on submission of the final report by the police. Having taken various authorities into consideration, the following observations have been made by the Division Bench in para 15 of the judgement at page 1100 of the report:-

"From the aforesaid decisions, it is thus clear that where the Magistrate receives final report, the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:-

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

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

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

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

In view of the observations made by the Division Bench of this Court in the case of ***Pakhando Vs. State (supra),*** the objections/protest petition filed by the complainant against the final report submitted by the police in Case Crime No. 81 of 2005, under sections 409/504/506 IPC, P.S. Milak Khanam (Rampur) ought to have been treated as complaint and after following the procedure laid down in Chapter XV Cr.P.C., further order under section 203 or 204 Cr.P.C., as the case may be, should have been passed.

8. In the case of ***Mahesh Chand Vs. B. Janardhan Reddy and another (2003 (46) ACC 182 (S.C.),*** the three Judges'

Bench of the Hon'ble Apex Court has held that there cannot be any doubt or dispute that only because the Magistrate has accepted the final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition on the same or similar allegations. From the law laid down by the Hon'ble Apex Court in above mentioned ruling, it is crystal clear that even after acceptance of the final report by the Magistrate, the complainant can file protest petition and such petition can be treated as complaint and after following the procedure laid down in Chapter XV Cr.P.C., summoning order under Section 204 Cr.P.C. can be passed, if there are sufficient grounds to proceed against the accused. In the instant case, the revisionist/complainant has already filed objections against final report which have been rejected by the learned magistrate vide impugned order dated 13.08.2007 without following the procedure laid down in Chapter XV Cr.P.C. as directed by the learned lower Revisional Court in its judgment dated 07.10.2006 passed in Crl. Revision No. 27 of 2006.

9. Consequently, the revision is partly allowed. The impugned order dated 13.08.2007 rejecting the objections of the complainant against final report is set aside and the case is sent back to the court of judicial magistrate Rampur with the direction to decide the objections/protest petition of the complainant afresh, treating the same as complaint and following the procedure laid down in Chapter XV Cr.P.C.

The Office is directed to return lower court record expeditiously along with a copy of this judgement for further necessary action. Revision partly allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.05.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Crl. Misc. Writ Petition 4301 of 2008

Ajay @ Sheru and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri. S.K. Dubey

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

Code of Criminal Procedure-Section 482-quashing of summoning order-on the basis of FIR-alleged offence under Section 392,323,504 IPC-I.O. submitted charge sheet for offence under Section 323/504 IPC-Magistrate on the basis of report submitted u/s 173 taken cognizance after due application of mind-objection regarding following procedure of chapter XV-not sustainable-submission of investigating report-treated complaint, the Investigation Officer a complainant-being a Police Officer acted during discharge of public duty-no need of examination u/s 202-held order passed by Magistrate-warrant no interference.

Held: Para 8

In instant case, the investigating officer had submitted a report in a case, which discloses after investigation the commission of a non-cognizable offence, which in view of the Explanation to Section 2(d) Cr.P.C. shall be deemed to be a complaint and the police officer by whom the said report was made shall be deemed to be the complainant. Since the

said deemed complaint has been filed by a public servant in discharge of his official duties, hence it is not necessary to examine the said police officer upon oath under Section 200 Cr.P.C. During the course of investigation of the case of crime no. 282 of 2006, evidence has already been collected by the investigating officer. Hence, there is no need now to make further inquiry by the Magistrate or to direct fresh investigation to be made by a police officer as envisaged in Section 202 Cr.P.C., because the purpose of holding inquiry by the Magistrate under Section 202 Cr.P.C. is also to collect the evidence for deciding whether or not there is sufficient ground for proceedings and to pass order under Section 203 or 204 Cr.P.C. as the case may be.

Case law discussed:

2007(58) ACC 998, 2007(57), ACC 528, 2007(59), ACC 998, 2001(1) UPCRR 165 (SC).

(Delivered by Hon'ble Vijay Kumar Verma, J.)

1. "Whether after taking cognizance and issuing summons to the accused on the police report disclosing non-cognizable offence after investigation, fresh summoning order is to be passed after following the procedure laid down in Chapter XV of the Code of Criminal Procedure (in short, the Cr.P.C.)", is the main point that falls for consideration in this proceeding under Section 482 Cr.P.C., by means of which the applicants-accused have invoked inherent jurisdiction of this Court praying for quashing the entire proceedings of criminal case no. 5513 of 2006 (State Vs. Ajay and others) arising out of case crime no. 282 of 2006 under Section 323, 504 I.P.C. P.S. Buxa, District Jaunpur pending in the Court of Judicial Magistrate 1st (Court No. 27) Jaunpur.

2. Shorn of unnecessary details, the facts leading to the filing of the application under Section 482 Cr.P.C., in brief, are that Sri Ramesh Kumar (opposite party no. 2 herein) had lodged an F.I.R. on 26.05.2006 at P.S. Buxa, District Jaunpur, where a case under Section 392, 323, 504 I.P.C. was registered at crime no. 282 of 2006 against the accused-applicants. After investigation, the police submitted the report (charge sheet) on 28.06.2006 under the provisions of Section 173(2) Cr.P.C. under Section 323, 504 I.P.C., on which cognizance was taken by learned Judicial Magistrate 1st (Court No. 27) Jaunpur vide order dated 28.09.2006 and the applicants-accused were summoned to face the trial under Section 323, 504 I.P.C. When the accused-applicants did not appear in pursuance of the summons, order of issuing bailable warrant was passed against them. Instead of appearing in the Trial Court, the applicants-accused have approached this Court in this proceeding under Section 482 Cr.P.C. to quash the entire proceedings of criminal case referred to above.

3. I have heard Sri S. K. Dubey, learned counsel for the applicants, learned A.G.A. for the State and perused the entire record.

4. The main contention raised by the learned counsel for the applicants-accused was that after investigation of the case of crime no. 282 of 2006, the police of P.S. Buxa (Jaunpur) had submitted chargesheet under Section 323, 504 I.P.C., which are non-cognizable offences, which in view of the Explanation to Section 2 (d) Cr.P.C., will be deemed to be a complaint and hence, the order dated 28.09.2006 taking

cognizance by the learned Magistrate without following the procedure laid down in Chapter XV Cr.P.C is wholly illegal and on this ground alone, the entire proceedings of criminal case no. 5513 of 2006 arising out of case crime no. 282 of 2006 are liable to be quashed. In the alternative, it was submitted by the learned counsel for the applicants that the order dated 28.09.2006 passed by the learned Magistrate be quashed and direction be issued to the learned Magistrate to pass fresh summoning order after following the procedure laid down in chapter XV Cr.P.C. The contention of the learned counsel for the applicants was that since the police report (chargesheet) submitted under the provisions of Section 173 (2) Cr.P.C., which after investigation discloses non-cognizable offence, is deemed to be a complaint in view of the Explanation to Section 2(d) Cr.P.C., hence cognizance on such police report cannot be taken without recording the statements of the police officer making investigation and witnesses as provided under Section 200 and 202 Cr.P.C. In support of his contention, the learned counsel for the applicants has placed reliance on the cases of ***Santosh Kumar Trivedi Vs. State of U.P. and another (2007 (58) ACC 998), Parvesh and another Vs. State of U.P. and another (2007 (57) ACC 528), Dr. Rakesh Kumar Sharma Vs. State of U.P. and another (2007 (59) ACC 998), State of Bihar Vs. Chandra Bhushan Singh and others (2001 (1) U.P.C.R.R. 165(S.C.)*** and two unreported judgements both dated 05.03.2008 passed by this Court in criminal misc. application no. 3111 of 2008 and 3112 of 2008.

5. The learned A.G.A. on the other hand submitted that on submission of the police report (chargesheet) in case crime no. 282 of 2006, the Magistrate has rightly taken cognizance and issue summons against the accused-applicants and hence it is not necessary now to pass fresh summoning order after following the procedure laid down in chapter XV Cr.P.C. It was further submitted by learned A.G.A. that the Magistrate concerned may be directed to follow the procedure for trial of the accused as laid down in Chapter XX Cr.P.C.

6. Having given my thoughtful consideration to the rival submissions made by the learned counsel for the parties, in my considered opinion, the proceedings of criminal case no. 5513 of 2006 arising out of crime no. 282 of 2006 pending in the Court of Judicial Magistrate 1st Jaunpur cannot be quashed on the basis of the aforesaid submissions made by the learned counsel for the applicants. I entirely agree with the submission of the learned A.G.A. that after taking cognizance on the chargesheet (deemed complaint), there is no need to pass fresh summoning order after following the procedure laid down in the Chapter XV Cr.P.C.

7. It is true that after investigation of the case of crime no. 282 of 2006 police report (chargesheet) under the provisions of Section 173(2) Cr.P.C. was submitted under Section 323, 504 I.P.C. which are non-cognizable offences and hence according to the Explanation to Section 2(d) Cr.P.C, the said police report shall be deemed to be a complaint and the police officer by whom such report was submitted shall be deemed to be the complainant, but since the cognizance has already been taken by the Magistrate on the said deemed complaint and summons

have been issued to the accused-applicants, hence in my opinion, there is no need at all to pass fresh summoning order by the Magistrate after following the procedure laid down in Chapter XV Cr.P.C.

8. Chapter XV Cr.P.C. relates to the complaints to the Magistrate. It is provided in Section 200 Cr.P.C., which lies in Chapter XV, that a Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any. The first proviso to Section 200 Cr.P.C. lays down that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses in the cases where the complaint has been filed by a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint. Section 202 Cr.P.C., which also lies in Chapter XV Cr.P.C., lays down the procedure for making inquiry by the Magistrate himself or to direct an investigation to be made by a police officer for the purpose of collecting the evidence for deciding whether or not there is sufficient ground for proceeding. In instant case, the investigating officer had submitted a report in a case, which discloses after investigation the commission of a non-cognizable offence, which in view of the Explanation to Section 2(d) Cr.P.C. shall be deemed to be a complaint and the police officer by whom the said report was made shall be deemed to be the complainant. Since the said deemed complaint has been filed by a public servant in discharge of his official duties, hence it is not necessary to examine the said police officer upon oath under Section 200 Cr.P.C. During the course of investigation of the case of crime no. 282 of 2006, evidence has already been collected by the investigating officer. Hence, there is no need now to make further inquiry by the Magistrate or to direct fresh investigation to be made by a police officer as envisaged in Section 202 Cr.P.C., because the purpose of holding inquiry by the Magistrate under Section 202 Cr.P.C. is also to collect the evidence for deciding whether or not there is sufficient ground for proceedings and to pass order under Section 203 or 204 Cr.P.C. as the case may be. As stated above, the police officer, who made the investigation in instant case, has already collected the evidence during the investigation, on the basis of which, the police report (deemed complaint) disclosing the offences punishable under Section 323, 504 I.P.C. has been filed. From the order dated 28.09.2006 passed by the learned Magistrate on the said deemed complaint, it is revealed that the learned Magistrate had applied his mind to the facts of the case and the evidence collected by the investigating officer was perused by him and only thereafter, cognizance was taken and summons were issued to the applicants-accused to face the trial under Section 323, 504 I.P.C. When a Magistrate on the basis of the material available in the case diary submitted with the police report has taken cognizance and summons have been issued to the accused, then in my opinion, there is no need at all to pass fresh summoning order after following the procedure laid down in Chapter XV Cr.P.C. No prejudice has been caused to the accused by the impugned summoning order dated 28.09.2006, which in my opinion does not suffer from any illegality, as there was no need to follow the procedure laid down in Chapter XV Cr.P.C. before taking cognizance on the basis of the police report (deemed complaint) Therefore, the proceedings of

criminal case no. 5513 of 2006 pending in the Court of Judicial Magistrate 1st Jaunpur on the basis of the summoning order dated 28.09.2006 are not liable to be quashed.

9. The observations made by the Hon'ble Apex Court in the case of State of Bihar vs. Chandra Bhushan Singh (supra), are not helpful to the applicants in instant case, as the controversy which has been raised in instant case was not involved in the aforesaid ruling. I respectfully differ from my esteemed brothers, who have taken contrary view on this matter in the cases referred to herein-above.

10. Before parting with this order, I would like to state that trial of the accused-applicants shall be made in accordance with the procedure laid down in Chapter XX Cr.P.C. The title of the criminal case no. 5513 of 2006 also should be amended showing S.I. Ramakant (investigating officer) as the complainant and the case shall be treated as complaint case.

11. With these observations and for the reasons mentioned herein-above, the application under Section 482 Cr.P.C. is rejected. The Magistrate concerned is directed to follow the procedure laid down in Chapter XX Cr.P.C. for the trial of the applicants-accused in criminal case no. 5513 of 2006 arising out of case crime no. 282 of 2006 under Section 323, 504 I.P.C. P.S. Buxa, District Jaunpur.

The office is directed to send a coy of this judgement to the Trial Court concerned for necessary action.

Application Rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.05.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Crl. Misc. Application No. 5660 of 2008

Safdar ...Applicant
Versus.
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Sri. Haji S. Kamal Akhatar Khan

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

Code of Criminal Procedure-Section 482-Final report accepted by the Magistrate-protest application rejected on the ground final report accepted-held-Magistrate as well as the revisional Court committed great illegality by ignoring the well settled principal of Law-learned Session Judge also misinterpreted the ratio of Law laid down by Apex Court in Mahesh Chandra case-even if the complainant absent and from case dairy sufficient evidence found to take cognizance-Magistrate is not bound to accept the final report-held-application allowed impugned orders quashed with direction to pass fresh reasoned order.

Held: Para 9

The order dated 06.06.2006 passed by the Judicial Magistrate/2nd Additional Civil Judge(J.D.), Rampur in criminal misc. case no. 523 of 2007 (State Vs. Safdar) shows that the learned Magistrate did not apply his mind to the facts of the case and even the case diary was not perused by him at the time of passing this order and the final report has been accepted merely on the ground that the complainant is absent and a report under Section 182 Cr.P.C. has been submitted by the police for taking

action against the complainant. The learned Magistrate was required to go through the case diary and the final report could be accepted only if there was no evidence at all to take cognizance and issuance of process against the accused. It is well settled principle of law that if there is evidence in the case diary to take cognizance and to summon the accused for trial, then the Magistrate is not bound to accept the final report, even if the complainant is absent or has not filed any protest petition/objections against the final report.

Case Law discussed:

1985 Cri. L. J. 437, AIR 2002 Supreme Court 483, 2003 (46) ACC 182 (S.C.)

(Delivered by Hon'ble Vijay Kumar Verma, J.)

1. *"Can a Magistrate even after accepting the final report filed by the police still take cognizance of an offence upon a protest petition or complaint on the same or similar allegations of fact?"* is the main point that falls for consideration in this proceeding under Section 482 of the Code of Criminal Procedure (in short, "the Cr.P.C.), by means of which, the applicant has invoked inherent jurisdiction of this Court, praying for quashing of the order dated 17.09.2007 passed by the then Sessions Judge, Rampur in criminal revision no. 149 of 2007 (Safdar Vs. State of U.P.) and order dated 19.06.2007 passed by the Judicial Magistrate/ 2nd Additional Civil Judge/(J.D.) Rampur in criminal misc. case no. 523 of 2007.

2. Shorn of unnecessary details, the facts leading to the filing of the application under Section 482 Cr.P.C., in brief, are that an application under Section 156(3) Cr.P.C. was moved by the applicant in the Court of Judicial Magistrate, Rampur on 12.12.2005, which was allowed. Pursuant to the order passed on that application by the learned Magistrate, an F.I.R. was lodged on 23.12.2005 and a case under Section 323, 504, 506, 452 and 307 of Indian Penal Code (in short, "the I.P.C.") was registered against Yaseen S/o Pyare and Guddu S/o Ahmad Navi (opposite parties no. 2 and 3 herein) at P.S. Bhot (Rampur). After investigation, final report was submitted by the police and a report under Section 182 I.P.C. was also sent for taking action against the applicant/complainant. Notice of the final report and application under Section 182 I.P.C. was sent to the complainant on 20.02.2006. On getting information, the complainant appeared in the Court of Magistrate concerned and sought time to file objections against the final report. On 06.06.2006, the complainant did not appear in the Court and hence, the learned Magistrate accepted the final report and adjourned the case for taking action under Section 182 I.P.C. against the complainant. Thereafter, the complainant filed protest petition against the final report on 01.08.2006. After hearing the counsel of the complainant, the learned Judicial Magistrate/2nd Additional Civil Judge (J.D.), Rampur vide his order dated 19.06.2007 dismissed the protest petition holding that since the final report has already been accepted on 06.06.2006, hence the protest petition is not maintainable. Order dated 19.06.2007 passed by the learned Magistrate was challenged by the complainant/applicant in the Court of Sessions Judge, Rampur by means of criminal revision no. 149 of 2007, which has been dismissed by the then learned Sessions Judge, Rampur vide his order dated 17.09.2007. Both these orders have been challenged in this proceeding under Section 482 Cr.P.C.

3. Since no adverse order has been passed against the accused/opposite parties, hence notices of the proceeding have not been issued to them.

4. I have heard Sri Haji S. Kamal Akhtar Khan, learned counsel for the applicant, learned A.G.A. for the State and perused the record.

5. It was vehemently contended by the learned counsel for the applicant that the order dated 19.06.2007 passed by the Judicial Magistrate/ 2nd Additional Civil Judge (J.D.), Rampur in criminal misc. case no. 523 of 2007 and order dated 17.09.2007 passed by the Sessions Judge, Rampur in criminal revision no. 149 of 2007 are wholly illegal, as even after acceptance of the final report by the Magistrate, the complainant has right to file protest petition and cognizance still can be taken by the Magistrate upon the protest petition.

6. The learned A.G.A. on the other hand contended that there is no illegality in the impugned orders, as after acceptance of the final report by the Magistrate, protest petition of the complainant was not maintainable and hence the same was rightly dismissed by the learned Magistrate and the learned Sessions Judge also did not commit any illegality in affirming the order of Magistrate dismissing the protest petition.

7. Having given my thoughtful consideration to the rival submissions made by the learned counsel for the parties, I find force in the above mentioned contention of the learned counsel for the applicant. The matter of maintainability of the protest petition after acceptance of the final report by the Magistrate was considered by the Division Bench of Patna High Court in the case of **Munilal Thakur and others Vs. Naval Kishore Thakur and another (1985 Cri.L.J. 437)**. After considering various authorities, it has been held by the Division Bench that a Magistrate even after accepting the final report can still take cognizance of the offence upon a complaint or a protest petition on the same or similar allegations of fact. This matter came before the Hon'ble Apex Court in the case of **Kishore Kumar Gyanchandani Vs. G. D. Mehrotra (AIR 2002 Supreme Court 483)**. In that case also, final report was submitted after investigation by the police, which was accepted by the Magistrate. Thereafter, the complainant had filed a protest petition, which was treated as complaint by the Magistrate and after holding inquiry under Section 202 Cr.P.C., summoning order was passed, which was challenged by the accused in the High Court. In exercise of its inherent power, the High Court had set-aside the order of taking cognizance and issuance of process in the complaint proceeding. When appeal against the order of High Court was preferred in the Hon'ble Apex Court, the following observations have been made in para 4 of the judgement:-

"..... It is too well settled that when police after investigation files a final form under Section 173 of the Code, the Magistrate may disagree with the conclusion arrived at by the police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final form submitted by the police, the right of the complainant to file a regular complaint

is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 202 of the Code and takes cognizance if the materials produced by the complainant make out an offence.

With these observations, the appeal was allowed and order of the High Court was set-aside by the Hon'ble Apex Court.

8. This matter was again considered by the three Judges' Bench of the Hon'ble Apex Court in the case of **Mahesh Chand Vs. B. Janardhan Reddy and another(2003 (46) ACC 182 (S.C.)**, in which it is held that there cannot be any doubt or dispute that only because the Magistrate has accepted the final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition. From the law laid down by the Hon'ble Apex Court in above mentioned rulings, it is crystal clear that even after acceptance of the final report by the Magistrate, the complainant can file protest petition and the said petition cannot be dismissed holding that the same is not maintainable. Therefore, in instant case also, the view of the learned Magistrate that after acceptance of the final report, the protest petition is not maintainable is wholly erroneous. For the same reasons, the order dated 17.09.2007 passed by the then learned Sessions Judge, Rampur in criminal revision no. 149 of 2007, whereby the aforesaid view of the learned Magistrate has been affirmed is also wholly illegal. Although, the learned Sessions Judge has made reference of the case of **Mahesh Chand Vs. B. Janardhan Reddy (supra)** in his impugned order dated 17.09.2007, but it is very unfortunate that the learned Sessions Judge could not understand the principle of law laid down by the Hon'ble Apex Court in this ruling. In para 11 of the judgement of this case, the Hon'ble Apex Court has very clearly held that only because the Magistrate has accepted the final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition. Therefore, the protest petition filed by the complainant/ applicant after acceptance of the final report could not be dismissed on the ground that after accepting the final report, the protest petition is not maintainable. The learned Magistrate could treat the protest petition as complaint and after recording the statement of the complainant under Section 200 Cr.P.C. and taking evidence under Section 202 Cr.P.C., proper order under Section 203 or 204 Cr.P.C. ought to have been passed, but instead of following this procedure, the learned Magistrate dismissed the protest petition vide his order dated 19.06.2007 holding that after acceptance of the final report, protest petition is not legally maintainable. As mentioned herein-above, this view of the learned Magistrate is wholly erroneous.

9. It was also contended by the learned counsel for the applicant that order dated 06.06.2006, whereby the final report was accepted by the learned Magistrate is also wholly illegal, because the learned Magistrate did not apply his mind to the facts of the case and final report has been accepted merely due to absence of the complainant on 06.06.2006. It was submitted by the learned counsel for the applicant that the order dated 06.06.2006 also should be quashed by this Court in its inherent jurisdiction under Section 482 Cr.P.C. so that the Magistrate may pass reasoned

order on the final report after perusal of the case diary. This contention of the learned counsel for the applicant has also got force. The order dated 06.06.2006 passed by the Judicial Magistrate/2nd Additional Civil Judge (J.D.), Rampur in criminal misc. case no. 523 of 2007 (State Vs. Safdar) shows that the learned Magistrate did not apply his mind to the facts of the case and even the case diary was not perused by him at the time of passing this order and the final report has been accepted merely on the ground that the complainant is absent and a report under Section 182 Cr.P.C. has been submitted by the police for taking action against the complainant. The learned Magistrate was required to go through the case diary and the final report could be accepted only if there was no evidence at all to take cognizance and issuance of process against the accused. It is well settled principle of law that if there is evidence in the case diary to take cognizance and to summon the accused for trial, then the Magistrate is not bound to accept the final report, even if the complainant is absent or has not filed any protest petition/objections against the final report. Therefore, the order dated 06.06.2006 also is liable to be quashed, so that a reasoned order after perusing the case diary may be passed by the learned Magistrate on the final report.

10. For the reasons mentioned herein-above, both the impugned orders as well as the order dated 06.06.2006 passed by the learned Judicial Magistrate accepting the final report deserve to be quashed.

11. Consequently, the application under Section 482 Cr.P.C. is allowed. Both the impugned orders dated 19.06.2007 and 17.09.2007 as well as the order dated 06.06.2006 accepting final report are hereby quashed. The learned Magistrate concerned is directed to pass fresh reasoned order on the final report in case crime No. C-3/2005 of P.S. Bhot (Rampur) and protest petition keeping in view the observations made in this order.

Application Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2008

BEFORE
THE HON'BLE SHIV SHANKER, J.

Crl. Misc. II Bail Application 7049 of 2008

Kamlesh Kumar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri. V.P. Srivastava
Sri. Lav Srivastava
Counsel for the Opp. Party:
A.G.A.

Code of Criminal Procedure-Section 439-Second Bail Application-based on similar facts those of First Bail Application-no fresh or new facts brought-cannot be considered on merit-held-second bail liable to be rejected.

Held: Para 7

After rejecting the firs bail application, the new and fresh grounds can only be considered and such bail may be granted. The rejection order passed in the first bail application reveals that the question of locking the door from outside or inside has already been considered. The general diary, as contended by learned counsel for the applicant, was already in existence at the time of moving the first bail application even then this ground cannot be considered in

second bail application, therefore, there is no fresh and good ground after rejecting his first bail application. In such a circumstances, the contention made by the learned counsel for the applicant has no force and his second bail application is also not liable to be allowed.

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

1. This is second bail application moved on behalf of applicant Kamlesh Kumar son of Chhangoo Lal in Case Crime No. 07 of 2006 under Sections 498A, 304B I.P.C. and 3/4 D.P. Act, P.S. Palari, District Chitrakoot. His first bail application has already been rejected by this Bench vide order dated July 6, 2007 in Crl. Misc. Bail Application No. 26689 of 2006 on merit of the case.

2. Heard learned counsel appearing on behalf of the applicant and learned A.G.A.

3. It is contended by learned counsel for the applicant that in the earlier filed bail application, much discussion has occurred on the issue that the door of the room, where the deceased was found, was locked from outside or inside. As soon as this incident occurred, the matter reported to the police of P.S. Pahari, District Chitrakoot by the applicant side. A true copy of G.D. entry No. 20 dated 31.01.2006 of P.S.. Pahari, District Chitrakoot is on record as Annexure-2. On receiving the information, S.O., Sri K.D. Singh reached at the place of incident and completed the inquest proceeding of the deceased Smt. Chandra Kiran. After completion of the inquest proceeding, he went off and prior to leaving the place of incident, he locked the room from outside. In this regard, a true copy of the G.D. entry dated 01.02.2006 of P .S. Pahari, District Chitrakoot is on record as Annexure-3.

4. It is further contended when 5.0., Sri K.O. Singh left the place, then this place of incident was again visited by C.O., who made local inspection of the area, prepared site plan after opening the room and handed over the keys to land lord. A true copy of G.O. entry No. 25 dated 02.02.2006 is also on record as Annexure -4. Therefore, it is crystal clear that when the C.O. reached at the place of incident for preparing site plan, he found the room locked outside, which was locked by S.O., Sri D.K. Singh himself and none else outside of the room. Therefore, theory of locking door of room of deceased, where the deceased was burning from outside at the time when incident occurred, is false. The lock found by C.O. was actually place there by the S.O. and not by the applicant or any in-laws. It is further contended that the applicant could not get copies of these general diary entries at the time of hearing of first bail application, hence, he could not present the same here before this Court at the time of consideration of first bail application of the applicant. Therefore, no case of dowry death is made out and applicant's bail application is liable to be allowed.

5. A.G.A. has urged that there is no fresh ground in the second bail application and it is also liable to be rejected.

6. In dowry death, homicide and suicide, both come within the category of unnatural death. In such circumstances, there will be no effect either the deceased committed suicide by locking the door

inside or was murdered by the accused by burn injuries. The applicant is the husband of the deceased. She has died within seven years of her marriage as unnatural death by burn injury at the house of her husband. She was subjected to cruelty due to non-fulfilment of demand of dowry. Later on, she died due to burn injuries, which is unnatural death. The first bail application of the present applicant has already been rejected by this Court by passing the detailed order. After rejecting the first bail application of the present applicant, there is no fresh and good ground in the second bail application.

7. It is worthwhile to mention here that when the first bail application has already been rejected by the Court and any ground, which was existed in the first bail application, the same ground cannot be taken in another bail application. Meaning thereby, all the grounds are existed before moving the first bail application of the accused, however, if some grounds were taken and some grounds were not taken in the first bail application, the grounds, which were not taken in the earlier bail application cannot be taken into consideration by filing the second bail application after rejecting his first bail application. After rejecting the firs bail application, the new and fresh grounds can only be considered and such bail may be granted. The rejection order passed in the first bail application reveals that the question of locking the door from outside or inside has already been considered. The general diary, as contended by learned counsel for the applicant, was already in existence at the time of moving the first bail application even then this ground cannot be considered in second bail application, therefore, there is no fresh and good ground after rejecting his first bail application. In such a circumstances, the contention made by the learned counsel for the applicant has no force and his second bail application is also not liable to be allowed.

8. Consequently, this second bail application of the present applicant is also hereby rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2008

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE SURENDRA SINGH, J.

Crl. Misc. Writ Petition 7256 of 2008

Ram Sagar Patel ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar

Counsel for the Respondents:
A.G.A.

Constitution of India-Article-226-writ jurisdiction-writ of Mandamus seeking direction to Police authorities to follow the provision of Para 486(I) and (III) of Police regulation-to lodge FIR-petitioner has remedy either to move application u/s 156(3) of Cr.P.C. Or to lodge complaint-extraordinary power cannot be exercised.

Held: Para 8

After hearing the petitioner's counsel in support of this petition and the learned AGA, we are of the considered opinion that prayer made in this writ petition is wholly misconceived and the petitioner

has alternative statutory remedies available to him. Firstly, he should have filed an application under Section 156(3) Cr.P.C., secondly he should have lodged complaint against malefactors under Section 190 (I) (a) of the Code. The tendency of the litigants to approach High Court or Supreme Court under Article 226 or 32 of the Constitution to get their FIR registered have been depreciated by the Apex Court. This not only throng dockets of the higher courts but also erodes the tendency of the litigants to by pass statutory remedies. This practice, in our view, should not be encouraged. This writ power under Article 226 of the Constitution of India is an extraordinary Constitutional power which should be entertained only when other statutory remedies have been exhausted.

Case law discussed:

2008 A.C.C. 689, AIR 2004 Supreme Court 4753, AIR 2006 SC 2464, AIR 2006 SC 1937.

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

1. The petitioner, aggrieved by the inaction on the part of the respondents, to the present writ petition has invoked our extraordinary jurisdiction under Article 226 of the Constitution of India praying for a writ of Mandamus commanding the respondent no. 2 to follow the paragraph no. 486(I) and (III) of the U.P. Police Regulation and register the FIR and investigate the offences against respondent nos. 4 to 7.

2. We have heard learned counsel for the petitioner at a great length and learned AGA and perused the record of the writ petition.

3. Encapsulated facts are that the petitioner is the owner of landed property near Varanasi Development Authority. Rakesh Naik, a local M.L.A. And a Land Mafia in collusion with one Abdul Kalam got executed one forged will dated 1.6.2002 in favour of one Ram Surat Patel. On coming to know about the will, petitioner in 2002 filed a suit for cancellation of the will deed before Civil Judge (S.D.) and obtained an injunction to maintain status qou. It is further alleged that by way of counter blast to exert pressure in Civil Suit, Rakesh Naik lodged an FIR against the petitioner on 24.2.2004 as crime no. 463 of 2004 under section 8/21 N.D.P.S. Act and also under Section 3/25 of Arms Act at police station Cantt, District Varanasi.

4. The petitioner was arrested in the aforesaid crime. His brother however, moved an application before respondent no. 2 for initiating an enquiry which was conducted by Santosh Kuamr (C.O.) District Varanasi. The Enquiry Officer (C.O.) submitted a report on 10.11.2004 to respondent no. 2 in favour of the petitioner. In the enquiry report C.O. held that the petitioner has been falsely implicated in the fake recovery of 400 gms. of heroine, vide aforesaid crime and thus he found the implication of the petitioner to be false under Section 8/21 of N.D.P.S. Act and also under Section 3/25 Arms Act.

5. In pursuance of enquiry report the I.O. (Dy. S.P.) submitted a final report under Section 169 Cr.P.C. in favour of the petitioner in the court of Special Judge, N.D.P.S. Act District Varanasi. The petitioner was released on bail by the Special Judge, N.D.P.S. Act on 8.12.2004. However, the crime was taken up for further investigation which culminated in submission of charge sheet against the petitioner.

6. The petitioner thereafter preferred a Criminal Misc. Application No. 9155 of 2006 and Criminal Misc. Application No.9183 of 2006 before this Hon'ble Court, both under Section 482 Cr.P.C., challenging the aforesaid charge sheet i.e. Under Section 8/21 N.D.P.S. Act (vide crime no. 463/04) and also under Section 3/25 Arms Act (vide crime no. 464/04). This Court vide its order dated 31.7.2006 and 1.8.2006 stayed the proceedings of the lower court in the aforesaid Criminal Misc. Applications which stay order is still in vogue. Respondent no. 2, however, initiated a departmental proceedings against the respondent nos 4 to 7 under Rule 14 Sub clause (I) of the U.P. Police Officers of the Subordinate Rank (Punishment and Appeal) Rules 1991 in which the objection of the petitioner was invited.

7. The petitioner desires and now he has prayed that the proceedings against the respondent nos. 4 to 7 be initiated under the provisions of paragraph no. 486 (I) and (III) of the U.P. Police Regulation as it was imperative on the part of the police authorities to lodge a FIR against them for the offence under IPC and get the matter investigated. According to the petitioner, his effort is to get the FIR registered against the respondent no. 4 to 7, yielded no result, although it should have been registered as envisaged under paragraph no. 486 (I) and (III) of the Police Regulations.

8. After hearing the petitioner's counsel in support of this petition and the learned AGA, we are of the considered opinion that prayer made in this writ petition is wholly misconceived and the petitioner has alternative statutory remedies available to him. Firstly, he should have filed an application under Section 156(3) Cr.P.C., secondly he should have lodged complaint against malefactors under Section 190 (I) (a) of the Code. The tendency of the litigants to approach High Court or Supreme Court under Article 226 or 32 of the Constitution to get their FIR registered have been depreciated by the Apex Court. This not only throng dockets of the higher courts but also erodes the tendency of the litigants to by pass statutory remedies. This practice, in our view, should not be encouraged. This writ power under Article 226 of the Constitution of India is an extraordinary Constitutional power which should be entertained only when other statutory remedies have been exhausted. We do not mean that the alternative remedy is a bar in exercise of writ power but what we mean to say is that it should be exercised only when it is most desired in rarest of rare cases to preserve the Fundamental Rights of the citizens. Our thrust is not so much on possession of power but is on its exercise. This matter is no longer res integra. The Apex Court has held in the following decisions that for registration of a FIR victim or aggrieved person has got alternative remedies. It has been held in case of **Sakiri Vasu Vs. State of U.P. And others 2008(60) ACC 689** as follows:-

"11. In this connection we would like to state that if a person has a grievance that the police station is not registering his F.I.R. under section 154, Cr.P.C., then he can approach the Superintendent of Police under section 154(3), Cr.P.C. by an application in writing. Even if that does not yield any satisfactory result in the sense that either the F.I.R. is still not registered, or that even after registering it

no proper investigation is held, it is open to the aggrieved person to file an application under section 156(3), Cr.P.C. before the learned Magistrate concerned. If such an application under section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

Further in the same decision Supreme Court held as follows:-

13 We would further clarify that even if an F.I.R. has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under section 156(3), Cr.P.C. and if the Magistrate is satisfied, he can order a proper investigation and take other suitable steps and pass such other orders as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under 156(3), Cr. P. C.

….....

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII, Cr. PC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

….....

17. In our opinion section 156(3), Cr.P.C. is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an F.I. R. and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the police. Section 156(3),k Cr. P.C., though briefly worked, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

9. Further it has been held by the Apex court in the case of **Gangadhar Janardan Mhatre V State of Maharashtra: AIR 2004 Supreme Court 4753**

"*13. When the information is laid with Police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to. take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical*

Sciences Employees' Union (Reg.) through its President v. Union of India and others (1997) Supreme Court Cases (Crl) 303. It was specifically observed that a writ petition in such cases is not to be entertained.

It has further been held in the case of **Hari Singh versus State Of U.P., AIR 2006 SC 2464** as follows:-

"4. When the information is laid with the police, but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and others ((1996) 11 SCC 582). It was specifically observed that a writ petition in such cases is not to be entertained".

10. Yet in another decision **Minu kiumari and another versus State of Bihar and another: AIR 2006 SC 1937** it has been laid down by the apex court as follows:-

"15. When the information is laid with the Police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and others (1996 (11) SCC 582). It was specifically observed that a writ petition in such cases is not to be entertained."

In view of the above discussions, this petition is devoid of merits and hence it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 01.07.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.7568 of 2000

Yogesh Kumar Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Ojha
Sri O.P. Singh
Sri B.D. Mishra
Sri M.S. Rathore
Sri R.K. Singh
Sri I.N. Singh
Sri D.N. Dubey
Sri V.R. Dwivedi

Counsel for the Respondents:
S.C.

Constitution of India-Art.226-Service Law-termination on ground of false declaration in application form-challenged on the ground of subsequent acquittal held-subsequent absolvement of criminal proceeding will not condone the misconduct of misrepresentation-court declined to interfere.

Held: Para 2

In my opinion, the said judgment cannot be relied upon by the petitioner in view of the successive pronouncements given by the Supreme Court in various decisions. Further, the decision in Qamrul Hoda's case is no longer a good law as held in *Ravindera Singh vs. State of U.P.* decided on 16.5.2005 in writ petition No.39418 of 2005.

Case law discussed:
1997 (2) UPLBEC 1201, 1996 (11) SCC 605, 2003 (3) SCC 306, 2005 (2) SCC 746, 2003 (1) AWC 294

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

1. The petitioner was selected as a constable and was sent for training. At the time of filling his form, a declaration was required to be given by the petitioner, which he did, stating therein that he was not involved in any criminal proceedings. The respondents made an enquiry and found that the petitioner was involved in a criminal proceeding under Section 307 IPC in case crime No. 27 of 1997. Consequently, the respondents issued an order dated 4.11.99 terminating the services of the petitioner. The petitioner, being aggrieved, has filed the present writ petition contending that the punishment of dismissal was harsh and did not commensurate with the misconduct. Further, the petitioner was absolved in that criminal proceedings and was acquitted by the Court. In support of his submission, the petitioner has relied upon a decision in **Qamrul Hoda vs. Chief Security Commissioner, N.E. Railway, Gorakhpur, 1997 (2) UPLBEC 1201.**

2. In my opinion, the said judgment cannot be relied upon by the petitioner in view of the successive pronouncements given by the Supreme Court in various decisions. Further, the decision in Qamrul Hoda's case is no longer a good law as held in ***Ravindera Singh vs. State of U.P.*** decided on 16.5.2005 in writ petition No.39418 of 2005.

3. In **Delhi Administration through its Chief Secretary and others vs. Sushil Kumar, 1996 (11) SCC 605,** the Supreme Court held that the concealment of involvement in the criminal proceeding in the declaration form and subsequent absolvement in the criminal proceedings will not condone the

act of misrepresentation. The Court held that the conduct or character of the candidate to be appointed in service is relevant and not the result of the criminal proceedings. The Supreme Court held-

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

4. In **Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav, 2003 (3) SCC 306**, the Supreme Court held-

"The object of requiring information in columns 12 and 13 of the attestation form and certification thereafter by the candidate was to ascertain and verify that character and antecedents to judge his suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. The employer having regard to the nature of the employment and all other aspects had the discretion to terminate his services, which is made expressly clear in para 9 of the offer of appointment. The purpose of seeking information as per columns 12 and 13 not find out either the nature or gravity of the offence or the result of a criminal case ultimately. The information in the said columns was sought with a view to judge the character and antecedents of the respondent to continue in service or not. The High Court, in our view, has failed to see this aspect of the matter. It went wrong in saying that the criminal case had been subsequently withdrawn and that the offences, in which the respondent was alleged to have been involved, were also not of serious nature."

5. Similar view was again expressed by the Supreme Court in the case of **Secretary, Department of Home Secretary, A.P. and others vs. B. Chinnam Naidu, 2005 (2) SCC 746.**

6. Further, a division bench of this court **Rajesh Yadav vs. Union of India and others, 2003 (1) AWC 294** has again held the same view.

7. In view of the aforesaid, the petitioner is not entitled for any relief. The writ petition fails and is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.05.2008

BEFORE
THE HON'BLE AMAR SARAN, J.

Crl. Misc. Application 9080 of 2008

M/s Rishabh Nath Developers & Builders (Pvt.) Ltd. and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Sri. D.C. Mathur

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section-482-quashing of criminal proceeding-offence under Section 138/142 of Negotiable Instrument Act-challenge made on ground no notice received by the applicants before lodging complaint-can be probed suitably by the Trail Court-following the guidelines of the Apex Court 2001 Cri.L.J. 4250.-necessary direction issued.

Held: Para 8

This relief is being granted up to the stage of framing of charges provided the applicants give an undertaking to the satisfaction of the trial court that (a) their counsel will remain present on their behalf and represent them on each date, (b) they will not raise any objection as to their being the actual person who is facing trail, (c) they do not object to the evidence being recorded in their absence, (d) they undertake to be present before the Court whenever called upon to do so at any stage

Case law discussed:
(2005)4 SCC 417
AIR 1998 SC 3043
(1999) 4 SCC 567
2001 Cri.L.J. 4250

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

1. Heard learned counsel for the applicants and learned Additional Government Government.

2. In this case admittedly the applicants have got themselves bailed out.

3. Now this application has been filed for quashing the further proceedings against the applicants in case no. 1639 of 2007, under sections 138/142 of Negotiable Instrument Act, pending in the court of Special Judicial Magistrate, C.B.I., Ghaziabad.

4. Placing reliance on the decisions of Supreme Court in the case of ***Prem Chand Vijay Kumar Vs. Yashpal Singh and another,*** (2005) 4 SCC 417, ***Sadanandan Bhadran Vs Mahhavan Sunil Kumar***, AIR 1998 SC 3043 and ***SIL Import, USA Vs Exim Aides Silk Exporters, Banglore***, (1999) 4 SCC 567, learned counsel for the applicants submits that in this case two notices were issued, first on 31.7.2997 and the second on 15.09.2007. However, I find that in the complaint there is no mention of the first notice. The argument of the learned counsel for the applicants is that the cause of action arises under section 138 read with 142(b) within 15 days of the receipt of the first notice.

5. However, in the case cited by the learned counsel for the applicants there was an admitted position that two notices were served, but this matter requires to be probed before the trail court as the complaint is silent about the first notice.

6. I think, it would be proper to permit the applicants to raise their

objections at the stage of framing of charges before the trial court.

7. As the applicants have already secured bail, they are permitted to appear through counsel and raise their objections to the initiation of trail proceedings against them at the stage of framing of charges.

8. This relief is being granted up to the stage of framing of charges provided the applicants give an undertaking to the satisfaction of the trial court that (a) their counsel will remain present on their behalf and represent them on each date, (b) they will not raise any objection as to their being the actual person who is facing trail, (c) they do not object to the evidence being recorded in their absence, (d) they undertake to be present before the Court whenever called upon to do so at any stage.

9. These undertaking are being taken in the light of the directions of the Supreme Court in the case of M/s Bhaskar Industries Limited Vs. Bhiwani Denim and Apparels Limited, 2001 Cri.L.J. 4250.

10. With these observations this application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.06.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE RAKESH SHARMA, J.

Criminal Misc. Writ Petition 9642 of 2008

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

Counsel for the Petitioner:
Sri. S.P. Sharma

Counsel for the Respondents:
A.G.A.

U.P. Control of Gunda Act 1970-Section 2(b)-2(iv)-Petitioner habitual of creating terror in society repeated offence under chapter 16, 17 and 22 etc in FIR-serious allegations made sufficient material disclosed in notice-against notice the petitioner to submit explanation before the authority concerned-writ Court cannot see the sufficiency or insufficience of material-it is the authority to take appropriate decision-petition dismissed.

Held: Para 8

From the facts and circumstances as narrated above, it is apparent from reading of notice that the petitioner is committing offence again and again to create terror in society therefore he can be said to be habitual of committing the acts which have been narrated in the notice impugned. The petitioner has come up against the notice only and it is always open to him to submit reply to the same. Sufficiency of Evidence is not to be seen by the High Court at this stage of notice . This Court under judicial scrutiny under Article 226 of the Constitution is to see, on existence of material and not the sufficiency or adequacy of material in the notice under the Uttar Pradesh Control of Goondas Act, 1970 read-with U.P. Control of Goonda Rules, 1970.

Case Law discussed:
(1984) 3 Supreme Court Cases Page 14.

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

1. Heard learned counsel for the parties.

The petitioner has come up before this Court, against the notice dated 17.04.2008 which according to the counsel for the petitioner contains allegations of general nature.

2. Learned A.G.A. denies these allegations and submits that it is not so, and notice has rightly been issued based on material allegations.

3. The learned counsel for the petitioner submits that petitioner has come up against the notice in which three cases have been shown against him, i.e. N.C.R. No.15/2007 dated 11.05.2007 under section 323, 504 I.P.C. and N.C.R. No. 53 of 2007 under section 504, 506, 427 I.P.C. dated 24.11.2007 was registered against him. Apart from above Case Crime No.111 of 2008 under section 4125 Arms Act is also registered against him for keeping a knife which according to the petitioner's counsel made a basis for the purpose of proceedings under the U.P. Control of Goonda Act-1970.

4. The contention of the learned counsel for the petitioner is that the petitioner does not come under the definition of U.P. Control of Goondas Act, 1970 hereinafter referred to as the "Goonda Act" and Uttar Pradesh Control of Goondas Rules, 1970 hereinafter referred to as the 'Rules, 1970'. Learned counsel for the petitioner has relied upon the Preamble of the Act which itself make special provisions for the Control of Goondas. Goondas Act has been defined in section 2(b) which is as under:-

2(b) "Goondas" means a person who--
(i)either by himself or as a member or leader of a gang, habitually commits or abets, the commission of an offence punishable under section 153-B or section 294 of the Indian Penal Code or Chapter XV, or Chapter XVI Chapter XVII or Chapter XXII of the said Code; or .
(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic in Women and Girls Act 1956; or
(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or
(iv) is generally reputed to be a person who is desperate and dangerous to community; or
(v) has been habitually passing indecent remarks or teasing women or girls; or
(vi) is a tout;

5. It is apparent from records that other two N.C.Rs exists against the petitioner, section 29b) of Control of Goondas read-with section 2 (IV) provide that even a person who abets in commission of Crime under Chapter XV, XVI and XII I.P.C., and whose general reputation is of a dangerous person to the community is covered by the definition under the Act. From reading of the notice it is apparent that the petitioner is repeatedly committing offence as given under Chapter 16,17 and 22 I.P.C. He is not a respected person and is dangerous to the community or society. Material allegations against the petitioner prima facie have been made in the impugned F.I.R.

6. The Judgement reported in Civil journal Imran alias Abdul Gaffar Vs. State of U.P. and others in which section 2(b) relied upon by the counsel for the petitioner have also been considered by

us. It is in the peculiar facts and circumstances of that case that the Court has held that for calling a person Goonda he must necessary come under the category of goonda. The allegations were made against a student of M.A. in the aforesaid case. The facts of that peculiar case were considered for the purpose to ascertain whether he fell within the ambit of 'Goonda' as defined in Section 2 of the .Act. The second, case on which reliance has been placed rendered by the Apex Court in Vijay Narain Singh Vs. State of Bihar (1984) 3 Supreme Court Cases Page 14.

7. In the aforesaid cases the word habitually is considered which is as under:-

"The word 'habitually' means by force of habit. It is the force of habit inherent or latent in an individual with criminal instinct, with a criminal disposition of mind, that makes a person accustomed to lead a life of crime posing danger to the society, in general. If a person with criminal tendencies consistently or persistently or repeatedly commits or attempts to commits or abets the commission of offences punishable under Chapter XVI or Chapter XVII of the Penal Code, he should be considered to be an "anti social element".

8. From the facts and circumstances as narrated above, it is apparent from reading of notice that the petitioner is committing offence again and again to create terror in society therefore he can be said to be habitual of committing the acts which have been narrated in the notice impugned. The petitioner has come up against the notice only and it is always open to him to submit reply to the same. Sufficiency of Evidence is not to be seen by the High Court at this stage of notice. This Court under judicial scrutiny under Article 226 of the Constitution is to see, on existence of material and not the sufficiency or adequacy of material in the notice under the Uttar Pradesh Control of Goondas Act, 1970 read-with U.P. Control of Goonda Rules, 1970.

9. For the reasons stated above, we are not inclined to interfere in the matter. It is open for the authorities concern to place the material before the authority and pass appropriate orders.

10. Writ Petition is, accordingly, dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2008

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

Criminal Misc. Application 10413 of 2008

Smt. Mamta Kanojia@ Pinki ...Applicant
Versus
Davesh Kumar Kanojia and another ...Respondents

Counsel for the Applicant:
Sri. Shiv Nath Singh
Sri. Pramod Srivastava

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 190(1)(b)-power of Magistrate-treating the protest application as complaint-instead of taking cognizance on the basis of statements of witness-Magistrate rightly exercised 4th option given by the Apex Court in Pakhando case-no interference under section 482 called for.

Held: Para 7

The learned Chief Metropolitan Magistrate in the present case adopted the fourth option available to him instead of taking cognisance under section 190 (1) (b) on the basis of statements of the complainant and the witnesses recorded during the investigation. Since this option was available to the learned Magistrate to treat the protest petition of the applicant as a complaint case, I do not find any force in this Application under section 482 Cr.P.C. in the light of the above law. Since the learned Chief Metropolitan Magistrate exercised the fourth option aforesaid as per the law laid down in the case of *Pakhando & other's Vs. State of U.P. & another,* as quoted above, no interference in the matter is called for under section 482 Cr.P.C.

Case Law discussed:

AIR 1989 SUPREME COURT 885; 2007 (59) ACC 1050; 2001 (43) ACC 1096.

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

1. This Application under section 482 Cr.P.C. has been made to stay the effect and operation of order dated 18.1.2008 passed by Chief Metropolitan Magistrate, Kanpur Nagar in Misc. Case No.711 of 2007 in Case Crime No.487 of 2007 under sections 323, 504, 506, 498A IPC and section ¾ Dowry Prohibition Act, Police Station Chakeri, District Kanpur Nagar and also to stay further proceedings of the aforesaid case.

2. The facts to this case are that applicant lodged an FIR on 13.6.2007 at Police Station Chakeri, which was registered as Case Crime No. 487 of 2007 under sections 323, 504, 506, 498A IPC and section ¾ Dowry Prohibition Act. The investigating officer during investigation recorded the statement of applicant, her mother, father and brother under section 161 Cr.P.C., but the police submitted the final report in favour of respondent no.1. The applicant filed protest petition on 17.9.2007 before the Chief Metropolitan Magistrate, Kanpur Nagar and the learned Chief Metropolitan Magistrate rejected the final report submitted by the police and registered the protest petition as a complaint case.

3. It has been argued by the learned counsel for the applicant that on the basis of FIR and medical report of the applicant and statements recorded under section 161 Cr.P.C., the case under sections 323, 504, 506, 498A IPC and section ¾ Dowry Prohibition Act was made out and the learned Magistrate erred in treating the protest petition as a complaint case. The learned Magistrate could ignore the conclusion arrived at by the investigating officer that no case against respondent no.1 was made out and on the basis of statements of complainant, her mother, father and brother recorded, the learned Magistrate under section 190 (l) (b) could direct the issue of process to the accused.

4. The Hon'ble Apex Court in the case of ***M/s. India Carat Pvt. Ltd. Vs. State of Karnataka & another AIR 1989 SUPREME COURT 885*** has laid down in paragraph 16 as follows:

Para 16. The position is therefore, now well settled that upon receipt of a police report under section 173 (2) a Magistrate is entitled to take cognisance of an offence under Section 190 (1) (b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognisance of the offence complained of and order the issue

of process to the accused. Section 190 (1) (b) does not lay down that a Magistrate can take cognisance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognisance of the case, if he thinks fit, in exercise of his powers under section 190 (1) (b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190 (1) (a) **though it is open to him to act under Section 200 or Section 202 also.** The High Court was, therefore, wrong in taking the view that the Section Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him.

5. Learned counsel for the applicant has cited the case of ***Sanjay Bansal & another Vs. Jawaharlal Vats 2007 (59) ACC 1050*** in which a similar view was taken by the Hon'ble Apex Court.

6. In the case of ***Pakhando & others Vs. State of U.P. & another 2001 (43) ACC 1096*** it has been laid down by this Court that when a final report is submitted in a case and is received by the Magistrate the following four courses are open to him and he may adopt anyone of them as the facts and circumstances of the case may require:

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

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

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

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

7. The learned Chief Metropolitan Magistrate in the present case adopted the fourth option available to him instead of taking cognisance under section 190 (1) (b) on the basis of statements of the complainant and the witnesses recorded during the investigation. Since this option was available to the learned Magistrate to treat the protest petition of the applicant as a complaint case, I do not find any force in this Application under section 482 Cr.P.C. in the light of the above law. Since the learned Chief Metropolitan Magistrate exercised the fourth option aforesaid as per the law laid down in the case of *Pakhando & others Vs. State of U.P. & another,* as quoted above, no interference in the matter is called for under section 482 Cr.P.C.

8. The Application under section 482 Cr.P.C. is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD24.06.2008

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

Criminal Misc. Application No.14300 of 2008

Jhabbu Lal and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Sri Ramashanker Shukla

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-S-482-two first information reports-two different charge sheet against same accused persons-held-not justified-second FIR as well as the charge sheet quashed with direction to the Magistrate to consider whether any fracture caused to the mother of complainant.

Held: Para 4

Therefore, the second First Information Report, which had been registered as Case Crime No. 05 of 2006 is quashed and the charge sheet submitted on the basis of that First Information Report is also quashed. However, taking into consideration that there are allegations in the First Information Report that there was fracture on the head of the mother of the complainant, the Magistrate, at the stage of framing the charges shall consider this aspect of the case as to whether the mother of the complainant had received a fracture on her head or not, and if there was any fracture, what offence is prima facie made out against the accused in respect of that fracture on the head, and then he shall proceed with the case registered as Case No.2766 of 2005 on the basis of Case Crime No. 13 of 2005.

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

1. This is an application under Section 482 Cr.P.C. for quashing the impugned charge sheet No.14/2007 in Case Crime No.C-5/2006 of P.S. Dannahar, District Mainpuri, under Sections 323,504,506,308 I.P.C. pending before 3rd Additional Civil Judge (J.D.)/Judicial Magistrate-1st Class, Mainpuri.

2. Since the point involved in this case is legal one, I have, with the consent of the parties, heard learned counsel for the applicants as well as learned A.G.A. for the State and I am deciding it without calling for any counter affidavit.

3. The facts relevant for disposal of this application under Section 482 Cr.P.C. are that the complainant-opposite party no. 2 moved an application against the accused-applicants under Section 156(3) Cr. P.C. in the Court of Additional Chief Judicial Magistrate-I, Mainpuri leveling allegations under Sections 323, 504, 506 and 308 I.P.C. against the accused-applicants in respect of an incident which had allegedly taken place on 6.4.2005 at 6.00 P.M. with the mother of the applicant. This application was moved on 23.4.2005 and on this application, the learned Magistrate passed an order on 3.5.2005 directing the police to register the First Information Report and investigate the same. Then Case Crime No.13 of 2005 under Sections 323, 504, 506 & 308 I.P.C. was registered at the police station on 2.10.2005 and charge

sheet No.113/2005 was submitted against all the accused-applicants under Sections 32, 504, 506 I.P.C. on 29.10.2005. It appears that subsequently a copy of the aforesaid application under Section 156(3) Cr.P.C. along with a carbon copy of the aforesaid order dated 3.5.2005 was again sent to the police station Dannahar for compliance and on the basis of that order again a First Information Report was registered in respect of the same incident as Case Crime No.C-5/2006. The police again investigated the case, though the investigation was conducted this time by another investigating Officer; and this time the charge sheet was submitted against all the accused under Sections 323, 504, 506 and 308 I.P.C. The number of this charge sheet is 14/2007. It has been submitted that on this charge sheet also, the Magistrate took cognizance and passed an order in respect of the accused. So, now the position is that in respect of one and same incident which had allegedly taken place on 6.4.2005 between the same parties two F.I.Rs. were registered and two charge sheets have been filed on the basis of those two First Information Reports and two separate cases bearing no.2766 of 2005 and 325 of 2007 have been registered in the same Court.

4. Learned counsel for the applicants submitted that when the earlier First Information Report had already been registered against the accused and a charge sheet had also been submitted after investigation, there was no justification for registration of the second First Information Report and reinvestigation. This contention is correct. There cannot be two First Information Reports for the same offence against the same persons. Therefore, the second First Information Report, which had been registered as Case Crime No. 05 of 2006 is quashed and the charge sheet submitted on the basis of that First Information Report is also quashed. However, taking into consideration that there are allegations in the First Information Report that there was fracture on the head of the mother of the complainant, the Magistrate, at the stage of framing the charges shall consider this aspect of the case as to whether the mother of the complainant had received a fracture on her head or not, and if there was any fracture, what offence is prima facie made out against the accused in respect of that fracture on the head, and then he shall proceed with the case registered as Case No.2766 of 2005 on the basis of Case Crime No. 13 of 2005.

5. This petition under Section 482 Cr.P.C. is finally disposed of with the above observations.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2008

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE VIKRAM NATH, J.

Special appeal No.682 of 2008

Smt. Sangeeta Devi ...Appellant
Versus
The State of U.P. & others...Respondents

Counsel for the Appellant:
Sri R.C. Singh

Counsel for the Respondents:
Sri O.N. Rai
S.C.

Uttar Pradesh Punchayat Raj (Removal of Pradhan and Up-Pradhan & Member)

Enquiry Rules 1997-Rule 4 and 5 readwith U.P. Punchayat Raj Act 1947-Section 95 (1)(g)-ceasing financial power of village Pradhan-on certain financial irregularity-show cause notice before passing the order ceasing with final financial power of village Pradhan not necessary-at the stage of fact finding enquiry.

Held: Para 13

That apart, having regard to the provisions of U.P. Panchayat Raj Act and the Rules framed thereunder referred to above, we are of the view that the order withdrawing financial and administrative power and function of the Pradhan or Up-Pradhan under the proviso to Section 95 (1) (g) of the Act is in the nature of interim order pending enquiry to prevent misuse of financial and administrative power and function by the Pradhan facing charges of financial and administrative irregularities and thus, at this stage the Act or the Rule does not contemplate to provide any opportunity of hearing or show cause or participation of Pradhan or Up Pradhan facing charges in the preliminary enquiry.

Case law discussed:
1997 (1) AWC 251, 2003 (1) UPLBEC 736

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This is intra Court appeal, under the Rules of tile Court arising from the judgment of the Hon'ble Single Judge of this Court dated 7.4.2008 dismissing the petitioner-appellant's Civil Misc. Writ Petition No.17785 of 2008 for quashing the order of the District Magistrate, Kushinagar dated 30.3.2008 whereby the financial and administrative power of the appellant has been suspended under the proviso to Section 95 (1) (g) of the U. P. Panchayat Raj Act, 1947 (for snort the Act).

2. We have heard learned counsel for the appellant and Sri O.N. Rai, learned Standing Counsel for the State-respondents and also perused the record.

3. It appears that a proceeding under Section 95 (1) (g) of the Act is initiated against the petitioner-appellant. It further appears that the District Magistrate being satisfied with the report of the preliminary enquiry showing prima facie involvement of the petitioner-appellant in the alleged financial and other irregularities, withdrew the financial and administrative power of tile appellant in exercise of the power conferred under the first proviso to Section 95 (1) (g) of the Act. The aggrieved appellant preferred the aforesaid writ petition, which has been dismissed by the Hon'ble Single Judge of this Court, mainly on the ground that at this stage the defence of the petitioner-appellant and sufficiency or insufficiency of the evidence in support of the allegations cannot be looked into as the formal enquiry is yet to be concluded and the order to suspend the financial and administrative power is as an interim measure pending formal enquiry.

4. Learned counsel for the petitioner, however, contended that the appellant was not given sufficient opportunity to submit effective reply to the charges nor the copy of the enquiry report was provided, hence the impugned order withdrawing the financial administrative power deserves to be set aside.

5. In our view, there is no substance in the submission. The order impugned in the writ petition is passed under first proviso of Section 95 (1)(g) of the Act, which empowers the State Government to withdraw financial and administrative

powers and function of Pradhan or Up Pradhan, who is prima facie found to have committed financial and other irregularities until he is exonerated of the charges in the final enquiry and till then such power shall be exercised by a Committee consisting of three members of Gram Panchayat. For ready reference Section 95 (1)(g) of the Act is extracted hereinafter:

"Section 95 (1) - The State Government may-

(a) xxxxx
(b) xxxxx
(c) xxxxx
(d) xxxxx
(e) xxxxx
(f) xxxxx

(g) Remove a Pradhan, Up-Pradhan or member of a Gram Pnchayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch. Sahayakl Sarpanch or Sarpanch of a Nyaya Panchayat if he-

(i) Absents himself without sufficient cause for more than three consecutive meetings or sittings,
(ii) Refuses to Act or becomes incapable of acting for any reason whatsoever or if he is accused of or charges for an offence involving moral turpitude,
(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance as such is not desirable in public interest, or

has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of the Scheduled Castes, the Scheduled Tribes or the Backward Classes, as the case may be.
(iv) being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or
(v) suffers from any of the disqualifications mentioned in clauses (a) to (m) of Section 5-A:

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government."

6. Thus, where a proceeding for removal of a Pradhan or UppPradhan or a Member of a Gram Panchayat is undertaken and the matter is being enquired under Section 95(1)(g) of the Act, the State Government, if satisfied that the Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities, can cease the financial and administrative powers and functions, till he is exonerated of the charges in the final enquiry in the manner prescribed.

7. The power vested in the State Government under Section 95 (1) (g) of the Act has been delegated to the District Magistrates vide Notification No. 1648/33-1-1997-123/97, Lucknow dated 30th April, 1997 issued by the State Government in exercise of powers under

Section 96-A of the Act which enables the State Government to delegate all or any of the power under the Act to any officer or authority subordinate to it subject to such conditions and restrictions as it may deem fit and proper.

8. The State Government has framed Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the Rules) under Section 110 read with Clause (g) of sub-section (1) of Section 95 of the Act. Rule 3 provides about procedure relating to complaints against Pradhan or Up-Pradhan. Rule 4 provides about preliminary enquiry. It reads as under:

"4.Preliminary Enquiry.- (1) The State Government may, on the receipt of a complaint or report referred to in Rule 3, or otherwise order the Enquiry Officer to conduct a preliminary enquiry with a view to finding out if there is prima facie case for a formal enquiry in the matter.

(2) The Enquiry Officer shall conduct the preliminary enquiry as expeditiously as possible and submit his report to the State Government within thirty days of his having been so ordered."

9. Thus, where a complaint is made against a Pradhan or Up-Pradhan under Rule 3 of the Rules a preliminary enquiry is made to find out the truth as to whether the alleged complaint is vexatious, frivolous or mala fide etc. Where in the preliminary enquiry some substance in the allegation and prima facie involvement of Pradhan or Up-Pradhan in the alleged financial and other irregularities is found from the report submitted in the preliminary enquiry, the State Government shall direct for formal enquiry under Rule 5 of the Rules which provides as under:

"5. Where the State Government is of the opinion, on the basis of the report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section (1) of Section 95 it shall forthwith constitute a committee envisaged to proviso to clause (g) of sub-section 95, of the Act and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated under sub-rule (2) of Rule (4), to hold the enquiry."

10. Therefore, from a plain reading of 1st proviso of Section 95 (1)(g) read with Rule 4, it is evident that in the preliminary enquiry Pradhan or UP-pradhan facing charges in the alleged complaint is not required to be noticed nor any opportunity is to be provided for the reason that it is merely a fact finding enquiry to ascertain the correctness of the allegations and to find out the bona fide of the complaint. Obviously, if in the preliminary enquiry allegations are found baseless, the proceedings would be dropped. However, the involvement of Pradhan or Up-Pradhan, if prima facie is found then only a regular enquiry is to be initiated under Rule 5 of the Rules whereunder the Enquiry Officer shall deliver a copy of the Articles of charge, the statement of the imputations and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require that person by a notice in writing to submit his written statement of his defence within the specified time and to state whether he desires to be heard in person and to

appear before him on the specified date and time. The detailed procedure has been prescribed for holding such enquiry in Rule 6 of the Rules.

11. In the case in hand, the impugned order has been passed by the District Magistrate under the proviso to Section 95 (1)(g) of the Act after receipt of the report in the preliminary enquiry made under Rule 4. It is apparent from the perusal of the order of the District Magistrate dated 30.3.2008 impugned in the writ petition (Annexure-8 to the writ petition) that upon receipt of the complaint against the petitioner-appellant, the District Social Welfare Officer, Kushi Nagar was nominated to hold preliminary enquiry vide order dated 3rd October, 2007. The District Social Welfare Officer, Kushi Nagar submitted report on 22nd December, 2007. In the report various irregularities alleged against the petitioner-appellant were prima facie found to be correct, hence notice was served on her on 14.1.2008 and 14.2.2008 under Section 95(1)(g) of the Act calling upon to show cause pursuant to which show cause was filed on 26.2.2008. The District Magistrate since did not find any substance in the cause shown and having satisfied with the report in the preliminary enquiry wherefrom the appellant is prima facie found to have committed financial and other irregularities, passed the impugned order whereunder she has been prevented to exercise financial and administrative powers and functions till she is exonerated of the charges in the regular enquiry and also constituted Committee consisting of three Members of Gram Panchayat to exercise and perform the financial and administrative powers of the Panchayat.

12. The contention that copy of the enquiry report was not provided and, therefore, the impugned order is bad, can also not be, accepted since it has not been demonstrated before us or in the writ petition as to what prejudice has been caused on account of non-supply of the report. Further, admittedly after receipt of the show cause notice, the petitioner had filed show cause and nothing has been brought before us that she asked for copy of the report before furnishing show cause, hence it does not lie in the mouth of the appellant at this stage to contend that in the absence of the copy of report provided to the appellant the order passed under the proviso to Section 95 (1) (g) of the Act is vitiated.

13. That apart, having regard to the provisions of U.P. Panchayat Raj Act and the Rules framed thereunder referred to above, we are of the view that the order withdrawing financial and administrative power and function of the Pradhan or Up-Pradhan under the proviso to Section 95 (1) (g) of the Act is in the nature of interim order pending enquiry to prevent misuse of financial and administrative power and function by the Pradhan facing charges of financial and administrative irregularities and thus, at this stage the Act or the Rule does not contemplate to provide any opportunity of hearing or show cause or participation of Pradhan or Up Pradhan facing charges in the preliminary enquiry. The Hon'ble Single Judge of this Court in the case of **Smt. Radhili Devi Vs. the District Magistrate, Padrauna & others, 1997 (1) AWC 251**, took the view that no opportunity of hearing is necessary before resorting to such interim measure as it is analogous to a suspension order passed against a Government servant and only at

the stage of regular enquiry before passing final order of removal, opportunity of hearing is to be extended. Similar view was expressed by a Division Bench of this Court in the case of **Moti Lal Vs. District Magistrate, Lalitpur & @ others, 2003 (1) UPLBEC 736**, wherein their Lordships having taken note of the provisions contained in Rules 3 & 4 and proviso to Section 95 (1)(g) of the Act, held that while holding preliminary enquiry the Enquiry Officer is not obliged to give opportunity to the appellant nor the rule requires holding of preliminary enquiry in the presence of the appellant. We, with respect endorse the above view. Therefore, we do not find any substance in the contention that the impugned order has been passed in violation of the principles of natural justice nor we find any violation of prescription of law calling for interference in the impugned order.

14. Therefore, there is no fault in the judgment of the Hon'ble Single Judge assailed in this appeal.

15. No other point is urged before us.

16. However, looking to the facts of the case, we are of the view that the formal enquiry initiated under Rule 5 of the Rules requires early disposal. We, therefore, direct that the formal enquiry initiated against the petitioner shall be concluded expeditiously, preferably within a period of three months from the date of production of a certified copy of this order. We further provide that the enquiry officer or the District Magistrate while taking final decision shall not be influenced or prejudiced in any manner by the observations made by this Court in the writ petition and in this appeal as it was only for the purpose of deciding the validity of the order passed under proviso to Section 95 (1) (g) of the Act.

17. With the above observations the special appeal stands dismissed but without costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.06.2008

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

Criminal Misc. Application 14872 of 2008

Mohan Lal and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri. S.R. Singh

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section 319-summoning order-merely on the basis of examination-in-chief-without cross examination-held-illegal.

Held: Para 4

Learned counsel for the applicants cited before me a ruling of Hon. Supreme Court in Mohd. Shafi vs. Mohd. Rafiq, 2007 (58) ACC 254. In this case the trial court on the basis of examination-in-chief of witness had summoned the accused appellant under Section 319 Cr.P.C. The order was challenged and the Hon. Supreme Court held that the order summoning the accused applicant could not be passed on the basis of examination-in-chief of the witness, but the court concerned for ascertaining the veracity of the witness should have permitted his cross examination first and

then the court should have taken a decision as to whether the appellants should be summoned as an accused or not under Section 319 Cr.P.C.

Case Law discussed:

2007 (58) ACC 254.

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

1. This is an application moved under Section 482 Cr.P.C. to quash the order dated 19.3.2008 passed by Additional Sessions Judge/ F.T.C. Court no.1, Jalaun at Orai in S.T.No.112 of 2007, State vs. Praveen Kumar summoning the applicants as accused persons under Section 319 Cr.P.C.

2. The relevant facts for disposal of this application are that aforesaid S.T. is pending against co-accused Praveen Kumar under Sections 363,366 and 376 I.P.C . Applicants were named as accused persons in the F.I.R. but no charge-sheet was submitted against them. After investigation the charge-sheet was submitted against Praveen Kumar only. The case was committed to the court of Sessions Judge and during trial of the case the statement of Km. Poonam Soniya, prosecuterix was recorded as P.W.2 and in that statement she named accused applicants Mohan Lal, Dinesh Kumar, Raj Kumar and Satish mentioning their respective roles in the incident. Thereafter, the prosecution moved an application for summoning the above accused applicants and that application was allowed by the trial court. Aggrieved of that order the present accused applicants filed this application under Section 482 Cr.P.C .

3. Heard Sri S. R. Singh, learned counsel for the applicants and learned A.G.A. at the stage of admission on merits also and now I am deciding it on merits without calling any counter affidavit as the point involved is legal one.

4. Learned counsel for the applicants cited before me a ruling of Hon. Supreme Court in Mohd.Shafi vs. Mohd. Rafiq, 2007 (58) ACC 254 . In this case the trial court on the basis of examination-in-chief of witness had summoned the accused appellant under Section 319 Cr.P.C . The order was challenged and the Hon. Supreme Court held that the order summoning the accused applicant could not be passed on the basis of examination-in-chief of the witness, but the court concerned for ascertaining the veracity of the witness should have permitted his cross examination first and then the court should have taken a decision as to whether the appellants should be summoned as an accused or not under Section 319 Cr.P.C.

5. He submitted that above the ruling applies with full force. to the present case where the court has summoned the applicants as accused persons, only on the basis of examination-in-chief of Km.Poonam Soniya without her cross examination. So the order passed by Additional Sessions Judge should be set aside. I agree with his contention.

6. The application under Section 482 Cr.P.C. is therefore, allowed to this extent that the order passed by Additional Sessions Judge summoning the applicants as accused persons on the basis of examination-in-chief of Km. Poonam Soniya is set aside. It is, however, directed that the court below may, after her cross examination, reconsider the

matter of summoning the applicants as accused persons, if so, prayed by the prosecution.

7. The application under Section 482 Cr.P.C. is disposed of accordingly subject to above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition 17846 of 2008

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

Counsel for the Petitioner:
Sri Ashok Kumar Singh Yadav

Counsel for the Respondents:
Sri. Anuj Kumar
Sri. Janardan Singh Yadav
Sri. A.K. Singh

Constitution of India, Article 226- Settlement of Fisheries Rights-petitioner belonging to S.C. Candidate of the same village granted lease-on complaint of respondent no. 5 cancelled on the ground the settlement made without publication in two newspapers-secondly contrary to in order of preference contained in G.O. 17.10.95-held- normally the proviso not construed as nullifying enactment-Para 5(i) of the G.O. cannot be construed as changing the preference-person belonging to Machhua Community may be of the same village-Nyay Panchyat or Block-a Scheduled Caste candidate belonging to same village cannot be preferred over the person belonging to Machhua Community of the Block.

Held- Para 18

Paragraph 5(1) at best can be read as proviso to the preferences as indicated in the Government Order. A proviso is normally not construed as nullifying the enactment or as taking away completely a right conferred by the enactment. Thus, paragraph 5(1) cannot be construed as changing the preferences as mentioned in the Government Order. Persons belonging to Machhua Community be that of (a) same village concerned (b) concerned Nyaya Panchyat or concerned Block are in the first category and they will take precedence over a member of Schedule Caste who is in second category, thus, the petitioner who belongs to Schedule Caste, cannot be preferred to a person belonging to Machhua Community although of concerned Block. Thus the submission of the learned counsel for the petitioner that respondent No. 5 could not have been given preference over the petitioner, cannot be accepted.

Case Law Discussed:
2006 (1) ALJ 376

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

1. Heard Sri Ashok Kumar Singh Yadav learned counsel for the petitioner, Sri Janardan Singh Yadav learned counsel appearing for respondent No.4, Sri A.K. Singh, Advocate, appearing for respondent NO.5 and learned Standing Counsel.

2. By the consent of the learned counsel for the parties, the writ petition is being finally decided.

3. By this writ petition, the petitioner has prayed for quashing the order dated 10th March, 2008 passed by the Sub Divisional Officer, Mohammadabad, Ghazipur, withdrawing the approval granted in favour of petitioner dated 3rd June 2006 and the order dated 1st April 2008 and 4th April

2008 approving the fishery lease in favour of respondent NO.5.

4. Brief facts of the case for deciding the writ petition are; plot No. 198 area 0.760 Hectare is a pond situate in Village Firojpur, Pargana & Tehsil Mohammadabad. District Ghazipur. The petitioner is a resident of Village Firojpur and belongs to Scheduled Caste category. The Sub Divisional Officer approved the fishery lease in favour of the petitioner for an amount of Rs.4,000/- per annum vide his order dated 3rd June, 2006. A complaint was filed by respondent No.4 to the Sub Divisional Officer against the approval of lease in favour of the petitioner. On the complaint, a report was submitted by the Naib Tehsildar to the effect that in the auction, the Government Order dated 17th October 1995 has not been followed since there are several persons belonging to Machhua Community in the village. It was also reported that no proof of munadi or publication in newspaper are in the file. A notice was issued to petitioner as to why the approval be not cancelled. The petitioner filed an objection stating that auction in favour of petitioner was made after following the procedure prescribed. It was also stated that in spite of repeated requests, the lease has not yet been registered. The Sub Divisional Officer by the impugned order dated 10th March 2008 withdrew the approval dated 3rd June 2006 and directed for fresh steps for settlement of pond The Sub Divisional Officer gave two reasons for withdrawing the approval, firstly that there is no material to prove that prior to auction wide publicity was made and secondly the petitioner was a Scheduled Caste who does not come in the eligibility since preference is to be given to the persons of Machhua Community. Subsequent to order dated 10th March, 2008, the Sub Divisional Officer held proceedings on 24th March, 2008 for fresh settlement. The highest bid was given by the respondent No.5 of Rs.6,000/- per annum. Consequently, a lease was executed in favour of respondent No.5 on 1st April 2008. The respondent No.5 claims to be a person belonging to fishing community. It was further stated that petitioner also filed a suit on 21.1.2008 in the Court of Civil Judge for injunction. The respondent No. 5 was impleaded on an application filed by respondent No.5 himself vide order dated 16th April 2008. The petitioner was also permitted to amend the writ petition by the order of the same date i.e. 16th April, 2008.

5. Learned counsel for the petitioner challenging the order dated 10th March, 2008 as well as subsequent settlement in favour of respondent No.5, contended that there was no ground to recall the approval in favour of the petitioner. He further contends that fresh settlement has been granted in favour of respondent No.5 who claims to be a Cooperative Society.

6. Learned counsel for the petitioner in support of his case has relied on paragraph 5 of the Government Order dated 17th October 1995 to the effect that lease can be granted to a person belonging to Machhua Community of the Nyay Panchayat only when there is no person available in the village who is desirous to take the lease. Learned counsel for the petitioner submits that in preference to the petitioner who belongs to Scheduled Caste and resident of the same village, the grant of lease in favour of respondent No.5 who belongs to another village namely Shavaz Kuli is not in accordance

with the Government Order dated 17th October 1995.

7. Learned counsel for the respondents refuting the submissions of learned counsel for the petitioner contends that the approval granted in favour of petitioner was withdrawn since there was no proper publication at the time of approval in favour of the petitioner. It is further contended that the respondent No.5 belongs to Machhua Community and he being available for taking the lease, the petitioner was not eligible person under the Government Order dated 17th October, 1995.

8. I have considered the submission of the parties and perused the record. The grant of lease was approved in favour of the petitioner by order dated 3rd June 2006. A complaint was submitted by respondent No. 4 on which, a report was called from Naib Tehsildar who submitted his report on 12.12.2007, which has been filed as Annexure No. 3 to the writ petition, which indicates that Naib Tehsildar recommended for cancellation of lease in favour of the petitioner basically on two grounds, firstly, there was no material that there was proper publication of the date of auction and secondly, there being persons belonging to Machhua Community available, the petitioner was not an eligible person. The Sub Divisional Officer in the order dated 10th March 2008 gave two reasons for withdrawing the approval firstly there is no material that prior to auction, appropriate publication was made.

9. A Full Bench of this Court in ***2006 (1) ALJ 376 Ram Kumar & others Vs. State of U.P***. has laid down that before settling the fishery lease, proper publicity of the same is to be done. The Sub Divisional Officer being satisfied that there was no publicity of the lease, he was not powerless to withdraw the approval. Consequently, the Sub Divisional Officer took the view that persons of Machhua Community were available, the grant of lease in favour of persons belonging to Scheduled Caste was not correct.

10. The submission which has been much pressed by the learned counsel for the petitioner is that when a Scheduled Caste candidate of the village in question where the pond is situated is available, a person belonging to Machhua Community of the concerned Nyay Panchayat or Block is not an eligible person and cannot be preferred.

11. The submission of the learned counsel for the respondents to the contrary is that a person of Machhua Community belonging to the village in question shall have first preference but thereafter a person belonging to Machhua Community of the concerned Nyay Panchayat and thereafter of the concerned Block, will be preferred to a person belonging to Scheduled Caste of the village in question.

12. For appreciating the above submission, it is relevant to quote the relevant provision in the Government Order dated 17.10.1995 providing for preference:

"स्तम्भ-१
छो हेक्टेयर तक के क्षेत्रफल के तालाबों, पोखरों, मीनाशयों के लिये।
(अ) सम्बन्धित गॉव सभा क्षेत्र के मछुवा समुदाय (मछुवा, केवट, निषाद, मल्लाह, बिन्द, धीवर, धीमर, कश्यप, बाथम, रायकवार, मांझी, गोड़िया, (कहार) तुरेहा का तुराहा आदि।)

(ब) सम्बन्धित न्याय पंचायत के मछुवा समुदाय (मछुवा, केवट, मल्लाह, निषाद, बिन्द, धीवर, घीमर, कश्यप, बाथम, रायकवार, मांझी, गोड़िया, (कहार) तुरेहा का तुराहा आदि।

(स) सम्बन्धित विकास खण्ड के मछुवा समुदाय (मछुवा, केवट, मल्लाह, निषाद, बिन्द, धीवर, घीमर, कश्यप, बाथम, रायकवार, मांझी, गोड़िया, (कहार) तुरेहा का तुराहा आदि।

2. (अ) सम्बन्धित गॉव सभा क्षेत्र के अनुसूचित जाति/जनजाति के व्यक्ति।
(ब) सम्बन्धित न्याय पंचायत के अनुसूचित जाति/जनजाति के व्यक्ति।
(स) सम्बन्धित विकास खण्ड के अनुसूचित जाति/जनजाति के व्यक्ति।

3. (अ) सम्बन्धित गॉव सभा क्षेत्र की मछुवा समुदाय की सहकारी समिति जो सहकारिता नियमों के अन्तर्गत गठित व पंजीकृत हो और मत्स्य पालन विभाग द्वारा मान्यता प्राप्त हो।
(ब) सम्बन्धित न्याय पंचायत क्षेत्र की मछुवा समुदाय की सहकारी समिति जो सहकारिता नियमों के अन्तर्गत गठित व पंजीकृत हों।
(स) सम्बन्धित विकास खण्ड स्तर की मछुवा सहकारी समिति जो सहकारिता नियमों के अन्तर्गत गठित व पंजीकृत हों।

4. (अ) सम्बन्धित गॉव सभा क्षेत्र की अनुसूचित/जनजाति की पंजीकृत सहकारी समितियॉ जो सहकारिता नियमानुसार गठित एवं पंजीकृत हों।
(ब) सम्बन्धित न्याय पंचायत क्षेत्र की अनुसूचित जाति/जनजाति की पंजीकृत सहकारी समितियॉ जो सहकारिता नियमानुसार गठित एवं पंजीकृत हों।
(स) सम्बन्धित विकास खण्ड की अनुसूचित जाति/जनजाति की पंजीकृत सहकारी समितियॉ जो सहकारिता नियमानुसार गठित एवं पंजीकृत हों।

5. प्रतिबन्ध यह है कि-

(१) सम्बन्धित गॉव सभा क्षेत्र की किसी इच्छुक व्यक्ति के न होने पर सम्बन्धित न्याय पंचायत तत्पश्चात् सम्बन्धित विकास खण्ड और तत्पश्चात् सम्बन्धित जनपद के इच्छुक व्यक्ति को पटट्ा दिया जा सकेगा।
(२) यदि वरीयता क्रम में एक से अधिक व्यक्ति/समितियॉ हों तो उनके प्रार्थना-पत्र प्राप्त कर निर्धनता/आवश्यकता के आधार पर पटट्ा आवंटन समिति द्वारा विचार कर पटट्ा निष्पादित किया जायेगा।
(३) यदि नीलामी में किसी मामले में किसी न्यायालय द्वारा स्थगनादेश पारित कर दिया जाता है तो उस दशा में परगनाधिकारी द्वारा भाडे पर मत्स्य आखेट की व्यवस्था की जायेगी।

.....यहां इसका उल्लेख प्रासंगिक होगा कि उपरोक्त व्यवस्था में निर्धारित वरीयता क्रम के अनुसार प्रासंगिकता के आधार पर समुचित अग्रेतर कार्यवाही सुनिश्चित की जाये।

13. A perusal of the Scheme of the Government Order dated 17th October, 1995 as quoted above, indicate that the person of Machhua Community of the village has first preference who are in first category. The persons belonging to Machhua Community of concerned Block are also included in first category at Item No. (b), thus, the first category of the preference is persons of Machhua Community belonging to (a) Village Gaon Sabha, (b) concerned Nyay Panchyat (c) concerned Block.

14. From the material on record, it is clear that although petitioner is a resident of village Firojpur Kuli where the pond is situated but the respondent No. 5 is a person belonging to Block Mohammadabad which is concerned Block and from the Machhua Community. A person belonging to Scheduled Caste of the village in question is mentioned at category 2(a) and, similarly, Scheduled Caste of concerned Block are at 2(c), herein the petitioner and respondent No. 5 whose names are included at category 2(a) and 1(c) are claiming rights.

15. Relying on paragraph 5 learned counsel for the petitioner contends that since a person belonging to the same village although a Scheduled Caste is available, a person of Block even though belonging to Machhua Community, cannot be preferred.

16. It is golden rule of interpretation that a provision of statute have to be so construed as to give effect to the intent

and purpose of the statute have to be given effect to. The object of Government Order is to give preference to persons of Machhua Community and Scheduled Caste. The preferences are divided in three categories i.e. category-1, category-2, category-3. All category has three sub categories. In case, submission of learned counsel for the petitioner is accepted that a person belonging to Scheduled Caste belonging to same village, has to be preferred to ,a person of Machhua Community and belonging to the concerned Block, the Government Order would have included category 2(a) in first category itself and all the persons and Cooperative Societies of concerned village should have been included in category 1 and the category would have been thus:

1(a) persons belonging to Machhua Community of concerned village.
(b) Schedule Caste of concerned village.
(c) Cooperative Society of members of Machhua Community of concerned village.
(d) Cooperative Society of Schedule Caste persons of concerned village.

17. A perusal of Government Order indicates that the different categories have been mentioned according to preference and from paragraph 3 of Government Order, it is clear that the settlement has to be undertaken in accordance with prescribed preference. In case, the submission of learned counsel for the petitioner is accepted, the preferential category have to be re-written.

18. Paragraph 5(1) at best can be read as proviso to the preferences as indicated in the Government Order. A proviso is normally not construed as nullifying the enactment or as taking away completely a right conferred by the enactment. Thus, paragraph 5(1) cannot be construed as changing the preferences as mentioned in the Government Order. Persons belonging to Machhua Community be that of (a) same village concerned (b) concerned Nyaya Panchyat or concerned Block are in the first category and they will take precedence over a member of Schedule Caste who is in second category, thus, the petitioner who belongs to Schedule Caste, cannot be preferred to a person belonging to Machhua Community although of concerned Block. Thus the submission of the learned counsel for the petitioner that respondent No. 5 could not have been given preference over the petitioner, cannot be accepted.

19. In view of the foregoing discussions, the petitioner is not entitled for any relief in this writ petition. The writ petition is accordingly, dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.07.2008

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application 18374 of 2008

Ashok Kumar Tiwari & others ...Applicants
Versus
State of U.P. & another...Opposite Parties

Counsel for the Applicants:
Sri. Satish Trivedi
Sri. Lalit Singh

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

Code of Criminal Procedure-Section-482-quashing of criminal proceedings-on

ground of two F.I.R. for same occurrence-offence under section 498-A, 394-B, 201 I.P.C. read with ¾ Dowry Prohibition Act-first F.I.R alleged to be lodged by the son of the father of deceased in very casual manner without disclosing the time and place of occurrence, even the name of witness not mentioned-strongly disputed the signature of informant of first F.I.R.-no denial-subsequent F.I.R. with correct version cannot be treated as second F.I.R.-held-cannot be touched at this stage-direction issued for trial of both cases by the same Judge in accordance with law.

Held: Para 22 & 23

More over, on the facts of the present case T.T. Antony's case (supra) does not apply at all as second FIR was registered after the investigation on the earlier FIR, which was alleged to be manufactured and shame document was already over. The grievance in the present case by the father of the deceased is that the police in connivance with the accused, and to save them from the clutches of law, registered a FIR in the name of his son which was not lodged by his son at all. By no stretch of logic can such allegations be treated to be a second FIR.

The contention of the learned counsel for the applicants regarding the registration of second FIR in the back drop of above discussion is bereft of any merit and is hereby repelled.

Case Law discussed:

AIR 2001 SC 2637

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

1. A family of Dina Nath Tiwari consisting of himself, his wife Smt. Ram Dulari, son Ashok Kumar Tiwari along with Smt. Nirmala w/o Bharat Tiwari have invoked my inherent jurisdiction with the prayer that entire proceedings of Case No. 574 of 2008, State versus Ashok Kumar Tiwari and others arising out of Crime No. C-131/2007, u/s 498A, 304-B and 201 of IPC and section ¾ of Dowry Prohibition Act, P.S. Sahatwar, district Ballia, pending in the court of Judicial Magistrate 1st , Ballia be quashed. The ancillary prayer is to stay further proceedings of the aforesaid case pendentlite.

2. The back ground facts are that Reena Tiwari d/o informant Prem Shanker Tiwari respondent no. 2 was married with Ashok Kumar Tiwari applicant no. 1 s/o Dina Nath Tiwari and Smt. Ram Dulari applicants no. 2 and 3. Reena Tiwari however, was murdered and in respect of her death, her brother Krishna Kant Tiwari s/o respondent no. 2 Prem Shanker Tiwari lodged a FI R as Crime No. 149 of 2005, u/s 302/201 IPC at P.S. Sahatwar, district Ballia on 24.11.2005 at about 1.50 p.m., mentioning there in that his sister was married with Ashok Kumar Tiwari s/o Dina Nath Tiwari and for the reasons unknown, Bharat Tiwari, brother of Ashok Kumar Tiwari has burnt the deceased to death after murdering her.

3. It transpires that on the basis of the registered FIR, annexure no. 1, investigation was taken up by the I.O., who concluded the same and submitted charge sheet No.5 of 2006 in the court on 20.1.2006 for the offences u/s 306/201 IPC against Bharat Tiwari, Madhuvan Yadav and Prabhawati. On the basis of the said charge sheet, annexure 2 cognizance was taken by the Magistrate and the accused were summoned. Their case was committed to the court of Sessions and Sessions Trial No. 124/07 was registered in the Court of Sessions

Judge, Ballia vide annexure 3 A to this application.

4. It seems that respondent no. 2 Prem Shanker Tiwari moved an application u/s 156 (3) Cr. P.C. against the present applicants along with Bharat Tiwari, Smt. Nirmla and Prabhawati Devi with the prayer to direct the police to register his F.I.R. and investigate the offences of 498-A 304-B IPC and ¾ D.P. Act. It is pertinent to mention here that Prabhawati and Bharat Tiwari were charge sheeted accused for the offences u/s 306/201 IPC vide annexure 2 as has already been mentioned above.

5. The allegations, which were levelled by respondent no. 2 in his application u/s 156 (3) Cr. P.C. were that he had married his daughter Reena, according to Hindu customs and rites with Ashok Kumar Tiwari s/o Dina Nath Tiwari on 1.5.2004. Soon after the marriage the husband, father-in-law and mother-in-law along with Jeth Bharat Tiwari and his wife started demanding Rs. 50,000/- cash, a Fridge and a Maruti Car from his daughter and started torturing her for non fulfilment of the same. For making the life of his daughter happy, respondent no. 2 parted with the Rs. 50, 000/-, so that the torture of his daughter comes to an end but the act resulted in aggravation of torture of his daughter for demand of a Fridge and a Maruti Car. When the informant came to know of it, he sent his son Krishna Kant on 17.11.2005 for bringing back his daughter but the applicants did not send her back. His daughter Reena was assaulted in the presence of her brother as well.

6. On 18.11.2005 Krishna Kant informed the respondent No. 2 regarding torture and assault on Reena on telephone, on which the informant asked him to take respectable persons along with him and bring back Reena. Thereafter when Krishna Kant had gone to bring back Reena, then he found that Reena was murdered and cremated. Krishna Kant informed regarding the said murder to Prem Shanker Tiwari on telephone who came to district Ballia and endeavoured to lodge his report but his report was not taken down. On the contrary the I.O. started pressurising him for a compromise. A written application was dispatched by Prem Shanker Tiwari to Superintendent of Police, Ballia but in-vain. According to the version of the informant, the police, to save the accused from rigour of punishment, in connivance with the accused, registered a FIR on their own in the name of Krishna Kant Tiwari son of respondent no. 2 ostensibly to save the accused from offences committed by them and it was asserted by respondent no. 2 that his son never lodged any F.I.R. at P .S. Sahatwar. It was further mentioned that even at the time of marriage of Reena, the accused had demanded Hero Honda Splendor Motor Cycle which was given in dowry by the informant respondent no. 2.

7. With the aforesaid allegations respondent no. 2 prayed to the Magistrate vide his application dated 4.1.2006 to direct the police to register the F.I.R. and investigate the offence. His application u/s 156 (3) Cr. P.C. is annexure No.4.

8. Vide order dated 23.1.2006, the Magistrate rejected the said application recording in his order that the F.I.R. lodged by Krishna Kant Tiwari as Crime No. 149/05, u/s 302/201 IPC was registered at the Police Station Sahatwar,

which crime was investigated and charge sheet was submitted u/s 306/201 IPC. Learned Magistrate relied upon a judgment of the apex court in **T.T. Antony's** case and rejected the application of the applicant u/s 156 (3) Cr. P .C. observing that the second F.I.R. cannot be registered at the instant of respondent No. 2 as the earlier F.I.R. was already registered.

9. Order of rejection dated 23.1.2006 of the application u/s 156 (3) Cr. P.C. was challenged in Criminal Revision No. 24/06 unsuccessfully by respondent no. 2 where in his revision was dismissed vide order dated 8.2.2007 passed by Special Judge/Additional Sessions Judge Court No.7, Ballia vide annexure 6 to this application.

10. According to the case of the applicants both the aforesaid rejection orders were challenged before this court in Criminal Misc. Writ Petition No. 2680/07, which was allowed and both the orders passed by Magistrate as well as by learned Additional Sessions Judge dated 23.1.2006 and 8.2.2007 respectively were set aside and the matter was remanded back for fresh decision on the application of respondent no. 2 u/s 156 (3) Cr. P.C.

11. It was after the remand that on 17.4.2007, the Magistrate ordered for registration of F.I. R and investigation and hence crime No. C-131/07 was registered against the present applicants u/s 498-A, 304-B and 201 IPC and section ¾ D.P. Act at P.S. Sahatwar, district Ballia vide annexure no. 7 to this application.

12. Follow up investigation resulted in filing of Charge Sheet No. 5 A/08 against the applicants in the court of Judicial Magistrate, 1st Ballia, on the basis of which Case No. 574/08 State versus Ashok Kumar Tiwari and others was registered in the Court of J.M. 1st Ballia for the aforesaid offences.

13. It is on back ground of the above facts that the four applicants who are husband, father-in-law, mother-in-law and sister-in-law (Bhabhi) have filed the instant Criminal Misc. Application with the prayer that entire proceedings of the subsequent registered case No. 574/08 State versus Ashok Kumar Tiwari and others for causing dowry death and offence under dowry prohibition Act be quashed.

14. I have heard Sri Satish Trivedi, learned Senior Counsel in support of this application and learned AGA in opposition.

15. Sri Satish Trivedi learned Senior Counsel raised no new argument but confined himself on the same contention that second F.I.R. cannot be registered, therefore, the prosecution of the applicants be quashed. He further submitted that at least two of the applicants Prabhawati and Bharat Tiwari were already charge sheeted accused and therefore, the second F.I.R. against them is bad in law. He further contended that so far as these two accused persons are concerned, it will be difficult for them to defend themselves for the charges which are opposite in nature and therefore there is likely hood of recording of conflicting findings in both the trials. Sri Trivedi also relied upon on the judgment of the apex court in **T.T. Antony vs. State of Kerla and others A.I.R. 2001 SC 2637.**

16. Learned AGA on the contrary, refuted all the contentions raised by Sri Satish Trivedi and submitted that alternative charge can always be framed and whether it was a case of abatement of suicide or murder because of rapacity can be decided only at the stage of trial. It is further contended that the deceased was murdered within a very short span of time and there is nothing on record to suggest that she was inclined to commit suicide and therefore, earlier charge sheet submitted by the police was wholly dis satisfactory. Learned AGA also submitted that it is not a case of registering of second F.I.R but it is a case of bringing out new version by the father of the deceased, who had lost his daughter in prime of her youth. Concludingly, learned AGA contended that this application is bereft of merit and T.T. Antony's case (supra) does not apply at all and this application deserves to be rejected

17. I have considered the contentions of rival sides and have gone through various annexures appended along with this application. I have also gone through the judgment of the apex court in T.T. Antony's case (supra).

18. From the material placed on the record of this case, it is absolutely c1ear,which has not been rebuted by the learned counsel for the applicant, that the case of the father Prem Shankar Tiwari respondent no. 2 is that no FIR was lodged by his son Krishna Kant Tiwari with the allegations of murder and the police on its own registered FIR by impersonation in the name of Krishna Kant Tiwari. This allegation by respondent no. 2 has to be taken to be correct on its fact value. The applicants have not been able to show any thing on the basis of which it can be said that the said allegation levelled by the present informant is false. In such a view, there does not arise any question of lodging of second FIR as according to the case of the informant registration of the first FI R is fictitious and that is a shame document. Further it transpires that the allegations levelled by the present informant, the father is that the accused have committed dowry death. The earlier FIR, which has been appended as annexure No. 1 to this application speaks volume in itself. The said FIR does not contain any thing but for a very cursory narration of fact without disclosing the time and even the date of the incident, name of any witness etc. It transpires that the allegations of the present informant that his son had not lodged any FIR seems to be more probable.

19. Further, offence u/s 306 IPC is materially different from the offence u/s 304 -B IPC, so far as registration of FIR is concerned. Under section 154 Cr.P.C., what is to be registered is the information relating the commission of cognizable offence. In this back ground the contention of learned Senior Counsel for the applicants has to be analysed.

20. Cogitating over the submissions it is clear that if two persons give information regarding commission of two different offences which are cognizable in nature, may be in respect of the same incident, then the FIR of both the versions have to be registered. It will be the matter of investigation to investigate which version is correct. But so far as registration of FIR is concerned, the same cannot be denied for the reasons that the incident is one. For registration of FIR what is important is information

disclosing particular offence and not the incident. Under Section 154 Cr. P.C. it is no where mentioned that in respect of a single incident, no two FIRs can be registered even if the version given by both the informants are materially different and they disclosing different kind of offence as is the case here. There is another aspect of the matter, which requires consideration at this stage and that is that if one version given by the informant is not registered then his case will be closed for ever even before it is investigated. This is not the intention of the legislature in enacting under section154 Cr. P.C. Even in **T.T. Antony's** case (supra) while deliberating on the said aspect of the matter the apex court has observed that any cryptic information cannot be registered as FIR. It has further been observed by the apex court that any statements recorded during the investigation of cognizable offence disclosing commission of other cognizable offence will only be a statement u/s 161 Cr. P.C. and any such disclosure during investigation can not be treated to be a FIR. The apex court has observed in the aforesaid decision as follows:-

19. An information given under sub-section (1) of Section 154 of Cr. P. C. is commonly known as First Information Report (FIR) though this term is not used in the Code. It is very important document. And as its nick name suggests it is the earliest and the first information of a cognizable offence recorded by an officer-in-charge of a police station. It sets the criminal law into motion and marks the commencement of the investigation which ends up with the formation of opinion under Sections 169 or 170 of Cr. P.C., as the case may be, and forwarding of a police report under Section 173 of Cr. P. C. It is quite possible and it happens not infrequently that more informations than one are given to a police officer-in-charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter everyone of them in the station house diary and this is implied in Section 154 of Cr. P. C., apart from a vague information by a phone call or cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer-in-charge of police station is the First Information Report -FIR postulated by Section 154 Cr. P. C. All other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the First Information Report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 of Cr. P.C. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of the Cr. P.C. Take a case where an FIR mentions cognizable offence under Sections 307 or 326 IPC, and the investigating agency learns during the investigation or receives a fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular, in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W his

wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H the real offender-who can be arraigned in the report under Section 173 (2) or 173 (8) of Cr. P. C., as the case may be. It is of course permissible for the investigating officer to send up a report to the concerned Magistrate even earlier that investigation is being directed against the person suspected to be the accused.

19. The scheme of the Cr. P.C. is that an officer-in-charge of a Police Station has to commence investigation as provided in Section 156 or 157 of Cr. P.C. on the basis of entry of the First Information Report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of evidence collected he has to form opinion under Section 169 or 170 of Cr.P.C., as the case may be, and forward his report to the concerned Magistrate under Section 173 (2) of Cr.P.C. However, even after filing such a report if he comes into possession of further information or material, he need not register a fresh FIR, he is empowered to make further investigation, normally with the leave of the Court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of section 173 Cr.P.C"

21. Thus what has been prohibited by the apex court is the registration of two FlRs for the same offences. It however, does not preclude from lodging of two FlRs in respect of the same incident having materially different allegations of commission of different cognizable offences as is the present case.

22. More over, on the facts of the present case T.T. Antony's case (supra) does not apply at all as second FlR was registered after the investigation on the earlier FlR, which was alleged to be manufactured and shame document was already over. The grievance in the present case by the father of the deceased is that the police in connivance with the accused, and to save them from the clutches of law, registered a FlR in the name of his son which was not lodged by his son at all. By no stretch of logic can such allegations be treated to be a second FIR.

23. The contention of the learned counsel for the applicants regarding the registration of second FIR in the back drop of above discussion is bereft of any merit and is hereby repelled.

24. For obliterating the anxiety of learned counsel for the applicants regarding recording of the conflicting findings, it is desirable that both the trials should be conducted by the same court, which is hereby directed.

25. Another submission of the learned counsel for the applicants regarding defence of the accused, only this much is observed that the said contention is wholly meritless and bereft of any reasoning what so ever and hence is repelled.

26. While concluding the argument learned counsel for the applicants made oral request that in case the proceedings of the aforesaid case No. 574/08 State

versus Ashok Kumar Tiwari and others, Crime No. C-131/07, u/s 498-A, 304-B and 201 IPC and section ¾ D.P. Act, P.S. Sahatwar, district Ballia is not quashed, then the bail prayer of the applicants be directed to be considered if possible on the same day.

27. Looking to the facts of the case, I hereby direct that in case the applicants appears before the court concerned and move an application for their bail, the same is directed to be considered as expeditiously as possible without unreasonable delay and in the case of lady applicants the bail prayer shall be considered if possible on the same day

28. With the aforesaid direction this application stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition 19305 of 1988

U.P. State Road Transport Corporation ...Petitioner
Versus
The State of U.P. & others...Respondents

Counsel for the Petitioner:
Sri. Sameer Sharma

Counsel for the Respondents:
S.C.

U.P. Industrial Dispute Act 1947-Section 6-B(2)-Compromise between workman and employer-outside the Court-not registered-objection by the employer that acting upon the terms of compromise workman was reinstated with condition he will not claim past wages-held-misconceived-unregistered compromise-not enforceable.

Held: Para 19

In my opinion, the Labour Court has rightly allowed the application of the workman under Section 33-C(2) of the Act holding that such an agreement out side the conciliation proceedings is not enforceable in law in State of U.P. without it being registered under the provisions of Section 6-B (2) of the U. P. Industrial Disputes Act, 1947. It appears that the workman was reinstated in service in terms of the award and not in terms of the agreement.

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

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

2. Respondent no.3 was appointed as Carpenter on temporary post on 2.6.1977 in Gorakhpur Region. Subsequently on 26.7.1978 he was transferred from Bird Ghat Depot, Gorakhpur Region to Dohri Ghat Depot of Azamgarh Depot. He was placed under suspension by order dated 28.7.1978 on misconduct and a charge sheet dated 2.8.1978 was also issued to the petitioner. After enquiry the authorities reinstated the workman in service with warning and forfeiture of salary for suspension period except for suspension allowance by an order dated 16.11. 1978.

3. On 19.12.1979 a report was submitted by Sri Hardeo Ram, Chaukidar that he caught the workman along with Sri Dudh Nath Carpenter carrying 11 aluminum foils weighing 2-3 kgs. The workman was placed under suspension by an order dated 2.1.1980 and a chargesheet dated 29.1.1980 was also served on him.

He filed reply thereto on 1.2.1980. After holding an enquiry the petitioner issued show cause notice dated 21.3.1980 to the workman concerned along with an enquiry report. Thereafter the workman was removed from service by order dated 10.4.1980. In so far as Sri Dudh Ram is concerned, he was permitted to serve the department again.

4. The workman raised an industrial dispute before the Regional Conciliation Officer but no settlement could be arrived at and a report was submitted to the State Government by him and following matter of dispute was referred to the Labour Court, Gorakhpur where it was registered as Adjudication Case No. 145 of 1982.

"क्या सेवायोजकों द्वारा अपने श्रमिक मेवा लाल शर्मा पुत्र श्री श्याम दुलारे शर्मा को दिनांक १०ण्४ण्८० से सेवायें समाप्त किया जाना उचित तथा/ अथवा वैधानिक है। यदि नहीं तो संबंधित श्रमिक क्या लाभ/अनुतोष/रिलीफ पाने का अधिकारी है तथा अन्य किस विवरण सहित?"

5. Written statement and rejoinder statement on behalf of respondent no.3 as also on behalf of the petitioner Corporation were filed before the Labour Court. The Corporation also filed 17 documents before the Labour Court to prove that the order of removal had been passed in accordance with law. After hearing the parties, the Labour Court decided the following preliminary issues against the Corporation.

(a) That since no demand had been made the reference itself was bad and the Labour Court had no jurisdiction to adjudicate upon the matter.

(b) That .the order of reference was bad as the workman was removed from service by an order dated 10.4.1980 and not with effect from 10.4.1980.

6. The Labour Court by its award dated 22.10.1984 after perusing the evidence on record has recorded a finding that the charges of theft stood proved against respondent no.3. However, the Labour Court on an erroneous assumption that the case of respondent no.3 and Sri Dudh Nath was similar in nature exercised powers under Section 6(2-A) of the Act and directed reinstatement with effect from 1.1.1981 as fresh appointment without past benefits. The petitioner Corporation thereafter filed Writ Petition No. 8586 of 1985 before this Court challenging the said award dated 19.3.1985 but the award was not implemented by the Corporation.

7. During the pendency of Writ Petition no. 8586 of 1985 respondent no.3 moved an application under Section 33-C (2) of the U.P. Industrial Disputes Act, 1947 claiming Rs. 5868/- as the amount due under the award. The aforesaid application of the workman was registered as Misc. Case No. 63 of 1985. The Labour Court decreed the claim of the workman for the aforesaid amount claimed by him.

8. Respondent no.3 also moved an application on 5.3.1986 before the Regional Manager, U.P. State Road Transport Corporation, Azmagarh praying that in case he was given fresh appointment, he would not claim the benefit of seniority or any other benefit including Rs.5868/- as directed under the impugned award.

9. It appears that on that basis an agreement was entered into between the workman and the Management on 15.7.86/19.7.86 and the workman was

given fresh appointment. He has now retired from service.

10. The grievance of the petitioner is that inspite of the fact that the workman had entered into an agreement with the Management and had been given fresh appointment as per award, he moved an application under Section 33-C(2) of the Act claiming past wages from 1.7.1985 to 1.5.1986 amounting to Rs. 8118/-. This application was registered as Misc. Case No. 140 of 1986 before the Labour Court.

11. It was pointed out on behalf of the Corporation that on the basis of agreement entered into between the workman and the Management that he would not claim past benefits and wages, he had been given fresh appointment and as such he was stopped from claiming past wages. The Labour Court, however, by order dated 30.9.1987 has awarded Rs. 8118/- as claimed by the workman as past wages due to him for the aforesaid period 1.7. 1985 to 1.5. 1986.

12. It appears from the averments made in the writ petition that another application was moved by the workman before the Labour Court on 15.12.1987 claiming that the amount be recovered as arrears of land revenue and accordingly an application for amendment of the writ petition and for amendment of the relief was filed on behalf of the Corporation in the aforesaid writ petition no. 8586 of 1985 on 3.8.1988. The application of the petitioner Corporation was rejected on the ground that the writ petition had become infructuous and the award had been complied with as the workman had been reinstated in service. In so far as the amendment application was concerned it was a separate cause of action for which a fresh writ petition may be filed, hence the Corporation wanted to challenge the same. In these backdrops this writ petition has been filed before this Court.

13. The contention of learned counsel for the petitioner is that in view of the agreement entered into between the parties, the application under Section 33-C(2) of the U.P. Industrial Disputes Act was not maintainable and the Labour Court has committed an error in decreeing the claim for Rs.8118/-in as much as respondent no.3 was bound by the terms of the agreement and was stopped from making a claim in respect of the period for which he had agreed not to claim any past wages.

14. He submits that the proceedings under Section 33-C (2) of the U.P. Industrial Disputes Act were in the nature of an execution proceedings and there was no existing right of the workman to claim the past wages under Section 33-C(2) in view of the agreement entered into between the parties, hence he was not entitled to any past wages till the date of his reinstatement.

15. It is lastly submitted that the terms of the agreement could only be interpreted by the Labour Court on a reference being made to it under Section 4-K of the U.P. Industrial Disputes Act (Section 10 of the Central Industrial Disputes Act) and it could not arrogate to itself the functions of a Labour Court in exercise of powers under Section 33-C(2) of the Industrial Disputes Act.

16. The Standing counsel appearing for the respondents submits that admittedly the award was given in favour of the workman which had directed

reinstatement with continuity of service and full back wages to the workman as such he is entitled to the wages as claimed by him from the date of the award and that the Labour Court has therefore, not committed an illegality in allowing the application of the workman under Section 33-C(2) of the U.P. Industrial Disputes Act, 1947. He states that the claim of the workman was based upon an application under Section 4-K of the Act, hence no fresh application is required under the Act for entering into the terms of the agreement.

17. On a specific query made by the Court from learned counsel for the petitioner as to whether agreement said to have been entered into between the workman and the Corporation was registered under the provisions of Section 6-B (2) of the U.P. Industrial Disputes Act, 1947 or not? he has very fairly stated that it does not appear true from the record. In so far as the agreement entered into between the workman and the Corporation outside conciliation proceedings is concerned, it must be registered under the provisions of Section 6-B(2) of the U.P. Industrial Disputes Act, 1947. Since the agreement was no registered in the prescribed manner as provided under Section 6-B(2) of the Act it does not help the case of the petitioner being not in accordance with law.

18. If things are to be done in a certain manner, it must be done in that manner. Therefore, the agreement entered into the parties outside conciliation proceedings ought to have been registered under the provisions of Section 6-B(2) of the Act. Since the employers have failed to get the agreement registered under the provisions of Section 6-B(2) of the Act, they can not get benefit of it.

19. In my opinion, the Labour Court has rightly allowed the application of the workman under Section 33-C(2) of the Act holding that such an agreement out side the conciliation proceedings is not enforceable in law in State of U.P. without it being registered under the provisions of Section 6-B (2) of the U. P. Industrial Disputes Act, 1947. It appears that the workman was reinstated in service in terms of the award and not in terms of the agreement.

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

21. The Corporation shall pay wages to the workman under Section 33-C(2) of the Act within a period of two months from the date of production of a certified copy of this order. Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.05.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 24354 of 2007

Smt. Geeta and others ...Applicants
Versus
State of U.P. & another ...Opposite parties

Counsel for the Applicants:
Sri O.P. Mishra

Counsel for the Opposite Parties:
Sri V.P. Mishra
A.G.A.

Code of Criminal procedure-Section 482- Application for quashing criminal proceeding for offence under section 323/504/506/498-A readwith 3/4 Dowry Prohibition Act-Parties settled their differences before Medication & Conciliation Center Allahabad-agreed to withdraw all criminal cases against her husband-held-if the proceeding continued-the same amounts to abuse of the process of court, according by exercising inherent power all proceeding quashed.

Held; Para 7

In view of the above discussion, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants and other accused in renumbered allowed to continue. Therefore, to do the complete justice, the proceedings of the case may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

Case law discussed:

(2003) 4 Supreme Court Cases 675, [2006(30) JIC 135 (Alld)], 2005 (51) ACC 217 (SC), 2007 (59) ACC 123, 2007 (59) ACC 148

(Delivered by Hon'ble Vijay Kumar Verma, J.)

1. By means of this application under section 482 of the code of Criminal Procedure (in short the 'Cr.P.C.), the applicants Smt. Geeta, Smt. Krishna Devi and Smt. Rekha Solanki have invoked inherent jurisdiction of this Court, praying for quashing of the order dated 21.07.2007 passed by the Addl. Sessions Judge Court No. 10, Ghaziabad in Criminal Revision No. 206 of 2007 (Smt. Geeta & others Vs. State of U.P.) and the order dated 27.02.2007, passed by the Judicial Magistrate Ghaziabad in Crl. Case No. 1923 of 2006 (State vs. Onkar Singh & others) under sections 323, 506, 498A of Indian Penal Code (in short the 'IPC') and section ¾ Dowry Prohibition Act (in short the 'D.P. Act') of P.S. Murad Nagar (Ghaziabad).

2. Shorn of unnecessary details, the facts leading to the filing of the application under section 482 Cr.P.C., in brief, a re that an FIR was lodged by Smt. Manju (Opposite Party No. 2 herein) against her husband Onkar Singh and his family members including the applicants on 07.11.2005 at P.S. Murad Nagar District Ghaziabad, where a case under Section 498A, 323, 506 IPC and section 3/4 D.P. Act was registered at Crime No. 358/05. **Annexure 1** is the copy of that FIR. After investigation, charge-sheet was submitted against the accused persons, on which cognizance was taken by the Magistrate concerned and the accused persons including the applicants were summoned to face the trial in Criminal Case No. 1923 of 2006. After hearing parties counsel, the Judicial Magistrate Ghaziabad passed an order on 27.2.2007 to frame charge against the accused under section 498A, 323, 506 IPC and 3/4 D.P. Act. Consequently, the charge was framed against all the accused persons on 09.04.2007 by the Additional Chief Judicial Magistrate, Court No. 5 Ghaziabad in re-numbered Crl. Case No. 467 of 2007. Order dated 27.02.2007 was challenged by the applicants in the court of Sessions Judge Ghaziabad by means of Crl. Revision No. 206 of 2007, which has been decided by the Additional Sessions Judge Court No. 10, Ghaziabad vide impugned judgement and order dated 21.07.2007, whereby the revision has been dismissed. Both these orders have been sought to be quashed in this proceedings.

3. I have heard Shri O.P. Mishra, learned counsel for the applicants, learned AGA for the State and also perused the material on record. None appeared for O.P. No.2 on the day of hearing, although she had put in appearance through her counsel Sri V.P. Mishra Advocate.

4. At the time of admission of this case, the matter was referred to Allahabad High Court Medication and conciliation Centre vide order dated 04.10.2007. With the intervention of the Mediation Centre, the parties have settled their dispute and they filed compromise before the Mediation Centre on 03.02.2008, which is on record. According to the terms of this compromise before the Mediation Centre on 03.02.2008, which is on record. According to the terms of this compromise, Smt. Manju (O.P. No.2) has agreed to withdraw all the cases filed by her against her husband Onkar Singh and his family members. Criminal Case No. 1923 of 2006 (State vs. Onkar Singh & others), under section 498A, 323, 506 IPC and 3/4 D.P. Act also is to be withdrawn in addition to other cases mentioned in compromise (settlement agreement).

5. Drawing my attention towards the compromise filed by the parties before the Allahabad High Court Mediation & Conciliation Cent re, it was submitted by the learned counsel for the applicants that continuance of the proceedings of Criminal Case No. 1923 of 2006 (renumbered as Crl. Case No. 467 of 2007) is not in the interest of justice and hence the entire proceedings of the case including both the impugned orders should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C. For this contention, reliance has been placed on the cases of ***B.S. Joshi & others vs. State of Haryana & another (2003) 4 Supreme Court Cases 675 and Ausaf Ahmad Abbasi & ors. vs. State of U.P. & another. [2006(30) JIC 135 (Alld)].***

6. Having given my thoughtful consideration to the submissions made by the learned counsel for the applicants, I am of the opinion that continuance of criminal proceedings against the applicants are not in the interest of justice, as Smt. Manju (O.P. No.2) and her husband Onkar Singh have settled their matrimonial dispute due to intervention of the Mediation Centre and they have agreed to live together. All the three applicants are the family members of the husband of Smt. Manju, who have been arrayed as accused in the FIR lodged by her at case C rime No. 358/05 at P. S. Murad Nagar, on the basis of which criminal proceedings in re-numbered criminal case no. 467 of 2007 is pending against them. Since the matrimonia1 dispute has been settled amicab1y between Smt. Manju and her husband Onkar Singh, hence continuance of the Criminal proceedings against the applicants would not be in the interest of justice, as held by the Hon'ble Apex Court in the similar circumstances in the case of ***B.S. Joshi vs. State of Haryana*** (supra), which has been followed by this Court in the case of ***Ausaf Ahmad Abbasi vs. State of U.P.*** (supra). Reference in this regard may be made to the case of ***Ruchi Agarwal vs. Amit Kumar Agrawal & others 2005 (51) ACC 217 (SC)*** also, in which the Hon'ble Apex Court quashed the proceedings of the criminal case under section 498A, 323, 506 IPC and 3/4 D.P. Act, due to the compromise entered into between the parties in the proceedings under section 125 Cr.P.C. Following this

case, this court in the case of ***Shikha Singh & others vs. State of U.P. & another 2007 (59) ACC 123***. quashed the proceedings of criminal case due to the compromise entered into between the parties. Similarly in the case of ***Dinesh Kumar Jain & others vs. State of U. P. & others 2007 (59) ACC 148***, this court has quashed the proceedings of the criminal case under section 498A, 323,504, 506 IPC and 3/4 D.P. Act due to the compromise entered into between the parties in the proceedings under section 125 Cr.P.C. Reliance in this case has been placed on ***B.S. Joshi vs. State of Haryana*** (supra).

7. In view of the above discussion, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceedings against the applicants and other accused in renumbered allowed to continue. Therefore, to do the complete justice, the proceedings of the case may be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

8. Consequently, the application under section 482 Cr.P.C. is allowed. The proceedings of Criminal Case No. 467 of 2007 (old No. 1923 of 2006) State vs. Onkar Singh & others under section 498A, 323, 506 IPC and section 3/4 D.P. Act, arising out of case Crime No. 358/05 of P.S. Murad Nagar, District Ghaziabad, pending in the court of Addl. Chief Judicial Magistrate (Court No. 5) Ghaziabad, are hereby quashed.

The office is directed to send a copy of this order to the Trial court concerned for necessary action. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 26035 of 2008

Dr. Vinay Mohan Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. S.P. Pandey
Sri. S.K. Mishra

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

U.P. State Universities Act, 1973-Section 31(3)(c)-regularization-part time lecturer-working in an affiliated college-cannot be equated with regular teacher-benefit of regularization as contained in Section 31(3)(c)-held-not available to such part time teacher.

Held: Para 14 & 15

In view of the aforesaid statutory provisions, we are of the considered opinion that a teacher, who has been appointed in an affiliated Degree College, cannot be equated with that of the teacher appointed in the University with reference to Section 31 (3)(c) of the U.P. State Universities Act.

We are also of the considered opinion that any part time teacher appointed in a Degree College cannot claim benefit of the services rendered by him in the affiliated Degree College for the purposes of claiming benefit of regularization under Section 31 (3)(c) of the U.P. State Universities Act on being subsequently appointed in the University on part time/short term basis.

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

1. Heard Sri S. P. Pandey, Advocate on behalf of the petitioner and Sri B.D. Pandey Advocate on behalf of the respondents

2. This writ petition is directed against the order of the Vice Chancellor of Deendayal Upadhyay Gorakhpur University, Gorakhpur dated 16.01.2008 where under the regularization of the petitioner, as earlier directed with reference to Section 31(3)(c) of the U.P. State Universities Act, 1973 (as amended by U.P. Ordinance No.3 of 2004), has been revoked.

3. Counsel for the petitioner has vehemently contended that once regularization had been directed by the University after obtaining a report from a Four Member Committee, it is not open to Vice Chancellor to revoke the regularization. Even otherwise it is stated that a part time teacher of an affiliated Degree College, on been appointed in the University on part time basis subsequently, is entitled for computation of the services rendered in the degree college, for the purposes of regularization, as a teacher of the University under Section 31 (3)(c). Therefore, the impugned order passed by the Vice Chancellor is legally not sustainable.

4. The facts, which are not in dispute in the present writ petition are that the petitioner was initially appointed as part time Lecturer in Degree College Bhatauli Bazar, District-Gorakllpur on 25.04.1997. The said Degree College is affiliated to Deendayal Upadhyay Gorakhpur University, Gorakhpur. The petitioner was subsequently appointed as part time Lecturer in the Hindi Department of the University and is stated to have joined on 03.08.2001.

5. By U.P. Ordinance No.3 of 2004, Section 31 (3)(c) was added to State Universities Act, which reads as follows:

"(c) Any teacher of the University who was appointed as lecturer / Part time teacher on or before December 31, 1997 without reference to the Selection Committee by way of a short term or part time arrangement in accordance with the provisions for the time being in force for such appointment, may be given substantive appointment by the Executive Council, if any substantive vacancy of the same cadre and grade in the same department is available if such teacher-
(i) is serving as such on December 31, 1997 continuously since such initial appointment by way of short term/ part time arrangement;
(ii) possessed the qualifications requires for regular appointments to the post under the provisions of the relevant Statutes in force on the date of substantive appointment;
(iii) has been found suitable for regular appointment by the Executive Council.
A teacher appointed by way of short term / part time arrangement as aforesaid who does not get a substantive appointment under this clause shall cease to hold such post on such date as the Executive Council may specify."

6. That a substantive vacancy on the post of Lecturer Hindi was caused in the Hindi Department of the University. The petitioner made a request for his services being regularized under Section 31(3)(c) having regard to his initial appointment in the Degree College. The request made by

the petitioner was not considered. He, therefore, filed Writ Petition No. 53838 of 2006, which was disposed of vide order dated 26.09.2006 with liberty to petitioner to make a representation before the University, which in turn was required to consider the claim of the petitioner in a time bound manner.

7. The University, on receipt of the order of this Court, constituted a Four Member Selection Committee for considering the claim of the petitioner. The said Committee recommended that Degree College affiliated to University is no less than an institute as contemplated in the Ordinance, attracting the applicability of such provisions of regularization under Section 31 (3)(c). On receipt of the said report, the Vice Chancellor of the University, after obtaining legal opinion, issued an order dated 04.08.2007 offering appointment to petitioner substantive basis.

8. The petitioner claims to have started working as regular Lecturer w.e.f. 10.10.2007. However, he was not paid salary admissible to the post of Lecturer. He, therefore, initiated contempt proceedings, being Contempt Petition No. 3370 of 2007, wherein notices were issued.

9. It is at this stage of the proceedings that the Vice Chancellor has passed the impugned order dated 16.01.2008, whereby the order of appointment of the petitioner on substantive basis has been revoked.

10. From the facts as narrated herein above, it is apparently clear that between 25.04.1997 to 03.08.2001 the petitioner has admittedly working as part time teacher in an affiliated Degree College of the University namely Degree College Bhatauli Bazar, Gorakhpur. From a reading of Section 31 (3)(c) it is apparently clear that only a teacher of the University, who was appointed on part time basis on or before December 31, 1997, is entitled to be offered substantive appointment by the Executive Council, if any substantive vacancy in the same department or in the cadre of the same department is available, on other conditions stipulated therein being satisfied namely (i) that the teacher concerned was serving as such on December 31, 1997 continuously since his initial appointment on short-term basis, (ii) he is possessed of the prescribed minimum qualification and (iii) he has been found suitable for such regularization by the Executive Council. It is not in dispute that the petitioner was not working in the University as part time or on short-term appointment as on 31st December, 1997.

11. A teacher appointed in affiliated Degree College does not answer the description of a teacher of the University as is apparent from the provisions of Section 31 of the State Universities Act itself, which specifically differentiate between the teacher to be appointed in a Degree College and a teacher to be appointed in the University.

12. Reference may also be had to Section 31(3)(b) of the U.P. State Universities Act, where under substantive was directed to be offered to the teachers who were appointed on temporary post likely to last for more than 6 months and subsequently such post stood converted into substantive post or permanent post both in respect of teachers of University

as well as they are appointed in Degree Colleges.

13. At this stage it may also be noticed that with the enforcement of U.P. Higher Education Service Commission Act, 1980 (hereinafter referred to as Commission Act, 1980), appointment on the post of teachers in affiliated Degree Colleges is regulated under the Commission Act, 1980 where under various provisions for regularization of teachers of Degree Colleges covered by the aforesaid Commission Act, 1980 have been issued from time to time namely Section 31(1)(b) (added by Act No. 21 of 1988), Section 31-B (2) (a) (added by Act No. 26 of 1989), Section 31-C (added by U.P. Act No. 02 of 1992), Section 31-C (added by U.P. Act No. 10 of 1997).

14. In view of the aforesaid statutory provisions, we are of the considered opinion that a teacher, who has been appointed in an affiliated Degree College, cannot be equated with that of the teacher appointed in the University with reference to Section 31 (3)(c) of the U.P. State Universities Act.

15. We are also of the considered opinion that any part time teacher appointed in a Degree College cannot claim benefit of the services rendered by him in the affiliated Degree College for the purposes of claiming benefit of regularization under Section 31 (3)(c) of the U.P. State Universities Act on being subsequently appointed in the University on part time / short term basis.

16. We, therefore, have no hesitation to hold that since on the cut of date i. e. 31st December, 1997 the petitioner was not a teacher in the University (working on short term/part time), the benefit of the regularization as per Section 31 (3) (c) of the U.P. State Universities Act was not attracted in the case of the petitioner.

17. The Vice Chancellor has acted in conformity of law and is justified in holding that the regularization earlier offered to petitioner is legally not sustainable and is in defiance of the statutory provisions of Section 31 (3)(c). There is no error in the order of the Vice Chancellor so as to warrant any interference under Article 226 of the Constitution of India. Writ petition is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2008

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

Criminal Misc. Application 26653 of 2007

Panna Lal and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri. Manish Goyal

Counsel for the Opposite Parties:
Sri. B.P. Verma
A.G.A.

Code of Criminal Procedure-Section 482-quashing of charge sheet along with criminal proceeding-applicant a Lekhpal submitted false report in a mutation proceeding before Tehsildar-under Para 22 of Land Record Manual on the other hand wrongly shown alive person as dead-instead of moving application u/s 340 Cr.P.C.-application under Section 156(3) case registered and charge sheet submitted-held-Tehsildar itself a Court-instead of moving application under

Section 340-proceeding under Section 156(3) barred by Section 195 Cr.P.C.-entire proceeding in pursuance of taking cognizance order set aside.

Held: Para 11

Thus, the entire proceedings taken on the basis of the orders passed on the application under section 156 (3) Cr. P.C. and on the charge sheet submitted in compliance of the orders on that application are without jurisdiction, and the learned Magistrate erred in law by taking cognizance on that charge sheet. Hence, the present application under section 482 Cr. P .C. deserves to be allowed and the proceedings of the case deserve to be quashed in view of the bar of section 195 Cr. P .C.

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

1. This is an application under Section 482 Cr.P.C. to quash the charge sheet dated 18.9.2007 on the basis of which Criminal Case No. 1245/1X of 2007 State Vs. Panna Lal and others has been registered against the accused applicants under Section 420, 467, 468, 471, 120-B I.P.C. in the court of Additional Chief Judicial Magistrate-I, Mathura and the order dated 24.9.2007 whereby the Presiding Officer of the Court has taken cognizance against the accused persons in that case.

2. Before dealing with the respective case of the parties it will be useful to go through their pedigree. There were two brothers Nand Kumar and Bigha Ram. Nand Kumar had two sons named Prasadi and Ram Kishore. Ram Kishore had no issue. Prasadi had three sons named Panna Lal, Ram Babu and Rajkumar who are applicants No.1, 2 and 3 in the present case. Nand Kumar's brother Bigha Ram had three sons named Jagan Prasad, Devi Prasad and Gaya Prasad. Gaya Prasad did not have any male issue and he had one daughter only named Brahma Devi. Devi Prasad also had no issue. Jagan Prasad had a son named Mahesh Chand.

3. It is alleged in the FIR dated 13.10.04 registered on the application of Sri Mahesh Chandra Sharma (Opposite Party No. 2 in this case) that Bigha Ram was owner of the property entered in Khata No. 1 & 2 of Mahalia Hardutta, Tehsil and District Mathura. Since Devi Prasad S/o Bigha Ram had no issue he had given the land of his share (inherited from Bigha Ram) to his nephew Mahesh Chand. Since Gaya Prasad S/o Bigha Ram had no male issue, the share of Gaya Prasad in the land was also inherited by Mahesh Chand. Thus, Mahesh Chand became owner of the entire property of Bigha Ram by inheritance; and out of this property he sold its one third share to the complainant Mahesh Chand Sherma, opposite party No.2. in the present case, vide a registered sale deed dated 6.10.1986. Mahesh Chand son of Jagan Prasad and Mahesh Chandra Sharma son of Ganga Charan Sharma started to raise construction on that land on 23.9.1996 and at that time the accused Panna Lal, Ram Babu and Raj Kumar restrained them from raising constructions and they claimed that the land had been entered in their name. Then Mahesh Chand son of Jagan Prasad and Mahesh Chand Sharma present complainant, inspected the file of Case No. 293/14 Panna Lal and others Vs. Prasadi Lal and others under Section 34 of the Land Revenue Act Mauja Goverdhan Brahaman Pargana Mathura in the Court of Additional Tehsildar, Mathura and then they came to know that the above named accused persons in collusion with Lekhpal Prahlad Singh of

Goverdhan had got submitted a false report under Section 22 of the Land Record Manual in the Court on 18.8.1992 showing Jagan Prasad and Devi Prasad sons of Bigha Ram as dead persons and further showing that Jagan Prasad had no living issue and showing the accused applicants as heirs of Bigha Ram being grand sons of Nand Kumar brother of Bigha Ram. Lekhpal Prahlad Singh gave a false statement in the Court of Additional Tehsildar on 9.10.1992 asserting that Mahesh Chand had also died, and thus the accused-applicants obtained the mutation orders in their favour by misrepresentation of facts. Then the complainant Mahesh Chandra Sharma moved an application for setting aside that order of mutation. This application was allowed by the learned S.D.M., Mathura on 26.12.1998. Thereafter the accused persons filed an appeal before the Commissioner, Agra but that appeal was also dismissed on 18.8.2003. In this way, the accused Panna Lal, Ram Babu and Raj Kumar in collusion with Prahlad Singh, Lekhpal had hatched a conspiracy to cause damage to the complainant and had prepared fictitious documents and had given false statements in the Court of Tehsildar, Mathura alleging that Mahesh Chand son of Jagan Prasad had died, while Mahesh Chand was alive at that time. Thus the accused had committed offences under Section 420, 467, 468, 471 & 120-B I.P.C. Hence Mahesh Chandra Sharma, the complainant moved an application under section 156 (3) Cr. P.C. against the above accused persons on 13.10.2004.

4. On the above application, the learned Magistrate passed an order directing the police of P .S. Goverdhan, Mathura to register a case against the accused persons and investigate the same. The police accordingly registered Case Crime No. C51 of 2004 against the accused persons, but after investigation, the police submitted the final report on 10.12.04. Aggrieved with that report, the complainant Mahesh Chandra Sharma filed the protest petition on 19.3.05. The Magistrate treated that protest petition as a complaint vide the order dated 7.6.05 and fixed a date for statement of the complainant under Section 200 Cr. P.C. Aggrieved with that order treating the application under Section 156 (3) Cr. P.C. as a complaint, Mahesh Chandra filed Criminal Revision No. 335/05 in the Court of Sessions Judge, Mathura. During pendency of this revision, the Learned· Magistrate dismissed the above complaint in default under Section 203 Cr. P.C.. Aggrieved with that order the complainant filed Criminal Revision No. 526 of 2005 Mahesh Chand Sharma Vs. State.

5. Criminal Revision No. 335/05 was allowed by the Additional Sessions Judge Court No.9, Mathura vide judgment dated 31.10.05 and the order of the learned Magistrate dated 7.6.05 passed on the protest petition treating the same to be a complaint was set aside. Criminal Revision No.526 of 2005 was allowed by the same Judge on the same date and the order of dismissal of the complaint was set aside. In compliance of the aforesaid orders, the learned Magistrate again heard the complainant, on the final report submitted by the police, and he rejected the final report vide his order dated 7.7.07, and directed the concerned Station Officer to get the matter further investigated and to submit the report.

6. In compliance of the above order, the matter was further investigated, and this time the Investigating Officer submitted a charge sheet against all the accused persons under section 420, 467, 468, 471 & 120 B I.P.C. On the basis of that charge sheet, Cr. Case No. 1245/IX of 2007 was registered against the accused persons and the Magistrate took cognizance against all the accused persons vide his order dated 24.9.2007.

7. Aggrieved with the above charge sheet and the order taking cognizance on that charge sheet, the accused applicants have filed this application under Section 482 Cr. P.C.

8. I have heard the learned Counsel for both the parties and have gone through the record. It is to be seen that the allegation of the complainant opposite party No. 2 in the present case is that the accused applicants No.1, 2, and 3 in collusion with Prahlad Singh, Lekhpal got a fictitious report under Section 22 of the Land Record Manual prepared showing Mahesh Chandra son of Jagan Prasad as dead and showing the accused applicants Panna Lal, Ram Babu and Raj Kumar as heirs of the Bigha Ram, and that a false statement regarding death of Mahesh Chandra son of Jagan Prasad was given in the Court of Tehsildar while he was alive on that date. Thus, the offences alleged against the applicants are two fold. The first allegation is that a fictitious report under Section 22 of the Land Record Manual was prepared by Prahlad Singh, Lekhpal showing Mahesh Chand son of Jagan Prasad as dead with a view to give undue benefit to the accused applicants Panna Lal, Ram Babu and Raj Kumar, and the second allegation is that in support of this false report Prahlad Singh Lekhpal and the present accused applicants gave false statements before the Tehsildar deposing that Mahesh Chand son of Jagan Pal had died though he was alive at that time. Now, it is to be seen that these alleged offences were committed during the proceedings of the mutation case before the Tehsildar. So action in respect of these offences could be taken by that Court only where the offence was committed, in accordance with the provisions of section 195 of Cr.P.C. which runs as under:-

(1) No Court shall take cognizance-

(a) (i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860),
or
(ii) of any abetment of, attempt to commit, such offence,
or
(iii) of any criminal conspiracy to commit, such offence, except on the complainant in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

(b) (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive). 199.200.205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in. or in relation to, any proceeding in any Court. or
(ii) of any offence described in section 463. or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in. or in relation to, any proceeding in any Court, or
(iii) of any criminal conspiracy to commit, or attempt to commit, or the

abetment of, any offence specified in sub-clause (i) or sub-clause (ii),
[except on the complaint in writing of that Court by such officer of the Court as that Court may authorise in writing in this behalf, or of some other Court to which that Court is subordinate].

(2) Where a complaint has been made by a public servant under clause (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complainant and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:
Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded.

(3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a Court for the purposes of this section.

(4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinarily original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that-
(a) Where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;
(b) Where appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

9. In view of the provisions of the aforesaid section, action in respect of the offences alleged against the accused could be taken either by the Tehsildar or by the Appellate Court hearing appeals against the orders of the lower Court. The Court of Tehsildar being a Revenue Court comes within the definition of the term 'Court' as provided in sub section 3 of the above section. The procedure for taking proceedings in such cases has been enumerated in section 340 of the Cr. P.C. which runs as under:-

(1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to it in clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;
(b) make a complaint thereof in writing;
(c) send it to a Magistrate of the first class having jurisdiction;
(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is

non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint, under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint be exercised by the Court to which such former Court is subordinate within the meaning of sub- section (4) of Section 195.

(3) A complaint made under this section shall be signed,-
(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;
(b) in any other case, by the presiding officer of the Court.

(4) In this section, "Court" has the same meaning as in Section 195.

10. Thus, it is clear from the aforesaid section that the complainant could move an application in this regard before the Court of Tehsildar and that Court after making necessary enquiry could pass an order for lodging a complaint against the accused persons and that complaint could be sent to the court of Magistrate having jurisdiction to try the offences. The above procedure, which was the right and correct procedure in the present case, was not followed but an application under Section 156 (3) Cr. P.C. was moved for police investigation, which was barred in view of the provisions of section 195 Cr.P.C.

11. Thus, the entire proceedings taken on the basis of the orders passed on the application under section 156 (3) Cr. P.C. and on the charge sheet submitted in compliance of the orders on that application are without jurisdiction, and the learned Magistrate erred in law by taking cognizance on that charge sheet. Hence, the present application under section 482 Cr. P .C. deserves to be allowed and the proceedings of the case deserve to be quashed in view of the bar of section 195 Cr. P .C. The complainant opposite party No. 2 shall, however, be at liberty to move an application against the accused applicants under Section 340 Cr. P.C. before the concerned Court in accordance with the provisions of law.

12. The application under Section 482 Cr. P.C. is, therefore, allowed and the charge sheet submitted in Criminal Case No. 1245/IX of 2007 State Vs. Panna Lal and others, and the order of the Magistrate dt. 24.9.07 taking cognizance thereon are set aside. However, it will be open to the complainant opposite party No.2 to move an application before the concerned Court for taking action against the accused persons in accordance with the provisions of section 340 Cr. P .C. Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 26668 of 2002

Kedar Ram First ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. J.P.N. Singh
Sri. L.P. Singh

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

Fundamental Rules 56-(e)-Retirement benefits-petitioner initially appointed on the post of seasonal collection peon-temporary basis on 8.6.1964-worked intermittently up to 1.4.1982, but thereafter regarding worked regularly up to 31.12.2001-salary given in pay scale with all benefits of increments etc.-if working prior to 1982 ignored even then continuous working of 19 years not disputed-held-entitled for pension.

Held: Para 8

Similar view was also held in the case of Dr. Hari Shankar Asopa vs State of U.P. &. Ors., 1989 ACJ 337 in Writ Petition No. 49080 of 2000 (Bhikhari Yadav Vs. State of U.P. &. Ors.), decided on 06.08.2007, wherein the claim of the employee for pension, who had retired as a temporary seasonal collection peon, was allowed, and it was held that the said temporary employee was entitled for pension and other retirement benefits. The said judgment is squarely applicable to the present facts and circumstances of the case.
Case Law discussed:
(2006) 1 ESC 611, 1989 ACJ 337

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

1. Heard Shri J.P.N. Singh, the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

2. The petitioner was appointed as a seasonal collection peon on a temporary basis on 8th of June, 1964 and worked in that capacity till he reached the age of superannuation on 31.12.2001. The service record, which has been annexed as Annexure '2' to the writ petition, indicates that from 8th of April, 1964 to 4th of March, 1982, the petitioner has worked intermittently and there are gaps between the first appointment and the subsequent appointment, but, from 01.04.1982 till 31st December, 2001, the service record shows that he has worked continuously without any break in service. The service record also shows that the petitioner was categorised in a particular pay-scale and was not being paid a fixed or a lump-sum amount. Upon his retirement, the petitioner applied for pension, which remained pending, and consequently, the petitioner filed the present writ petition praying that a writ of mandamus be issued directing the respondents to grant pension and other retirement benefits to the petitioner.

3. The learned counsel for the petitioner submitted that he has put in government service of 37 years and assuming that the period from 1964 to 1982 is excluded, even then, from 1982 till the date of his retirement, the petitioner has worked continuously without any break in service, for more than 19 years, and therefore is qualified to be entitled for pension and that he has to be treated as a regular employee in government service.

4. The respondents in their counter affidavit have taken a stand that the petitioner remained a temporary seasonal collection peon and that his services were never regularised, and consequently, the petitioner should not be treated as a permanent employee appointed on a substantive or permanent post, and

therefore, was not qualified for entitlement of any pension.

5. Rule 56 (e) of the Fundamental Rules provides payment of pension and other retirement benefits to every government servant. For facility, the said rule is quoted hereunder:

"56(e) A retiring person shall be payable and other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules to every Government servant who retires or is required or allowed to retire under this rule.

Provided that where a Government servant who voluntarily retires or is allowed voluntarily to retire under this rule the appointing authority may allow him, for the purposes of pension and gratuity, if any, the benefit of additional service of five years or of such period as he would have served if he had continued till the ordinary date of his superannuation, whichever be less."

6. As per Government Order dated 1st July 1989 (Annexure '7' to the writ petition), the State Government has clarified that a government employee, who has put in 10 years of regular service, would qualify to receive pension. Qualifying service has been defined under Regulation 361 of Section 1 of Chapter XVI of the Civil Service Regulations, which provides that the service of an officer does not qualify for pension unless it conforms to the following three conditions:

"First- The service must be under Government.
Second- The employment must be substantive and permanent.
Third- The service must be paid by Government."

7. Admittedly, the 1st and 3rd conditions are met. The petitioner was in the service of the Government and was also paid the salary by the Government. The question is whether the employment of the petitioner was substantive and permanent? This question has been answered by a Division Bench of this Court in **Board of Revenue &. Ors. Vs. Prasidh Narain Upadhyay**, (2006) 1 ESC 611, wherein the Court held that in view of the provisions of Rule 56 (c) of the U.P. Fundamental Rules even a temporary employee is entitled to receive pension. The Court held that a person, who had worked for 37 years, would be entitled for pension, and the same cannot be brushed aside on the ground that his services remained temporary.

8. Similar view was also held in the case of **Dr. Hari Shankar Asopa vs State of U.P. &. Ors.,** 1989 ACJ 337 in Writ Petition No. 49080 of 2000 **(Bhikhari Yadav Vs. State of U.P. &. Ors.),** decided on 06.08.2007, wherein the claim of the employee for pension, who had retired as a temporary seasonal collection peon, was allowed, and it was held that the said temporary employee was entitled for pension and other retirement benefits. The said judgment is squarely applicable to the present facts and circumstances of the case.

9. In view of the aforesaid, the petitioner has made out a case for issuance of a writ of mandamus. Consequently, the writ petition is allowed and a mandamus is issued to the respondents to grant pension and other retirement benefits to the petitioner. The

said calculation shall be made and the amount disbursed by the authorities within three months from the date of furnishing a certified copy of this order.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05 2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE R.N. MISRA, J.

Civil Misc. Writ Petition No. 29385 of 1999

Dr. Brijesh Kumar Misra and another ...Petitioners

Versus

State Consumer Disputes Redressal Commission, U.P. & another ...Respondents

Counsel for the Petitioners:
Sri. R.B. Singhal.

Counsel for the Respondents:
Sri. V.M. Sahai.
Sri. MS Dikshit.
S.C.

Constitution of India-Article-226 - petitioner a Doctor facing civil as well as criminal proceeding for negligence in treatment-complainant launched proceeding before State Consumer Forum-held-proceeding before State Consumer Forum is neither criminal nor civil proceeding-cannot be quashed under writ jurisdiction.

Held: Para 6

As regards the jurisdiction is concerned, there is no such law that the Consumer Forum cannot be approached when a civil or criminal proceedings is pending. This fact is not disputed that the services of the medical practitioners got after payment come within the jurisdiction of Consumer Forum. Section 2(d) of the Consumer Protection Act, 1986 defines the word 'Consumer', according to which every persons who hires or avails the services consideration come within the ambit of consumer.

Case law discussed:
1995(3) Consumer Protection Reports 412, 1992 (1) Consumer Protection Reports 133, 2006 (2) Consumer Protection Journal 269, Judgment Today 2005(6) SC 584.

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

1. This petition has been filed by the petitioners for quashing the proceedings of complaint no. 105 of 1998 pending before State Consumer Disputes Redressal Commission, U.P. Lucknow (hereinafter referred to as 'Consumer Forum') for compensation filed by the respondent no.2.

2. We have heard Shri R.B. Singhal, learned counsel for the petitioners. None appeared for the respondents.

3. From the contents of the writ petition, it appears that Shuja Alia, the grandson of respondent no.2 fell ill and was treated by the petitioners free of cost because the respondent no.2 was their family friend and when his condition deteriorated, he was advised to be shifted to some better hospital in Meerut. He was admitted in Lok Priya HospitaJ,Meerut and in the intervening night of 14-15/9/1996 he died there. The .respondent no.2 lodged a criminal complaint no. 502/9/1997 against the petitioners in the Court of Judicial Magistrate, Muzaffarnagar, who summoned them for trial vide order dated 13.2.1997. The petitioners moved High Court under Section 482 Cr.P.C. for quashing the proceedings of criminal case. Proceedings No. 3641 of 1998 is pending before the

High Court, Allahabad. In the meantime, the respondent no.2 filed complaint before the Consumer Forum for compensation and refunds of the amount spent on the treatment.

4. In the counter affidavit filed by Shri Firoz AIi, son of respondent no.2., it has been alleged that the patient was treated by the petitioners negligently, causing serious complications and in the last moment he was advised to be shifted to some better hospital in Meerut. There was acute negligence on the part of the petitioners while treating the patient. Further it has been alleged that payment was made to the petitioners for treatment.

5. The only point which has been argued before us is that when the criminal proceeding is already pending before the Magistrate concerned, no remedy can be sought before the Consumer Forum. It has also been argued that the petitioners did not charge any amount for the treatment of the patient because the respondent no.2 was their family friend but respondent no.2 has alleged that payment was made. As regards the payment for the treatment is concerned that is subject matter of evidence.

6. As regards the jurisdiction is concerned, there is no such law that the Consumer Forum cannot be approached when a civil or criminal proceedings is pending. This fact is not disputed that the services of the medical practitioners got after payment come within the jurisdiction of Consumer Forum. Section 2(d) of the Consumer Protection Act, 1986 defines the word 'Consumer', according to which every persons who hires or avails the services consideration come within the ambit of consumer. In the case of ***Indian Medical Association Vs. V.P. Shantha and Others 1995(3) Consumer Protection Reports 412***, it has been held by the Apex Court that the services of Medical Practitioners come under the definition of 'service' as defined under Section 2(o) of the Consumer Protection Act, 1986.

7. No doubt the criminal complaint was filed earlier by the respondent no.2 against the petitioners and after sometimes the complaint before the State Commission was filed for compensation and refunds of money paid to the Doctors. But on this very basis the Consumer Forum cannot be deprived of its rights to entertain such complaint on the same facts. The criminal proceeding launched by the complainant on the same cause of action is no bar to the maintainability of a complaint under the Consumer Protection Act. This view has been taken by Madras High Court in the case of ***M.K.S. Balsubramainain Vs. Jayalakshmi Planers 1992 (1) Consumer Protection Reports 133.*** In the case of ***Powerware India Private Limited Vs. Economic Transport Organisation 2006 (2) Consumer Protection Journal 269***, the same view has been taken. In that case the petitioner had booked raw material for transportation, which was misappropriated by the transporter and the FIR was lodged with the police. The criminal case under Section 407 IPC was pending. The petitioners filed complaint before the Consumer Forum also seeking relief for the value of the goods on the basis of deficiency in service on the part of the transporter. The National Consumer Disputes Redressal Commission, while allowing the revision, held that the nature of two proceedings being different, the pendency of criminal case would not

come in the way of Consumer Forum in granting the relief in the complaint.

8. The learned counsel for the petitioners has cited ***Judgment Today 2005(6) SC 584, Jacob Mathew Vs. State of Punjab and Another*** and has contended that the norms for fixing the liability of negligence on the Doctors have been given in the said judgement. He has further contended that the proceeding before the Consumer Forum cannot be allowed to continue in the light of the said judgement. We have perused the aforesaid judgement. In that case the appellant had challenged the order passed under section 482 Cr.P.C. by the Punjab & Haryana High Court. The appeal was allowed and certain observations were made for fixing the liability of medical practitioners in respect of negligence. The proceedings before the Consumer Forum are not treated as criminal proceedings. The respondent no.2 has moved the Consumer Forum for compensation regarding negligence. The petitioners can take the help of the decision given in Jacob Mathew's case in the criminal case pending against them. In the case of ***Indian Medical Association Vs. V.P. Shantha and Others 1995(3) Consumer Protection Reports 412,*** referred to earlier the Hon'ble Supreme Court found itself unable to subscribe the view that merely because the medical practitioners belong to the medical profession, they are outside the purview of the provisions of the Consumer Protection Act. The Court held that medical practitioners though belonging to the medical profession, are not immune from a claim for damages on the ground of negligence. The fact that they are governed by the Indian Medical Council Act and are subject to the disciplinary control of the Medical Council of India and/or State Medical Councils is no solace to the person who has suffered due to their negligence and the right of such person to seek redress is not affected.

9. In view of above discussions, we are of the opinion that this petition is devoid of merits and is liable to be dismissed. Hence, the petition is dismissed. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2008

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

Civil Misc. Writ Petition No.31389 of 2008

Virendra Kumar Bansal ...Petitioner
Versus
Kanhaiya Lal Agarwal and another ...Respondents

Counsel for the Petitioner:
Sri Madhav Jain

Counsel for the Respondents:

<u>Code of Civil Procedure-Order II Rule 2 (3)</u>-Amendment of plaint-initial suit for eviction-subsequently by proposed amendment the relief regarding arrears of rent sought-allowed by courts below-held-proper-considering bar of Second Suit.

Held: Para 5

However, in my opinion, if subsequent suit will be barred for a relief on the basis of Order II Rule 2, C.P.C., then in the same suit amendment may be sought for adding the said relief. In this regard, reference may be made to AIR 1940 Privy Council 70, in which it has been held that the rule does not preclude the

amendment of plaint by the addition of the claim, which had been omitted.

Case law discussed:

AIR 1954 Bom. 125, AIR 1940 Privy Council 70, 1977 AWC 449 (454)

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

1. Heard learned counsel for the petitioner.

2. Landlords respondents have instituted suit for eviction against tenant petitioner in the form of S.C.C. Suit No. 51 of 2005 before J.S.C.C., Agra. Initially in the plaint, only relief for eviction was sought. Thereafter, relief for recovery of unpaid rent was also sought. Thereafter, relief for recovery of unpaid rent was also sought to be added through amendment in the plaint. Said application was allowed by the trial court on 05.10.2007. Against the said judgment and order, petitioner filed S.C.C. Revision No. 74 of 2007, which was dismissed on 03.03.2008 by District Judge, Agra, hence this writ petition.

3. The main argument of learned counsel for the petitioner is that in the original plaint plaintiff omitted to claim the relief for unpaid rent, hence by virtue of Order II Rule 2 (3), C.P.C. (op. cit.) it became barred.

"***Omission to sue for one of several reliefs.****-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."*

4. Learned counsel for the petitioner has cited **AIR 1954 Bom. 125 "K. Ram Chandran Vs. R. Shanker."** In the said authority, it has been held that even if subsequent suit is filed during pendency of first suit, bar of Order II Rule 2, C.P.C. will apply to the second suit, if other ingredients are made out.

5. However, in my opinion, if subsequent suit will be barred for a relief on the basis of Order II Rule 2, C.P.C., then in the same suit amendment may be sought for adding the said relief. In this regard, reference may be made to **AIR 1940 Privy Council 70**, in which it has been held that the rule does not preclude the amendment of plaint by the addition of the claim, which had been omitted.

6. The words '*he shall not afterwards sue' used in the aforesaid provision clearly mean that subsequent suit (whether filed after the decision of the first suit or during its pendency)* is barred but amendment is not barred. Seeking amendment does not amount to sue.

7. Moreover, Explanation-II has been added in Order II Rule 2, C.P.C. by U.P., which is quoted below:

"Explanation- For the purposes of this rule a claim for the ejectment of the defendant from immovable property let out to him and a claim for money due from him on account of rent or compensation for use and occupation of that property, shall be deemed to be claims in respect of distinct causes of action."

8. In **1977 AWC 449 (454)**, it has held that the aforesaid explanation is not affected by Section 97 (1) of the Amendment Act No.104 of 1976 (C.P.C. amendment).

9. Accordingly, by virtue of explanation added by U.P., Order II Rule 2, C.P.C. itself is not applicable to the facts of the instant case.

10. Revisional Court also clarified observation of trial court, which had been made against the plaintiff, who was respondent in the revision. By virtue of Order XLI Rule 33, C.P.C., it was quite permissible and in my opinion the clarification given by the revisional court was quite just and warranted.

11. Accordingly, there is no merit in the writ petition, hence it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.06.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 40244 of 2002

Smt. Janki Devi ...Petitioner
Versus
Nagar Nigam Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri A.P. Tewari

Counsel for the Respondents:
Sri S.D. Kautilya

U.P. Dying in Harness Rules, 1974-Rule-2 (a) (ii) Government Servant-petitioner's husband working as DOM on Daily wages basis-since 1984 Died in harness in the year 2000-petitioner was given appointment on Daily Wager Basis-she claimed to be regular employee and the other salary benefits like regular employees-Nagar Nigam is within the meaning of State-No attempt made to get the Post of DOM sanctioned-considering long term of regular need and nature of work-can not be treated as Daily wages-compassionate appointee always treated to be substantive appointee from the date of her initial appointment.

Held: Para 11 & 12

This Court is of the opinion that an appointment made under the Dying in Harness Rules is permanent in character, that is to say, a substantive appointment and that the appointment cannot be treated as a temporary appointment or an appointment on a daily rated basis as held by a division bench of this Court in 1999 (3)UPLBEC2263, Ravi Karan Singh vs. State of U.P. and others and 2002 (3) ESC 454, Sanjai Kumar vs. Dy. Director General (NCC) Directorate, U.P., Lucknow and others.

In view of the aforesaid, the writ petition is allowed. A writ of mandamus is issued directing the respondents to treat the petitioner as having been appointed in a substantive capacity under the Dying in Harness Rules. The petitioner is consequently entitled to be treated as a regular employee of the Nagar Nigam and is entitled to the pay given to a regular employee from the initial date of her appointment. The arrears of salary would be calculated by the respondents and shall be paid to the petitioner within three months from the date of the production of a certified copy of this order.

Case law discussed:
2003(1) Selected Allahabad Cases 122, 2002 (1) UPLBEC 337, 1999 (3)UPLBEC2263, 2002 (3) ESC 454

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

1. Heard Sri A.P. Tewari, the learned counsel for the petitioner. List has been revised. The learned counsel for the respondents is not present.

2. It transpires that the petitioner's husband was appointed as a 'DOM' on 4.12.1987 to work in the electric crematorium managed by the respondents in Daragranj at Allahabad. It is alleged that the petitioner's husband worked continuously on that post at that crematorium and died in harness on 13.9.2000.

3. Upon the death of the husband, the petitioner applied for an appointment under the **Dying in Harness Rules, 1974**. The Mukhya Nagar, Adhikari issued a letter dated 18.10.2000 recommending the appointment of the petitioner to work as a 'DOM'. It is alleged that based on the aforesaid recommendation, the petitioner was appointed and started working w.e.f. 22.12.2001. No formal appointment letter was issued but was paid the salary through cheques and that her name finds place in the muster roll of the employees of the Nagar Nigam, Allahabad.

4. The petitioner alleges that even though she is still working as a DOM, in the electric crematorium, she is being treated by the authority as a daily rated employee and is not being treated as a regular employee. The petitioner contends that an appointment under the Dying in Harness Rules is made in a substantive capacity on a permanent basis and that the petitioner cannot be treated as a daily rated employee. The petitioner, consequently filed the present writ petition praying that a writ of mandamus be issued to the respondents to treat the petitioner as having been appointed under the Dying in Harness Rules and that the respondents should treat the petitioner as a regular employee and pay salary of a regular employee month by month.

5. The respondents have filed a counter affidavit alleging that the petitioner's husband was working on a "temporary daily wage basis" and that the petitioner's husband was not appointed in a permanent capacity nor was working on a vacancy in view of the fact that no post of DOM was created or sanctioned by the State Government and therefore, engagement were made by the Nagar Nigam on a daily rated basis. The respondents contends that the Dying in Harness Rules, 1974 contemplates appointment of a dependent of the deceased on compassionate ground only where an employee was appointed in a permanent capacity as defined under Rule 2(a) of the Rules of 1974. The respondents contended that since the petitioner's husband was not appointed in accordance with the provision of Rule 2(a) of the Rules of 1974, the benefit of appointment on compassionate ground under the said Rules cannot be given.

6. Having hearing the learned counsels' for the parties and having perused the writ petition and the counter affidavit, this Court finds that the writ petition is liable to be allowed and a writ of mandamus is liable to be issued.

7. From the counter affidavit, it is clear that upon the construction of the electric crematorium at Daraganj in the city of Allahabad, no post of DOM was created by the Nagar Nigam, Allahabad and that the work of a DOM was taken by the engagement of persons on daily rated basis. The affidavits reveals that the petitioner's husband was appointed in the year 1987 as a DOM and that he worked continuously till he died in the year 2000. The Nagar Nigam, which is an instrumentality of the State, was required

to create a post. No such effort was made by the respondents to create a post and the respondents allowed the petitioner to work continuously on a daily rated basis. The affidavits reveals that the work which the petitioner's husband was performing, was a work which was of a permanent nature and which is still continuing as on date. Therefore it cannot be alleged that the employment of the petitioner's husband was on a temporary basis on account of exigency of service. The appointment of the petitioner's husband was of a permanent character and that the appointment of the petitioner on a daily rated basis was made for the simple reason that there was no sanctioned post of DOM, for which the petitioner's husband was not at fault and that the Nagar Nigam, Allahabad alone was at fault. Consequently, the mere fact that the petitioner's husband was working on a daily rated basis becomes immaterial since the work, which he was performing, was permanent in character.

8. The **U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974** provides rules regulating the recruitment of dependent of government servants dying in harness Rule 2(a) defines a Government Servant as under:-

"(a) Government Servant" means a Government Servant employed in connection with the affairs of Uttar Pradesh who-

(i) was permanent in such employment; or
(ii) though temporary had been regularly appointed in such employment; or
(iii) though not regularly appointed, had put in three years' continuous service in regular vacancy in such employment."

The said rule has been explained through various judgments.

9. In **Sunil Kumar vs. State of U.P. and others, 2003(1) Selected Allahabad Cases 122**, it was held that a daily rated employee having worked for more than thirteen years, was deemed to be government servant, as defined under Rule 2(a) of the Rules of 1974. Similar view was again held in the decision of **Santosh Kumar Mishra vs. State of U.P. and others, 2002 (1) UPLBEC 337**.

10. In **writ petition No.51469 of 2005, Vijay Kumar Yadav vs. State of U.P. and others decided on 25.7.2005**, this Court held, that where a person had worked for more than three years as a part time Tube-well Operator on a temporary post, he was deemed to work on a. regular vacancy and was therefore entitled to be treated as Government servant.

11. In view of the aforesaid, this Court is of the opinion that the petitioner's husband having worked continuously for more than thirteen years which was permanent in character, was a Government servant as defined under Rule 2(a) of the Rules of 1974. Consequently, upon his death, the petitioner, being a widow and dependent on her husband, was entitled for an appointment on compassionate ground. The recommendation of the Nagar Nigam as disclosed in Annexure No.4 to the writ petition reveals that the petitioner was appointed under the Dying in Harness Rules. This Court is of the opinion that an appointment made under the Dying in Harness Rules is permanent in character,

that is to say, a substantive appointment and that the appointment cannot be treated as a temporary appointment or an appointment on a daily rated basis as held by a division bench of this Court in **1999 (3)UPLBEC2263, Ravi Karan Singh vs. State of U.P. and others and 2002 (3) ESC 454, Sanjai Kumar vs. Dy. Director General (NCC) Directorate, U.P., Lucknow and others.**

12. In view of the aforesaid, the writ petition is allowed. A writ of mandamus is issued directing the respondents to treat the petitioner as having been appointed in a substantive capacity under the Dying in Harness Rules. The petitioner is consequently entitled to be treated as a regular employee of the Nagar Nigam and is entitled to the pay given to a regular employee from the initial date of her appointment. The arrears of salary would be calculated by the respondents and shall be paid to the petitioner within three months from the date of the production of a certified copy of this order.

13. It is made clear that even if the post has not been sanctioned, the respondents are still required to pay the salary to the petitioner as payable to a regular employee and take immediate steps with the State Government for the creation of the post of DOM which is of a permanent character. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2008

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.42381 of 2006

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

Counsel for the Petitioner:
Sri S.K. Purwar
Sri Jamil Ali
Sri V.S. Parmar

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

Constitution of India, Art. 226-readwith Stamp duty Act-Demand of additional stamp value with penalty-on ground the petitioner had raised/occupied much excess area than the area given in sale deed-held-totally perverse and-misconceived-stamp duty paid strict in accordance with the valuation of property mentioned in sale deed-found sufficient-authority committed mistakes apparent on the face of record-if excess land occupied by the purchaser the same could be taken back by the actual owner-but the authorities have no role to play-impugned order quashed.

Held: Para 4

Under law, the stamp duty is leviable only for value of the portion for which the deed is executed. If any additional area is occupied, legally or illegally by the petitioner, the concerned authority or person may take appropriate action for getting back possession of such portion which has not been purchased by the petitioner. However, the stamp duty on such portion, which has not been

purchased by the petitioner through the sale deed, cannot be levied.

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

1. The short point involved in this writ petition in as to whether stamp duty can be charged on any such property which has been unauthorizedly and/or illegally occupied by the petitioner, which is beyond the area for which the sale deed had been executed.

2. The brief facts of this case are that the petitioner had, vide sale deed dated 17.10.2002, purchased a plot of land measuring 36 meters, for a sum of Rs.1.50 lacs. On the said transaction, the petitioner had paid the requisite stamp duty as per the existing circle rate fixed by the Collector, according to which the valuation of the property came to Rs.1.77 lacs. Up till this point there was no dispute with regard to payment of stamp duty. Subsequently in the year 2005, a complaint was lodged to the effect that the petitioner had occupied the adjoining area and made certain constructions beyond the portion of land which had been purchased by him. An enquiry was got conducted and a report had been submitted that the petitioner had made constructions on such land beyond the area purchased by him. The petitioner submitted his objections. Thereafter, the Additional District Magistrate, (F & R), Hamirpur, Respondent no.3 passed an order dated 31.12.205 levying additional stamp duty as well as penalty with interest on the petitioner, after taking the area which had been occupied by him illegally also into consideration as the area for which the sale deed had been executed. Challenging the said order, the petitioner filed an appeal before the Commissioner, Chitrakoot Dham, Respondent no.2 which was dismissed vide order dated 23.6.2006. Aggrieved by the said orders, this writ petition has been filed.

3. I have heard Sri Jamal Ali, 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.

4. Under law, the stamp duty is leviable only for value of the portion for which the deed is executed. If any additional area is occupied, legally or illegally by the petitioner, the concerned authority or person may take appropriate action for getting back possession of such portion which has not been purchased by the petitioner. However, the stamp duty on such portion, which has not been purchased by the petitioner through the sale deed, cannot be levied. The petitioner, having paid the stamp duty on the sale deed for the area which had been purchased by him, cannot now be subjected to additional stamp duty for any such area which has neither been purchased by him nor any deed having been executed for such area in his favour. As such the orders passed by the authorities below imposing additional stamp duty, penalty and interest on the petitioner for allegedly making illegal constructions beyond the area of land purchased by him, deserves to be quashed.

5. Accordingly, this writ petition stands allowed and the orders dated 23.6.2006 and 31.12.2005 passed by

Respondents no.2 and 3 respectively are quashed.

6. The office is directed to issue a certified copy of this order to the learned counsel for the petitioner within 48 hours on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.48643 of 2006

Farooque Ahmad ...Petitioner
Versus
U.P. State Road Transport Corporation Lucknow and another ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri S. Shekhar

Counsel for the Respondents:
Sri P.S. Chauhan
Sri B.S. Chauhan

Constitution of India Art. 226-Judicial Review-scope thereof-discussed-petitioner working as conductor carrying passenger without ticket-investigation team given signal to stop-but runaway-no place and time of enquiry given-alongwith enquiry report-No cause notice issued-even during enquiry the most relevant witness-the member of inspection team not examined-punishment based on suspension and speculation-held-can not survive-direction issued for reinstatement with full salary.

Held: Para 9

Now applying the aforestated principle in given facts and circumstances of the case I find that respondent Corporation has not led any evidence in support of the charges levelled in the charge sheet against the petitioner, as neither any member of checking squad was examined before inquiry officer and made out any case against the petitioner and thereafter he was given any opportunity to repel those charges. The letter of Sri Bhagirathi Singh, who was member of the checking squad, was also not proved by any person before Inquiry Officer. Even the said letter is taken as true, even then it cannot be assumed that since the bus was not stopped on receipt of signal from checking squad, therefore, it was carrying passengers without ticket. In my opinion such fact could be proved only after getting it stopped by chasing and checking done thereafter. But since no such steps were taken by the checking squad, therefore, it cannot be assumed merely by suspicion and speculation which cannot take the place of proof, howsoever strong such suspicion may be. Therefore, the petitioner can not be held to be guilty of the charges on mere suspicion and speculations without any proof of the same, accordingly the conclusion drawn by Disciplinary Authority cannot be sustained and the impugned order dated 5.8.2006 is hereby quashed.

Case law discussed:
A.I.R. 1964 SC 364, (2001) 9 SCC 575, (2002) 7 SCC 142

(Delivered by Hon'ble Sabhajeet Yadav, J.)

1. By this petition petitioner has challenged the order dated 5.08.2006 passed by respondent no.2 contained in Annexure-6 of the writ petition, whereby the petitioner has been removed from service while working as bus conductor in U.P.S.R.T.C.. It is stated that earlier also the petitioner was removed from service and he approached this Court by means of

Writ Petition No.24378 of 2001. While allowing the writ petition petitioner's removal from service has been quashed by this Court vide order dated 3.4.2002. After the aforesaid judgement the petitioner was reinstated in service and was performing his duties without any complaint. It is further stated that due to aforesaid reinstatement of the petitioner the Assistant Regional Manager Sri Girish Chandra Sharma was carrying malice against the petitioner and in furtherance of the same he again carved out a case against him and in July 2000 a charge sheet was served upon the petitioner. The charges levelled in the said charge sheet were grounded merely on the fact that the petitioner was conductor of the bus No. URY 907 and carrying the passengers in bus on 6.7.2000 on Orai-Jhansi route. It was alleged that the said bus was given signal to stop for checking by checking squad consisting of Sri Bhagirathi Singh and Radhey Shyam- Depot Incharge but the petitioner did not stop the bus, consequently bus could not be checked by the checking squad of the Corporation, therefore, the petitioner is guilty of misconduct carrying illegal passengers causing loss to Corporation and flouting the order of Superior authorities of the department. In support of the said charges only material upon which the reliance was sought for in the charge sheet was letter of Sri Bhagirathi Singh, who was alleged to be member of checking squad of the Corporation. The charge sheet was given to the petitioner on 22.7.2000 which was replied by him on 12.8.2000. The copy of the charge sheet and reply to the charge sheet are on record as Annexures-3 and 4 of the writ petition. The petitioner has also filed copy of the said letter of Sri Bhagirathi Singh as Annexure-5 of the writ petition. It is further stated that the Inquiry Officer has considered only written complaint given by Sri Bhagirathi Singh, wherein it was alleged that the bus was tried to be stopped through signal given by driver of the car of checking squad but bus did not stop for checking. It is also stated that after submission of reply of the charged sheet, the Inquiry Officer has submitted his report but the copy of which has never been supplied to the petitioner. On the basis of said inquiry report the petitioner has been removed from service by respondent no.2 vide order dated 5.8.2006 contained in Annexure-6 of the writ petition. It is further stated that in the impugned order incorrect statement of fact has been made to the effect that inquiry report along with show cause noticed dated 29.7.2004 was given to the petitioner. In fact the petitioner was never given any copy of the inquiry report and show cause notice dated 29.7.2004 and reminder dated 13.4.2005.

2. Heard Sri V.K. Singh, learned Senior Counsel assisted by Sri S. Shekhar for the petitioner and Sri B.S. Chauhan holding brief of Sri P.S. Chauhan for respondents no.1 and 2.

3. It is submitted by learned counsel for the petitioner that in counter affidavit the fact that no show cause notice along with inquiry report was served upon the petitioner, has been denied but no material has been placed along with the counter affidavit to establish that as to when the said show cause notice along with the inquiry report was served upon the petitioner. Therefore, in absence of necessary material in support of the said assertion in counter affidavit, the submission of learned counsel for the petitioner has to be accepted. Therefore, I

am of the considered opinion that no show cause notice along with inquiry report has been served upon the petitioner and the petitioner has been denied opportunity to defend his case.

4. Not only this but learned counsel for the petitioner has further submitted and demonstrated from the record that there is nothing to indicate that Inquiry Officer or Disciplinary Authority has ever informed the petitioner about the date and place of holding disciplinary inquiry against him and the petitioner has ever appeared before Inquiry Officer during inquiry. From a perusal of the impugned order also there is nothing to indicate as to whether any witness was examined in support of the charge levelled against the petitioner before Inquiry Officer and petitioner has ever been asked to cross-examine any such witness and also adduce his defence evidence before Inquiry Officer. According to him, as a matter of fact, no inquiry at all has been held against the petitioner. It appears that inquiry report, if any, has been prepared by the Inquiry Officer and submitted to the Disciplinary Authority straightway without holding any such inquiry. Thereupon acting on such inquiry report, the Disciplinary Authority passed impugned order without any show cause notice given to the petitioner along with the copy of inquiry report. Therefore, it is a case of total non compliance of principles of natural justice while holding disciplinary inquiry against the petitioner, as such entire disciplinary inquiry should be held to be non est and nullity. I have considered the aforesaid submission of learned counsel for the petitioner and have also gone through records and I found that the submissions of learned counsel for the petitioner have substance and deserve to be accepted as correct.

5. On merits too, learned counsel for the petitioner has vehemently urged that the only charge against the petitioner was that he did not stop the bus in spite of signal given for stopping the bus by the checking squad of the Department, whereas it is not in dispute that the bus was driven by the driver and the duty to stop the bus was on the driver on receiving the signal from checking squad. The petitioner, who was conductor of the bus, was not supposed to receive signal while sitting at back seat of the bus but the driver of the bus has been exonerated from the charges merely by giving a warning to him and petitioner has been removed from service on mere suspicion, which could not take the place of proof or reasonable doubt against the petitioner in connection of misconduct alleged to have been committed by him. In the counter affidavit filed on behalf of the Corporation aforesaid fact that driver of the bus has been given merely warning has not been denied. Besides this, learned counsel for the petitioner has further submitted that it was nowhere mentioned in the findings of Disciplinary Authority that the petitioner was aware of the said signal despite thereof he could not direct the bus driver to stop the bus and there is no material on record that even in spite of non stop of the bus, the checking squad had chased the bus and checked up thereafter and found some passengers carrying by the petitioner without any ticket, therefore, mere suspicion by the departmental authorities that the petitioner's bus was not stopped despite signal given to it by the departmental authorities, he might have been carrying the passengers without ticket for some

monetary gain cannot take the place of proof or reasonable doubt against the petitioner.

6. In support of his submission learned counsel for the petitioner has placed reliance upon a Constitution Bench decision of Hon'ble Apex Court rendered in ***Union of India Vs. H.C. Goel A.I.R. 1964 SC 364***, where in para 23 and 27 of the decision the Hon'ble Apex Court has been pleased to observe as under:-

"23…. The only test which we can legitimately apply in dealing with this part of respondent's case is, is there any evidence on which a finding can be made against the respondent that charge No. 3 was proved against him. ***In exercising its jurisdiction under Art.226 on such a plea, the High Court cannot consider the question about the sufficiency or adequacy of evidence in support of a particular conclusion. That is a matter which is within the competence of the authority which deals with the question; but the High Court can and must enquire whether there is any evidence at all in support of the impugned conclusion. In other words, if the whole of the evidence led in the enquiry is accepted as true, does the conclusion follow that the charge in question is proved against the respondent? This approach will avoid weighing the evidence. It will take the evidence as it stands and only examine whether on that evidence illegally the impugned conclusion follows or not. Applying this test, we are inclined to hold that the respondent's grievance is well founded, because, in our opinion, the finding which is implicit in the appellant's order dismissing the respondent that charge number 3 is proved against him is based on no evidence.***

27. ..... But the suspicion entertained by Mr. Rajagopalan cannot, in law, be treated as evidence against the respondent even though there is no doubt that Mr. Rajagopalan is a straight-forward and an honest officer. Though we full appreciate the anxiety of the appellant to root out corruption from public service, we cannot ignore the fact that in carrying out the said purpose, mere suspicion should not be allowed to take the place of proof even in domestic enquires. It may be that the technical rules which govern criminal trials in court may not necessarily apply to disciplinary proceedings, but nevertheless, the principle that in punishing the guilty scrupulous care must be taken to see that the innocent are not punished, applies as much to regular criminal trials as to disciplinary enquiries held under the statutory rules."

7. In this connection it would also be useful to refer few decisions of Hon'ble Apex Court which have material bearing with the question in controversy involved in the case. In ***Syed Rahimuddi Vs. Director General C.S.I.R. and others (2001) 9 SCC 575*** while dealing with the scope of judicial review in context of conclusion or finding of fact arrived at in a departmental inquiry by the Inquiry Officer and/or Disciplinary Authority in para 5 of the decision Hon'ble Apex Court held as under:

"5. It is well settled that a conclusion or a finding of fact arrived at in a disciplinary inquiry can be interfered with by the court only when there are no materials for the said conclusion, or that on the materials, the conclusion cannot be that of a reasonable man. Having examined the report of the Inquiry

Officer, we are unable to accept the contention of the learned counsel for the appellant that the findings of the Inquiry Officer cannot be held to be findings based on no evidence."

In ***Sher Bahadur Vs. Union of India and others (2002) 7 SCC 142 = JT 2002 (6) SC 152***, while explaining the meaning of expression "sufficiency of evidence" Hon'ble Apex Court in para 7 of the decision held that **"sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence which is neither relevant in a board sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law**. Para 7 is quoted as under:-

"7. It may be observed that the expression "sufficiency of evidence" postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence, however voluminous it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and the charged officer, is no evidence in law. The mere fact that the Inquiry Officer has noted in his report. "in view of oral, documentary and circumstantial evidence as adduced in the enquiry", would not in 'principle satisfy the rule of sufficiency of evidence.. .... "

8. Thus, from the aforestated legal principles it is clear that in exercising jurisdiction under Article 226 of the Constitution, the High Court cannot consider the question about the sufficiency or adequacy of evidence in support of a particular conclusion, that is a matter which is within the competence of the authority which deals with the question; but High Court can and must require whether there is any evidence at all in support of the impugned conclusion or on the basis of such evidence or materials the conclusion can be that of a reasonable man? In other words, if whole of the evidence led in the inquiry is accepted as true, does the conclusion follow that the charge in question is proved against delinquent? And further the expression sufficiency of evidence postulates existence of some evidence which links the charged officer with the misconduct alleged against him. Evidence however voluminous, it may be, which is neither relevant in a broad sense nor establishes any nexus between the alleged misconduct and charged officer is no evidence in the eye of law.

9. Now applying the aforestated principle in given facts and circumstances of the case I find that respondent Corporation has not led any evidence in support of the charges levelled in the charge sheet against the petitioner, as neither any member of checking squad was examined before inquiry officer and made out any case against the petitioner and thereafter he was given any opportunity to repel those charges. The letter of Sri Bhagirathi Singh, who was member of the checking squad, was also not proved by any person before Inquiry Officer. Even the said letter is taken as true, even then it cannot be assumed that since the bus was not stopped on receipt of signal from checking squad, therefore, it was carrying passengers without ticket. In my opinion such fact could be proved only after getting it stopped by chasing and checking done thereafter. But since no such steps were taken by the checking squad, therefore, it cannot be assumed merely by suspicion and speculation which cannot take the place of proof, howsoever strong

such suspicion may be. Therefore, the petitioner can not be held to be guilty of the charges on mere suspicion and speculations without any proof of the same, accordingly the conclusion drawn by Disciplinary Authority cannot be sustained and the impugned order dated 5.8.2006 is hereby quashed.

10. The respondents are directed to reinstate the petitioner in service with full back wages and continuity of service from the date of removal from service till date of his actual reinstatement and further continue him in service and pay his salary unless his services are dispensed with in accordance with law.

With the aforesaid observation and direction, writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 49313 of 2006

Akhilesh Kumar Awasthi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam
Sri Anand Mishra

Counsel for the Respondents:
S.C.

Fundamental Rule 54-Reinstatement without Salary-for suspension-dismissal to the period of reinstatement-without opportunity of hearing without show cause notice-held-'illegal'-order withholding salary-passed without show cause notice-can not sustained.

Held: Para 12 & 13

A bare perusal of the aforesaid provision makes it clear that before passing an order depriving the Government servant of full salary for the period of suspension or when he was out of employment, a show cause notice has to be issued to the concerned Government servant and only thereafter, the competent authority may pass appropriate order considering various aspects.

Admittedly, no such procedure has been followed, therefore, the impugned order, to the extent the petitioner has been denied arrears of salary for the period of suspension as well as during the period he was out of employment pursuant to the dismissal order, which was modified by the revisional order, is set aside. The writ petition is, accordingly, allowed partly.

Case law discussed:
1992 Supple. (1) SCC 222, AIR 1996 SC 326, JT 1996 (8) SC 550, AIR 2003 SC 1344

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

1. Heard Sri Vijay Gautam, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Since counter and rejoinder affidavits have already been exchanged between the parties, as requested and agreed by the learned counsel for the parties, the matter is heard finally under the Rules of the Court and is being decided at this stage.

3. Aggrieved by the order dated 26.5.2004 passed by Inspector General of Police, Allahabad Zone, Allahabad modifying punishment imposed upon the petitioner by converting dismissal from

service to reduction in the pay scale at the minimum for a period of three years and denying arrears of salary for the period petitioner was under suspension and out of employment pursuant to dismissal order dated 2.5.1994, this writ petition has been filed seeking writ of certiorari quashing the same and also a writ of mandamus directing respondents to pay all the benefits to the petitioners as he was never suspended.

4. The learned counsel for the petitioner submitted that the impugned order of punishment has been passed without considering the fact that the enquiry proceedings were conducted ex parte, the petitioner was not deliberately absent since he was ill and has submitted various medical certificates, therefore, it was not a case of unauthorized absence and, as such, there was no misconduct on the part of the petitioner inviting any punishment. He further contended that the impugned order, to the extent the petitioner has been denied arrears of salary during the period he was under suspension and out of employment, is vitiated for non compliance of Fundamental Rule-54 since no notice was issued to the petitioner under the aforesaid provision.

5. Learned Standing Counsel, on the other contrary, placed reliance on the stand taken in the counter affidavit and submitted that entire proceedings were conducted in accordance with law and, therefore, no interference is warranted in this writ petition.

6. From the submissions advanced by the learned counsel for the petitioner, I find that basically he has assailed the impugned order on the following grounds:

(1) The enquiry report submitted by the enquiry officer is pursuant to an ex parte enquiry without giving any opportunity of hearing to the petitioner, therefore, is vitiated in law.

(2) The procedure laid down in Rule 14(1) of U.P. Police Officers of Subordinate Ranks (Punishment & Appeal) Rules, 1991 (hereinafter referred to as '1991 Rules') has not been followed rendering the entire proceedings void ab-initio.

(3) Before passing order of dismissal, the disciplinary authority, i.e., respondent no. 4 has not afforded any opportunity to the petitioner and, therefore, it is bad in law.

(4) While deciding the appeal of the petitioner, various grounds raised by him have not been considered and, therefore, the appellate order is non speaking.

(5) The punishment imposed upon the petitioner is excessive, arbitrary and does not commensurate to the alleged misconduct.

(6) The proceedings are result of mala fide of the then Superintendent of Police, Banda, whose wife contested election from Etawah and the petitioner's Geep which is owned by the wife of petitioner was used in the said election, but no rent was paid and when the petitioner demanded, he was misbehaved, abused and a false report was also lodged against him on 9.7.1993.

(7) The revisional authority though modified the punishment by reduction in the pay scale, but even that punishment does not commensurate to the alleged misconduct.

(8) The order for denying salary during the period the petitioner was under suspension and out of employment pursuant to the dismissal order, which was modified by the revisional order, has not been passed in accordance with the procedure prescribed under Fundamental Rule-54.

7. Coming to the three submissions that the enquiry was conducted without affording opportunity to the petitioner, it is evident from the own pleadings and the record available before this Court that a charge sheet dated 19.8.1993 was served upon the petitioner making an allegation that he was found absent from duty from the night of 9.5.1993 to 13.7.1993 unauthorizedly and, therefore, was guilty of negligence, dereliction of duty and indiscipline. He was supplied with the copy of the documents relied upon in the charge sheet as well as preliminary enquiry report and the statements etc. recorded therein. Petitioner submitted his reply to the charge sheet on 28.8.1993 and made a statement before the enquiry officer that besides his written reply, he does not want to show anything further in the matter and signed proceedings before the enquiry officer. The enquiry officer, thereafter, proceeded to hold oral enquiry and recorded statements of Head Constable Sri Om Prakash, Sub-inspector Armed Police Sri Shaligram Misra and gave opportunity to the petitioner to cross examine them but he refused to do so. The aforesaid statements of the witnesses were recorded on 13.9.1993 and next date of recording statements of witnesses was fixed as 28.9.1993. Information was sent by Special Messenger but petitioner was not present at his permanent residence. Therefore, the notice was served upon his brother, Babloo Awasthi, in presence of two witnesses besides the Gram Pradhan of the village. The petitioner instead of attending proceedings, on 27.9.1993 sent letter to the enquiry officer stating that he is ill and would appear in the proceedings after becoming fit and till then enquiry should be suspended. This shows his knowledge of the next date, i.e., 28.9.1993. Thereafter, the enquiry officer vide his letter dated 22.10.1993 requested Chief Medical Officer, Banda for constituting a Medical Board and examine the genuity of alleged sickness of the petitioner. But despite information, the petitioner did not appear for the said examination. The enquiry officer, vide letter dated 4.11.1993, required the petitioner either to participate in the enquiry on 19.11.1993 otherwise he shall proceed ex parte, yet the petitioner did not appear though the said letter was served upon him by Special Messenger, which was received at the petitioner's residence by his wife Smt. Nirmala Awasthi. Even thereafter, the petitioner failed to appear and in these circumstances, the enquiry officer proceeded with further oral enquiry and after recording statements of rest of the prosecution witnesses etc., communicated the petitioner again to cross examine these witnesses and he was also given opportunity for producing his defence on various dates, but it appears that the petitioner was not inclined to participate in the enquiry, thus, absented himself from participating therein. In these circumstances, enquiry officer submitted his report on 26.3.2004 holding the petitioner guilty of the charges levelled in the charge sheet recommending punishment of dismissal from service. The disciplinary authority sent a copy of the conclusion of the enquiry report along with a show cause

notice dated 3.4.1994 giving an opportunity to the petitioner to submit his reply, but despite repeated opportunity, he did not submit any reply. The disciplinary authority, thus, passed the dismissal order on 2.5.1994. In the appeal submitted by the petitioner, general allegations have been made but it has not been said that when he was communicated on certain dates, why he did not appear in the enquiry proceedings.

8. Considering the entire facts and circumstances, I do not find it correct that the proceedings have been conducted against the petitioner without affording opportunity to him. The principles of natural justice, if not availed by the person concerned, it is not open subsequently to him to challenge an order adverse to him on the ground that he was not afforded opportunity when he himself failed to avail such opportunity.

9. So far as the validity of the revisional order is concerned, from a bare perusal thereof it is evident that every aspect has been considered by the Revisional Authority in detail and it has also considered the question of quantum of punishment imposed upon the petitioner and taking a lenient view in the matter, he has modified punishment by revoking the order of dismissal and reducing the punishment to reduction at the minimum of pay scale, that too, only for a period of three years. Therefore, even the contention of the petitioner that the punishment is disproportionate to the misconduct levelled against him is not acceptable. Petitioner is member of a disciplined force and, therefore, has to show a more sincere and disciplined conduct since any negligence on his part may result in serious consequences. Absence of petitioner for a long time without informing the authorities and unauthorizedly cannot be said to be a technical or non-serious misconduct, which does not warrant a strict punishment. In the matter of members of disciplined force, in order to maintain strict discipline, the nature of punishment would be stern comparing to other civil services.

10. So far as the argument of mala fide is concerned, learned counsel for the petitioner could not substantiate the said argument. Moreover, the person concerned against whom the mala fide is alleged has not been impleaded in the writ petition. It is well settled that a plea of mala fide shall not be entertained unless the person against whom mala fide is alleged is impleaded eo nomine as held in the case of **State of Bihar Vs. P.P. Sharma, 1992 Supple. (1) SCC 222, J.N. Banavalikar Vs. Municipal Corporation of Delhi AIR 1996 SC 326, A.I.S.B. Officers Federation and others Vs. Union of India and others JT 1996 (8) SC 550** and **Federation of Railway Officers Association Vs. Union of India AIR 2003 SC 1344**. Thus, the contention that the impugned order of punishment was passed pursuant to mala fide of the then Superintendent of Police, Banda has no substance and is rejected.

11. Now coming to the question as to whether the order passed by the revisional authority denying arrears of pay to the petitioner for the period he was under suspension as well as the period he was out of employment pursuant to the dismissal order dated 2.5.1994 is correct or not, I find that such an order can be passed by the competent authority only after issuing a show cause notice to the

employee concerned as contemplated under Fundamental Rule-54, which reads as under:

"F.R. 54. *(1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order reinstatement shall consider and make a specific order.-*

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal, or compulsory retirement, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority competent to order reinstatement is of opinion that the Government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him, and after considering the representations, if any, submitted by him, direct for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of sub-rule (7), be paid for the period of such delay, only such amount not being the whole of such pay and allowance as it may determine.

(3) In a case falling under sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In cases other than those covered by sub-rule (2), including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellant or reviewing authority solely on the ground of non-compliance with the requirements of clause (1) or clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held the Government servant shall, subject to the provisions of sub-rule (5) and (7), be paid such amount not being the whole of the pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period which in no case shall exceed sixty days from the date on which the notice has been served as may be specified in the notice.

(5) In a case falling under sub-rule (4), the period of absence from duty

including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be treated so for any specified purpose :

Provided that if the Government servant so desires, such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

(6) The payment of allowances under sub-rule (2) or sub-rule (4) shall be subject to all other conditions under which such allowances are admissible.

(7) The amount determined under the proviso to sub-rule 92 or under sub-rule (4) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(8) Any payment made under this rule to Government servant on his retirement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of removal, dismissal or compulsory retirement, as the case may be, and the date of reinstatement. Where the emoluments admissible under this rule are equal to or less than the amounts earned during the employment elsewhere, nothing shall be paid to the Government servant."

12. A bare perusal of the aforesaid provision makes it clear that before passing an order depriving the Government servant of full salary for the period of suspension or when he was out of employment, a show cause notice has to be issued to the concerned Government servant and only thereafter, the competent authority may pass appropriate order considering various aspects.

13. Admittedly, no such procedure has been followed, therefore, the impugned order, to the extent the petitioner has been denied arrears of salary for the period of suspension as well as during the period he was out of employment pursuant to the dismissal order, which was modified by the revisional order, is set aside. The writ petition is, accordingly, allowed partly.

14. However, it is open to the respondents to pass a fresh order in respect of arrears of salary of the petitioner for the period of his suspension as well as the period when he was out of employment pursuant to the dismissal order, which was modified by the revisional order dated 26.5.2004, complying the procedure prescribed under Fundamental Rule-54 and in accordance with law.

There shall be no order as to costs.

Petition partly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2008

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition 56228 of 2003

Ramjan Ali ...Petitioner

Versus

The Commissioner, Agra Division and others ...Respondents

Counsel for the Petitioner:
Sri. V. Singh

Sri. Dinesh Tiwari

Counsel for the Respondent:
Sri. C.B. Yadav
S.C.

Constitution of India Article 226-read with Stamp Act-charge of Stamp duty-admittedly the plot under transaction-agricultural plot-no material available regarding user of land for the purpose other than agriculture-duty cost on the value of transaction and not on valuation–demand of additional charge on the ground the plot in question surrendered by Hotel and other potential value–if wholly misconceived–No additional charge can be demanded.

Held – Para 5

Merely because a plot of land may have potential of being used for commercial purpose in future, the valuation for the purpose of determination of stamp duty cannot be fixed at such rate which may be for commercial or residential purpose. Stamp duty is charged on the value of the transaction and not on the valuation which it may acquire in future because of the land surrounding it in commercial use. In the present case, it has not been found that the plot of land is being used for any other purpose than agriculture purpose and the stamp duty has been paid on the valuation as has been fixed by the Collector at the time when the transaction had taken place. As such, the same cannot be said to be unjustified nor can the stamp duty be levied on the basis of subsequent notification whereby the valuation for the purpose of payment of stamp duty has been increased.

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

1. The petitioner had purchased share in certain plots of agricultural land measuring .3918 Hectare vide registered sale deed dated 8.6.2001. According to the petitioner the sale consideration paid was Rs.8,33,332/ -. However, since as per the existing circle rate the valuation of the said agricultural plot was Rs.15,06,700/- hence the stamp duty on the aforesaid valuation was paid by the petitioner. Subsequently on 1.4.2002 the circle rates of several villages for the purposes of payment of stamp duty had been revised. Then on 3.8.2002 the Additional Collector served a notice on the petitioner stating that the valuation of the property purchased by him was to the tune of Rs.46,98,000/- and thus there was deficiency of Rs.3,13,100/- in payment of stamp duty. The petitioner submitted his reply. However, by order dated 31.1.2003, the Additional Collector held that the instrument was deficiently stamped by Rs.3,13,100/ -. Challenging the said order, the petitioner filed an appeal before the Commissioner, Agra Division, Agra, which has also been dismissed by his order dated 20.10.2003. Aggrieved by the aforesaid orders, this writ petition has been filed.

2. I have heard Sri V. Singh, 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.

3. From the record, it is clear that as per the notification dated 5.11.1999 issued by the Collector, Agra the rate fixed for the irrigated agricultural plots was Rs. 40,00,000/- per Hectare for Village Basain, where the property in question is situated. Although in the said notification the rates for unirrigated as well as residential areas for all other

villages have been mentioned but for the village Basain the rate for unirrigated and residential plots has not been mentioned.

4. The impugned orders have been passed on the basis of some inspection report submitted by the Deputy Collector according to which, in and around the plot in question there are hotels and other commercial activities going on. However, it is not disputed by the respondents that the plot in question is being used for agricultural purpose and not for commercial or residential purpose. Even in the Khatauni, the land in question has been shown as being used for agricultural purpose.

5. Merely because a plot of land may have potential of being used for commercial purpose in future, the valuation for the purpose of determination of stamp duty cannot be fixed at such rate which may be for commercial or residential purpose. Stamp duty is charged on the value of the transaction and not on the valuation which it may acquire in future because of the land surrounding it in commercial use. In the present case, it has not been found that the plot of land is being used for any other purpose than agriculture purpose and the stamp duty has been paid on the valuation as has been fixed by the Collector at the time when the transaction had taken place. As such, the same cannot be said to be unjustified nor can the stamp duty be levied on the basis of subsequent notification whereby the valuation for the purpose of payment of stamp duty has been increased.

6. Accordingly, the orders passed by the authorities below imposing additional stamp duty cannot be sustained and are thus liable to be quashed.

7. This writ petition thus stands allowed. The order dated 31.1.2003 passed by the Additional Collector, City Stamp, Agra, respondent no. 2 and the order dated 20.10.2003 passed by the respondent no. 1, the Commissioner, Agra Division, Agra are quashed. It is directed that the amount deposited by the petitioner under the orders passed by the appellate court shall be refunded to the petitioner within three months from the date of filing of a certified copy of this order before the respondent no. 2, the Additional Collector, City Stamp, Agra. In case if the said amount is not refunded to the petitioner within the aforesaid period, the petitioner shall be entitled to 10% interest from the date of deposit till the date of actual payment.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE R.N. MISRA, J.

Civil Misc. Writ Petition 66608 of 2005

M/s Shambhu Singh Deena Singh ...Petitioner

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Sunil Kumar
Sri. Amarjit Singh

Counsel for the Respondents:
Sri. A.N. Shukla
Sri. Pankaj Rai
S.C.

U.P. High Speed Diesel and Light Diesel Oil (Maintenance of supplies and distribution) Order 1981-read with G.O. Dated 17.01.2004-cancellation of

dealer's licence-inspection made by Inspector alone-not accompanied either by Executive Magistrate or an officer not below the rank of D.S.O.-in utter violation of the G.O.-held-wholly illegal and without jurisdiction-Inspector alone has no power to inspect the premises and to take sample-cancellation order not sustainable.

Held: Para 6

Since in this case, the petitioner's premises was inspected only by the Supply Inspector he was not accompanied either by Executive Magistrate or by an officer not below the rank of district supply officer, therefore, in view of government order dated 17.1.2004 the inspector alone was not authorised to carry out the inspection of the business premises of the petitioner or to take sample and send it for chemical examination. Therefore, we are of the considered opinion that inspection of business premises of the petitioner on 28.12.2004 by the supply inspector only was wholly illegal and without jurisdiction and supply inspector had no power to inspect the business premises of the petitioner or to take sample or to send it for chemical examination. Hence all the proceedings taken against the petitioner in pursuance of inspection dated 28.12.2004 are without jurisdiction and on the basis of such an inspection the licence of a petty diesel dealer of the petitioner could not be suspended or cancelled by the respondent.

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

1. The petitioner was granted licence in the year 1984 in Form 'C' of the U.P. High Speed Diesel and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 (in brief Order, 1981). In paragraph 3 of the writ petition it has been mentioned that the licence of the petitioner was renewed from time to time and was valid till 31st March 2007. An inspection of the business premises of the petitioner was made by the Supply Inspector on 28.12.2004. Sample was taken from the business premises of the petitioner and sent for chemical examination on the same day. After receipt of the report from the chemical analyst, who reported that high speed diesel sample fails to meet the B.I.S. specification, a show cause notice was issued to the petitioner on 6.8.2005, the licence of the petitioner was suspended and one week's time was allowed to submit reply to the show cause notice. According to the petitioner along with show cause notice, chemical analyst's report was not supplied to the petitioner. The petitioner approached District Supply Officer Bulandshahar for supplying a copy of the report, which was received by the petitioner on 11.7.2005. The petitioner prayed before District Supply Officer that sample be again sent for re-testing as inspection was not carried by an officer, competent to carry out the inspection. It is not disputed by the petitioner that his business premises is lying closed with effect from 6.8.2005 and since then the petitioner's licence has been suspended.

2. We have heard Sri Amarjit Singh learned counsel for the petitioner and Shri A.N. Shukla learned standing counsel appearing for the respondents.

3. Shri Amarjit Singh learned counsel for the petitioner has urged that the business premises of the petitioner was inspected by the supply inspector on 28.12.2004 and he took sample and sent it for testing to the chemical analyst. According to the learned counsel the supply inspector has no power or authority to inspect the business premises of the petitioner or to take sample and send it for chemical examination. It was only the District Supply Officer and other officers mentioned in clause IV (A) of the Motor

Spirit and High Speed Diesel (Regulation of Supply and Distribution and Prevention of Malpractices) Order 1998 (in brief Order 1998), who were authorised to inspect the business premises of the petitioner. According to the learned counsel for the petitioner, the entire proceeding of inspection and taking sample and sending it for testing to the chemical analyst was without jurisdiction.

4. On the other hand, learned standing counsel has vehemently urged that since a licence was granted to the petitioner under Order 1981, it has been renewed from time to time, therefore, the authorities mentioned in clause 18 of the Order, 1981 would be entitled to carry out inspection and take sample and send it for chemical examination. He further urged that under Order 1981 the definition specifies that a dealer would not include an oil company and any other person who is engaged in business of purchase, sale or storage of high speed diesel would be a dealer. Under Order 1998 the definition of dealer is different. Under Order, 1998 a person appointed by an oil company to purchase, receive, store and sell motor spirit and high speed diesel would be a dealer. According to the learned counsel for the petitioner under Order 1981 oil company was not a dealer but under Order 1998, a person appointed by the oil company is a dealer. He has urged that since the petitioner was appointed as petty diesel dealer under license granted by the District Magistrate/Collector, he would not be a dealer and the provisions of Order 1998 would not apply to it.

5. By clause 8 of the Order 1998 the Motor Spirit and High Speed Diesel (Prevention of Malpractices in Supply and Distribution) Order, 1990 (In brief Order 1990) was repealed. It is not disputed by the learned standing counsel that Order 1990 has been repealed by order 1998 and the oil company did not have high speed diesel oil retail dealers (petty diesel dealer), therefore, the State Government framed a policy for appointment of petty dealers so that of high speed diesel oil could be made available in rural areas of the State where the oil companies had not yet appointed any dealer or has opened a retail diesel outlet. Looking to the problem faced by the villagers, petty diesel dealer licenses were issued by the State Government under its policy to benefit the farmers of the villages because the retail outlet appointed by the oil companies were at far of places. The government order was issued on 25.10.1987, to all district magistrates of the State that under Order 1981 for appointment of petty diesel dealer by the district magistrates and under this policy of the Government petty diesel dealers were appointed and continued. Almost similar government order was issued by the State Government on 2nd August 2000. By another Govt. order dated 3.2.2001 the State Government circulated a format for grant of petty diesel dealer licence/renewal of the licence on certain conditions. The format also mentioned that licence/renewal had to be made under Order 1981. Another Govt. order no.129/29-7-2003-1 PP/2000 dated 17.1.2004 was issued by the State Govt. to all the district magistrates that since the guidelines issued by the Central Government known as Marketing Discipline Guide Lines 2001 had been issued, therefore, in super session of the earlier Government Order dated 25.4.1997, the State Government has taken a decision that all pumps be inspected by a team which consists of an Executive Magistrate or an officer not below the rank of District Supply Officer and other member shall also not be below the rank of inspector. Officers of the oil company or District Co-ordinator or officer of the oil company would

also be made party of the team. The officers of oil company would be entitled to carry out inspection also of authorised petrol/diesel pumps for carrying out the inspection. It is necessary to extract the relevant part of the government order as under :

"संख्या-129/29-7-2003-1-पी०पी०/2000

प्रेषक,

अनिल कुमार गुप्ता,
सचिव,
उत्तर प्रदेश शासन।

सेवा में,

समस्त जिलाधिकारी,
उत्तर प्रदेश।

खाद्य तथा रसद अनुभाग-7

लखनऊः दिनांक 17 जनवरी, 2004

विषयः पेट्रोल एवं डीजल पम्पों के निरीक्षण/छापे की कार्यवाही एवं नमूने के परीक्षण।

महोदय,

उपर्युक्त विषयक शासनादेश संख्या-1459/29-7-97-73-पी०पी०/91, दिनांक 25 अप्रैल, 1997 का कृपया संदर्भ ग्रहण करें, जिसमें पेट्रोल/डीजल पम्पों के निरीक्षण/छापे की कार्यवाही एवं नमूने के परीक्षण हेतु विस्तृत दिशा-निर्देश निर्गत किये गये थे।

2. इस संबंध में मुझे यह कहने का निदेश हुआ है कि पेट्रोलियम एवं प्राकृतिक गैस मंत्रालय भारत सरकार द्वारा जारी विभिन्न कन्ट्रोल आर्डर एवं भारत सरकार द्वारा अनुमोदित मार्केटिंग डिसीप्लीन गाईड लाइन्स, 2001(Marketing Discipline Guide Lines, 2001) के लागू हो जाने के फलस्वरूप उक्त शासनादेश दिनांक २५.४.९७ को अतिक्रमित करते हुए शासन द्वारा सम्यक विचारोपरान्त निम्नलिखित निर्णय लिये गये हैं, जिनका कडाई से अनुपालन सुनिश्चित किया जाय-

1. पम्पों का निरीक्षण एक टीम द्वारा किया जाना चाहिए जिसका प्रधान एक (Executive Magistrate) अथवा जिला पूर्ति अधिकारी से निम्न श्रेणी का अधिकारी न हो और सदस्य इंस्पेक्टर श्रेणी के नीचे के न हो। उक्त टीम में तेल उद्योग के जिला समन्वयक या तेल कम्पनियों के अधिकारी भी शामिल रहें। आयल कम्पनी के अधिकारी केवल अधिकृत पेट्रोल/डीजल पम्प के डीलर की जांच में ही सदस्य होंगे।

.....

6. From the Government order, it is clear that petty diesel dealer's premises could be inspected either by the Executive Magistrate or by an officer not below the rank of District Supply Officer and an inspector would be member of the team along with District Coordinator of oil corporation. Since in this case, the petitioner's premises was inspected only by the Supply Inspector he was not accompanied either by Executive Magistrate or by an officer not below the rank of district supply officer, therefore, in view of government order dated 17.1.2004 the inspector alone was not authorised to carry out the inspection of the business premises of the petitioner or to take sample and send it for chemical examination. Therefore, we are of the considered opinion that inspection of business premises of the petitioner on 28.12.2004 by the supply inspector only was wholly illegal and without jurisdiction and supply inspector had no power to inspect the business premises of the petitioner or to take sample or to send it for chemical examination. Hence all the proceedings taken against the petitioner in pursuance of inspection dated 28.12.2004 are without jurisdiction and on the basis of such an inspection the licence of a petty diesel dealer of the petitioner could not be suspended or cancelled by the respondent.

7. For the aforesaid reasons, the writ petition succeeds and is allowed. The impugned suspension order dated 6.8.2005 (Annexure-3 to the writ petition) as well as cancellation order dated 3.10.2005 (Annexure 1 to the supplementary affidavit) passed by the district supply officer cancelling the petty diesel dealer license of the petitioner is quashed. A writ of mandamus is issued to respondents to renew the license of the petitioner within three weeks from the date a certified copy of this order is produced before respondent no.2. Respondent no.3 is directed to resume supply of the petitioner forthwith. Petition Allowed.
