APPELLATE JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 04.03.2009

BEFORE
THE HON'BLE JANARDAN SAHAI, J.
THE HON'BLE RAJES KUMAR, J.

Special Appeal No. 31 of 2009

Gulab Dhar Pandey ...Respondent/ Appellant
Versus
State of U.P. and others ...Petitioners/Opposite Parties

Counsel for the Appellant:
Sri Nirvikar Gupta
Sri C.B. Dubey

Counsel for the Respondents:
Sri P.S. Baghel
S.C.

Constitution of India Art. 226-jurisdiction of writ court-once programme for election of management society notified-voter list published-can not be interfered by writ court-order passed by learned Single Judge staying election programme set-a-side-However the list of voters list can be challenged after the election is over.

Held: Para 16

This Court has consistently held that once the election process has been started this court should not interfere. If any party has any grievance about the finalization of the voter list or about the voter list, it is always open to such person to challenge the same in the appropriate proceeding, namely, under the statute, Rules or Regulations or by filing suit in the Competent Court of law. Therefore, we are of the view that after the declaration of the election programme, interference by this Court is wholly unjustified. After the order dated 02.05.2008 passed by the Ex. District Inspector of Schools the issue relating to voter list had not become final. The order of the District Inspector of Schools was subject to further scrutiny and verification and in pursuance thereof, the process of verification was started by the Authorized Controller. Such further proceeding has not been challenged by the petitioners-respondents rather petitioners-respondents submitted before the Authorized Controller for the purpose of verification. Therefore, it cannot be said that process started for the finalization of the voter list after 02.05.2008 was not justified. However, it is always open to the petitioners-respondents to challenge the voter list after the election in an appropriate proceeding, referred herein above.

Case law discussed:
(1993) 2 UPLBEC, 1333, (1950-91) 4 AIEC, 155, 1998 (32) ALR 453, (1995) 1 UPLBEC, 51, (1996) 2 UPLBEC 1245, (1996) 1 ESC (All), 449, (1999) 1 UPLBEC, 461.

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

1. This is an appeal against the order dated 08.12.2008 passed by the learned Single Judge in Writ Petition No. 63078 of 2008, Rajeshwar Prasad Singh and others Versus State of U.P. and others.

2. Brief fact of the case giving rise to the present appeal are that there is a college, named, as Sri Gandhi Vidyalaya Intermediate College, Kachhwa, District Mirzapur (hereinafter referred to as **"institution"**) a recognized Intermediate College and is under grant-in-aid. The provisions of U.P. Intermediate Education Act (hereinafter referred to as **"Act"**) and Payment of Salaries Act, 1971 are applicable. The institution was established by a registered Society known as Sri Gandhi Vidyalaya Higher Secondary School, Kachhwa, Mirzapur (hereinafter referred to as **"Society"**). The Society has

its own registered bye laws and the institution has its approved Scheme of Administration approved by the Deputy Director of Education, Varanasi Region, Varanasi. It appears that the Scheme of Administration was amended by the Deputy Director of Education, 5th Region, Varanasi w.e.f. January, 1985. It appears that on account of certain irregularities being found in the institution, State Government passed an order under section 16-D of the Act, appointing an Authorized Controller in the institution in the Year, 1981 and since then, the Authorized Controller is continuing in the institution and no election on the basis of Scheme of Administration with valid member could be held for such a long time.

3. It appears that Writ Petitions were filed by one Sri Parmanand Dubey being Writ Petition No. 56441 of 2003 and by the alleged Committee of Management Sri Hari Mohan Singh being Writ Petition No.3022 of 2004. Both the Writ Petitions were decided by the learned Single Judge of this Court on 01.10.2007 directing the District Inspector of Schools, Mirzapur to hold the election of Committee of Management of the institution in accordance with law as per approved Scheme of Administration within a period of two months from the date of production of certified copy of the order. It appears that to hold the valid election the process of preparation of voter list has been started by the District Inspector of Schools, Mirzapur. The petitioners-respondents filed the list of 35 members to be included in the voter list to be allowed to participate in the election. Appellant and other life members filed a list of valid members before the District Inspector of Schools, Mirzapur and stated that there are only 9 life members of the institution, who alone arc entitled to be allowed to participate in the election. It appears that Ex.. District Inspector of Schools, Mirzapur Smt. Malti Rai has included 35 members to be valid voters vide order dated 02.05.2008. However, it has been directed to the Authorized Controller that in case there would be any concealment in the averment of affidavit, which is found later, then membership shall not be held valid and further direction was given to hold the election after the verification of affidavit. Challenging the order of District Inspector of Schools, Mirzapur dated 02.05.2008, Writ Petition No. 26346 of 2008 was filed. This Court vide order dated 28.05.2008 has directed the parties to exchange the affidavit. However observed that "***learned counsel for the petitioner states that District Inspector of Schools has passed an order directing the Authorised Controller to examine the receipts and the affidavits. This Court has no reason to doubt that such a direction shall not be followed***", Court further observed that the result of election shall be abide by the decision of the writ petition. It appears that in view of the judgment and observation of this Court dated 28.05.2008 passed in Writ Petition No.26346 of 2008, Authorized Controller issued notices to the persons named in the order dated 02.05.2008 passed by the District Inspector of School, Mirzapur to be present before him on 06.06.2008 so that their identity from the affidavits and the receipts filed by them may be verified. On 06.06.2008. Authorized Controller proceeded to make verification of the identity of members on the basis of their affidavits. It appears that during the course of verification some incident took place. Therefore, the election programme

was postponed and the Authorized Controller wrote letter to Joint Director of Education, Vindhyachal Region, Mirzapur as well as to the District Inspector of Schools, Mirzapur with a request that he is unable to hold the election, hence some other person may be appointed a Authorized Controller. On the basis of said report, election programme was postponed and Joint Director of Education appointed Sri Vijay Shanker Mishra as Authorized Controller to hold the election after verification of the identity of the members. Due to aforesaid reasons, the election scheduled for 14.06.2008 could not be held. The newly appointed Authorized Controller took the charge on 26.07.2008. The newly appointed Authorized Controller after taking over the charge proceeded to hold the election and for verification and the identity of the members with their affidavits and other documents fixed 31.10.2008. On that day, through vediography verification was done and by order dated 15.11.2008, the final list of members was approved and published by the Authorized Controller and with proper permission of the District Inspector of Schools, Mirzapur, he chalked out the election programme and published in the newspaper "Amar Ujala" and "Dainik Hindustan" on 27.11.2008 and 28.11.2008 respectively. As per the programme of election, nomination was to be started from 10.12.2008, scrutiny of the nomination was to be made on 10.12.2008, the withdrawal of the nomination on 10.12.2008 and in the case of contest, the date of voting was fixed on 12.12.2008.

4. Sri Rajeshwar Prasad Singh and others then filed Writ Petition No.63078 of 2008 challenging the voter list approved by the Authorized Controller on 15.11.2008 and also prayed for holding election with the members as directed by the District Inspector of Schools, Mirzapur vide order dated 02.05.2008. In the said Writ Petition, following impugned order has been passed on 08.12.2008:

"Learned Standing Counsel has accepted notice for the respondents no.1 to 3 and Sri Anil Bhushan for the respondent no.6. 'They pray for and are granted a month's time to file counter affidavit. The petitioner shall have two weeks thereafter to file rejoinder affidavit. List immediately thereafter.

Issue notice to the respondents no. 4 and 5 fixing a date immediately after six weeks.

On the next date, the respondent no.5 shall file his personal affidavit explaining as to why the elections which were announced on 24.5.2008 had been postponed even when there was no interim order granted by the High Court and further when the said election was postponed then on what basis he has changed the list of members which were earlier found to be 46 life members and one founder member and now the list is of only 10 members.

Considering the facts and circumstances of this case, it is directed that the elections in pursuance of the order dated 15.10.2008 passed by the Authorized Controller shall remain stayed:"

5. Challenging the aforesaid order, present appeal has been preferred.

Heard Sri Nirvikar Gupta, Advocate assisted by Sri C.B. Dubey, learned counsel appearing on behalf of the appellant and Sri P.S. Baghel, learned counsel appearing on behalf of respondent nos. 6 to 13.

6. Learned counsel for the appellant submitted that once the election process has been started, this court should not interfere. He submitted that after the election being held it is always open to challenge the election on various grounds including the issue relating to the finalisation of the voter list at the time of approval by the Regional Level Committed and thus, the impugned order passed by the learned Single Judge is liable to be set aside. He further submitted that the election process has been started in pursuance of the direction given by this Court; the voter list has been prepared after due consideration; after verification of their identity through their affidavits and other documents. Whether voter list finalized by the Authorized Controller was correct or not is a disputed question of fact which cannot be looked into by this court in writ jurisdiction under Article 226 of the Constitution of India and can only be looked into by the Court of fact; after the election being held, respondents will have every right to challenge the entire election before the Regional Level Committee on the ground of alleged irregularities in the preparation of the voter list.

7. In support of his contention, he relied upon the decisions of this Court the case of **Basant Prasad Srivastava and others Versus State of U.P. and other** reported in **(1993) 2 UPLBEC, 1333, Committee of Management, Sri Radha Krishna Sanskrit Mahavidyalaya and others Versus Deputy Director of Education reported in (1950-91) 4 AlEC, 155, R.P. Singh Baghel Versus City Magistrate/Election Officer reported in 1998 (32) ALR 453, Committee of Management of Sri Prachar Vidhyapeeth Vchattar Madhyamik Vidyalayalaya, Samathar Etawah and another Versus District Inspector of School, Etawah reported in (1995) 1 UPLBEC, 51, Committee of Management, Pt. Jawahar Lal (2) Krishak Inter College Mahuabari, Lar Road, Deoria and others Versus Deputy Director of Education and others reported in (1996) 2 UPLBEC 1245, Tribhuwan Prasad at Present Manager Committee of Management, Keshav Ram Arya Adarsh Balika Higher Secondary School, Azamgarh Versus Deputy Director of Education 1st, VIIth Region, Gorakhpur and others reported in (1996) 1 ESC (All), 449 and Committee of Management Brahmarshri Sri Ram Krishna Inter College, District Mau and another Versus Inspector of Schools, Mau and others reported in (1999) 1 UPLBEC, 461.**

8. Sri P.S. Baghel, learned counsel appearing on behalf of the respondent submitted that the preparation of the voter list was patently illegal. He submitted that in compliance of the order dated 02.05.2008 and order dated 22.05.2008 passed by the District Inspector of Schools the election programme was declared on 24.05.2008 by the Prabandh Sanchalak on the basis of electoral college of 46 life members and one founder member and the date of election was fixed on 14.06.2008. He submitted that the said electoral programme was challenged by two persons, namely, Sri Gulab Dhar

Pandey (present appellant) and Sri Lallan Dubey by means of Civil Misc. Writ Petition No. 26346 of 2008 and this Court has not granted interim order and it was directed that the result of the election shall abide by the decision in writ petition. The said writ petition is still pending before this Court. He submitted that prior to the election a notice was published on 29.05.2008 in the daily newspaper "Amar Ujala". In the said notice the members were directed to deposit their photographs, certificate of date of birth, duly attested by second class Gazetted Officer before the Principal piror to 05.06.2008. In pursuance of the said notice, the petitioners have deposited all the required documents and affidavits etc on 05.06.2008. On 04.06.2008 a notice was published in the newspaper that all the life members of the college should reach the office of the Authorized Controller on 06.06.2008 at 11.00 A.M. i.e. within two days of the publication of the notice. When the petitioners reached the office of the Authorized Controller without looking into the paper of the petitioners, the election dated 14.06.2008 was postponed by the Authorized Controller for which a notice was published in the daily newspaper "Amar Ujala" on 08.06.2008 regarding the postponement of the election. Thereafter, on 25.10.2008 the Authorized Controller written a letter to one Sri Rajeshwar Prasad Singh, which was received by Sri Rajeshwar Prasad Singh on 29.10.2008 directing him to inform all the 35 members at his own level that they should reach the office of the Authorized Controller on 31.10.2008 along with their domicile certificate, age certificate and identity certificate issued by the Election Commission or India. He submitted that in such short notice, it was not possible for the members who were residing outside Mirzapur to appear. Further, on 29.10.2008 a public notice was issued to all the members of the General Body which was published in local newspaper of Mirzapur "Hindustan" where the members of General Body were informed to appear before him on 31.10.2008. He further submitted that in response to the aforesaid notice, Rajeshwar Prasad Singh could inform only 17 members who were local members and they filed affidavits regarding their membership along with their domicile certificate, identity card, certificate of date of birth etc on 31.10.2008 before the Authorized Controller. The Authorized Controller without issuing any notice to the other members on wholly non-existent ground has accepted only 10 members and rejected the claim of all the 35 members who have been found to be genuine members by District Inspector of Schools by her order dated 02.05.2008 and 25.05.2008. The Authorized Controller has also rejected the membership of 17 persons who were present on 31.10.2008. The Prabandh Sanchalak passed the order dated 15.11.2008 wherein only 10 members have been found genuine members. The order dated 05.11.2008 passed by the Prabandh Sanchalak is without jurisdiction inasmuch he has traveled beyond his jurisdiction. The order of the Authorized Controller has been passed in flagrant violation of principle of natural justice and he has not given notice to all 35 members.

9. Having heard the learned counsel for the parties, we have gone through the impugned order passed by the learned Single Judge, other documents annexed along with the writ petition and have

given due consideration to the rival submissions.

10. Admittedly, the Authorized Controller was appointed in the year, 1981 and since then the ejection was not held. It was desirable that Committee of Management be formed to run the institution in accordance with the Scheme of Administration and therefore, having regard to this fact, this court vide order dated 1st October, 2007 has directed the District Inspector of Schools, Mirzapur to hold the election of Committee of Management of the institution as per approved Scheme of Administration within a period of two months from the date of presentation of certified copy of the order. It appears that for one reason or the other, the election could not be held as directed by this Court.

11. Finally, the final list of the members was approved and published by the Authorized Controller and with the proper permission of the District Inspector of Schools, Mirzapur and published in the newspaper "Amar Ujala and "Dainik Hindustan" on 27.11.2008 and 28.11.2008 respectively. As per the programme of election, nomination was to be started from 10.12.2008, scrutiny of the nomination was to be made on 10.12.2008, the withdrawal of the nomination to be made on 10.12.2008 and in the case of contest, the date of voting was fixed on 12.12.2008.

12. In the case of **Basant Prasad Srivastava and another Versus State of U.P. and another (supra)**, the Full Bench of this Court held as follows:

"When once the election process starts, it must come to its logical conclusion. Once it comes to its logical conclusion by declaration of result of the election the aggrieved person may challenge the election by filing election petition or civil suit in accordance with law. In such a proceeding the election may not be set aside if the alleged illegality or irregularity has not materially affected the result of the election. Approach to Court at intermediate stages in the election is bound to result in an office either remaining vacant or being occupied by a person whose entitlement to hold the office has ceased. Neither is a happy situation. It is, therefore, desirable that the election process should end as early as possible and the declaration of result should not be deferred through repeated interim orders passed from time to time."

13. In the case of **Committee of Management, Sri Radha Krishna Sanskrit Mahavidyalaya and others Versus Deputy Director of Education, Gorakhpur and others (supra)**, the Division Bench of this Court held as follows:

"There are large number of educational institution as and the functioning of such institutions are controlled and managed by a Committee of Management. Such Committee is constituted under the rules, regulations or certain Administrative schemes. The term of such Committee of Management is limited by time. The election process inter alia involves the determination of the members who can vote and participate in the election, nomination, preparation and publication of programme, scrutiny and declaration

of result. In case, at the intermediate stage of the election process the High Court entertains petitions under Article 226 of the Constitution it will further delay the election process. Secondly, the disputed question of fact as to who are the members and other related matters cannot be decided in the writ jurisdiction. A person who has any grievance can take recourse to the remedy provided under the Statute, Rules or Regulations or by filing suit in the competent Court of law."

14. In the case of **Committee of Management, Pt. Jawahar Lal Krishak Inter College Mahuabari, Lar Road, Deoria and others Versus Deputy Director of Education and others (supra)**, learned Single Judge of this Court held as follows:

"The question of validity of the election is dependant upon several factors including the validity and genuineness of the members inasmuch the election held with the help of invalid and take members cannot be said to be valid election. Therefore, in any case, when the question arises as to whether the members who participated in the election were or were not the members of the general body, the Deputy Director of Education is under obligation to decide the said question before recording any finding on the question of validity of the election. The validity of election is to be determined in accordance with the provisions of Scheme of Administration."

15. In the case of **Tribhuwan Prasad at Present Manager Committee of Management, Keshav Ram Arya Adarsh Balika Higher Secondary School, Azamgarh Versus Deputy Director of Education 1st, VIIth Region, Gorakhpur and others (supra)**, learned Single Judge of this Court held as follow:

"List of members given by D.I.O.S. was made basis by authorized controller, concluded election of office bearer of Committee of Management Representation of contesting opposite parties about in correctness of list of members regarding exclusion of certain persons from becoming members not to be entertained once election process had already started- Held, D.I.O.S. Not justified in passing orders during process of election. D.I.O.S. directed to pass appropriate orders about approval or disapproval of Committee of Management elected in the election conducted by authorised controller.

The O.P. Pramod Gandhi or any other person, if aggrieved by the election held by the authorised controller, may seek such other legal remedy before the appropriate civil court for adjudication, about the validity of members of the Committee of Management, if so advised. Neither the D.I.O.S. nor the High Court under Article 226 of the Constitution is supposed to enter into the controversy about the genuineness, correctness and validity of list of members."

16. This Court has consistently held that once the election process has been started this court should not interfere. If any party has any grievance about the finalization of the voter list or about the voter list, it is always open to such person to challenge the same in the appropriate proceeding, namely, under the statute, Rules or Regulations or by filing suit in the Competent Court of law. Therefore,

we are of the view that after the declaration of the election programme, interference by this Court is wholly unjustified. After the order dated 02.05.2008 passed by the Ex. District Inspector of Schools the issue relating to voter list had not become final. The order of the District Inspector of Schools was subject to further scrutiny and verification and in pursuance thereof, the process of verification was started by the Authorized Controller. Such further proceeding has not been challenged by the petitioners-respondents rather petitioners-respondents submitted before the Authorized Controller for the purpose of verification. Therefore, it cannot be said that process started for the finalization of the voter list after 02.05.2008 was not justified. However, it is always open to the petitioners-respondents to challenge the voter list after the election in an appropriate proceeding, referred herein above.

17. In the result, Special Appeal is allowed. The impugned order dated 08th December, 2008 passed by the learned Single Judge is set aside and Writ Petition No.63078 of 2008. Rajeshwar Prasad Singh and others Versus State of U.P. and others stand dismissed. The Authorized Controller is directed to issue election programme from the date from where the election process has been stayed within a period of two weeks by all means and hold the election on the basis of impugned voter list within a period of two months by all means. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2009

BEFORE
THE HON'BLE H.L. GOKHALE, C.J.
THE HON'BLE DILIP GUPTA, J.

Special Appeal (Defective) No. 115 of 2006

State of U.P and another
...Appellants/Respondents
Versus
Shailendra Kumar Singh ...Respondents

Counsel for the Appellants:
Sri Dr. Y.K. Srivastava
Sri C.B. Yadav
S.C.

Counsel for the Respondent:
Sri Rahul Sripat

Dying in Harness Rules 1974- compossionate appointment-part time Tube well operator-working for 2 ½ every day-can not be treated as regular employee-direction for compassionate appointment given by learned Single Judge ignoring Division Bench decision-not sustainable.

Held: Para 8

The burden of proof that the respondent's father was in a regular employment was on the respondent. In the facts as stated, we are of the view that he has not discharged that burden. This apart the learned Single Judge has not considered the above Division Bench judgment which clearly discusses the law on this point. It is perhaps due to the fact that since the earlier judgment is not reported, the same has not been referred to by the learned Single Judge. Now the same has been pointed out to us and we have noted the facts. In our view, the learned Single Judge has erred in granting the benefits to the

respondent arising out of the dying-in-harness rules of 1974.

Case law discussed:

Writ Petition No. 51-469 of 2005, Special Appeal No. 117 of 2000

(Delivered by Hon'ble H.L. Gokhale, CJ)

1. Heard Dr. Y.K. Srivastava, learned Standing Counsel in support of this appeal. Mr. Rahul Sripat appears for the respondent.

2. The appellant-State seeks to challenge the order passed by the learned Single Judge whereby the learned Single Judge has allowed the writ petition filed by the respondent herein by an order dated 9.11.2005. The respondent had sought employment on compassionate ground on the footing that his father was in a regular employment of the State.

3. There is no dispute that the father of the respondent was working as a Tube-Well Operator. The only question is whether his employment was part time employment or regular employment. The learened Single Judge relied upon a judgment passed in writ petition of **Vijay Kumar Yadav vs. State of U.P. and others (Writ Petition No. 51-469 of 2005)** decided on 25.7.2005. The learned Single Judge has quoted from that order wherein it has been held that since the petitioner's father was continuously working for more than three years, he should be deemed to have worked in a regular vacancy and therefore, would be deemed to be treated as Government servant. On the same analogy, the learned Single Judge has given the benefit to the respondent herein since it was claimed that his father had worked for about 10 years when he died in harness on 21.12.1998.

4. The State has challenged this judgment and order and has relied upon a Division Bench judgment in the case of **Stat of U.P. and anoter vs. Smt. Phoola Devi** passed in **Special Appeal No. 117 of 2000** decided on 14.7.2000. It is submitted by Dr. Srivastava, learned Standing Counsel for the State of U.P. that this judgment was not considered by the learned Single Judge. He points out that the Division Bench in Special Appeal No. 117 of 2000 examined the relevant rules and also noted that part time Tube-well Operators were to be called as NALKOOP SAHAYAKS in pursuance of Government Order issued on 20.2.1992. The respondent is calling himself as an Assistant Tube-well Operator, which is a translation of from NALKOOP SAHAYAK. The relevant Government Order in terms says that all these NALKOOP SAHAYAKS are supposed to work for part time and service conditions will be as given in Annexure-2 thereto. This scheme lays down that their working period will be just about 2 ½ hours and they will be free for their own business after above working hours though they will be available in the village concerned. It was, accordingly, held that the writ petitioner would not claim compassionate appointment on the ground that she was widow of a part time Tube-well Operator who died in harness.

5. It is submitted by Dr. Srivastava, learned Standing Counsel that the respondent's father was not in a regular employment and therefore, could not get any benefit of the rule providing employment to a person under dying in harness scheme.

6. Mr. Rahul Sripat, learned counsel for the respondent, on the other hand,

points out that in the counter affidavit before the learned Single Judge, the appellants had accepted that father of the respondent was being paid salary like regular employees. He has relied upon paragraph 12 of the counter affidavit filed by the State before the learned Single Judge, which mentions that "The father of the petitioner was being paid salary like regular employee pursuant to order of this Hon'ble Court." Thus, it is clear that pursuant to an order passed in some other proceedings, the father of the respondent was being paid regular salary. This cannot take the case of the respondent any further.

7. Mr. Rahul Sripat could not deny that the appointment order of respondent's father specifically stated that he was a part time tube-well operator. He does not have any document which can show that the said appointment was subsequently converted into a regular appointment. The appointment order further shows that part-time Tube-well Operators were appointed on a limited salary of Rs.299/-. There is no document showing that the salary was revised any time. The only thing which is relied upon, is an averment in the counter affidavit filed by the State which has been referred to above and which states that in view of order of the Court, higher salary was being paid to the respondent's father.

8. The burden of proof that the respondent's father was in a regular employment was on the respondent. In the facts as stated, we are of the view that he has not discharged that burden. This apart the learned Single Judge has not considered the above Division Bench judgment which clearly discusses the law on this point. It is perhaps due to the fact that since the earlier judgment is not reported, the same has not been referred to by the learned Single Judge. Now the same has been pointed out to us and we have noted the facts. In our view, the learned Single Judge has erred in granting the benefits to the respondent arising out of the dying-in-harness rules of 1974.

9. In the circumstances, the appeal is allowed. The order of the learned Single Judge is set aside and the writ petition is dismissed. There is no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2009

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

Special Appeal No. 1868 of 2008

Registrar, Chhatrapati Shahuji Maharaj University Kanpur ...Appellant
Versus
Vinay Gupta and another ...Respondents

Counsel for the Appellant:
Sri Neeraj Tiwari

Counsel for the Respondents:
Sri S.K. Srivastava

Constitution of India Art. 226-Promisory Estappel Appeal-Admission in 3 years L.L.B. course-circular 19.9.1997 provides 40% marks in graduation where admission based on entrance test and 45% where direct admission-without entrance test-petitioner secured 35th position in merit list but admission refused-held-proper-university never allowed to pursue the course-No question of promissory estoppels.

Held: Para 23

Respondent no.1 being not possessed of the minimum eligible qualification prescribed, the denial of admission to him by the University is justified. No principle of promissory estoppel can be pressed by the respondent no.1 in support of his admission.

Case law discussed:

(2004) 4 SCC 513, (1999) 7 SCC 120.

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

1. Heard Sri Neeraj Tiwari, learned counsel for the appellant, Sri S.K. Srivastava, learned counsel for respondent no.1 and learned Standing Counsel for respondent no.2.

2. Learned counsel for the parties agree that this special appeal be decided at this stage, without calling for any further affidavits.

3. This is an special appeal against the judgement and order of the Hon'ble Single Judge dated 11th November, 2008, whereby the writ petition filed by respondent no.1, Vinay Gupta has been allowed.

4. Brief facts necessary for appreciating the issues raised in the special appeal are as follows:

5. The appellant University published a notice for admission to LL.B three years degree course. The respondent no.1 applied in pursuance thereof and was permitted to appear in the entrance test, in which out of nearly 4,000 students he secured 35th position. However, he was not granted admission by the University on the ground that he did not have 45% marks at the graduation level. The denial of admission was challenged by the respondent no.1 in the aforesaid writ petition, the writ petition has been allowed by the Hon'ble Single Judge.

6. The Hon'ble Single Judge under the impugned judgment has held that the circular of Bar Council of India dated 19th September, 1997 has been misinterpreted by the University. The petitioner respondent no.1 cannot be denied admission after declaration of the results of Entrance Test, as he had not concealed or misrepresented any fact at the time of filing of the admission form or at any other stage. It has further been observed that in case the petitioner did not have required minimum percentage at graduation level, it was for the University to reject the admission form of the petitioner at the threshold.

7. Sri Neeraj Tiwari, learned counsel for the appellant-University allenging the judgment and order of the Hon'ble Single Judge contended that there is no dispute to the minimum requirements provided by the Bar Council of India vide circular dated 19th September 1997. He submits that under said circular if there is an entrance test, the minimum percentage of marks to have been achieved by the candidate appearing in the Entrance Test at the graduation level should be 40%. If there is no entrance test, the pass percentage at the Graduation Level should be 45 % for LL.B. Admission. Learned counsel for the appellant submits that there is no dispute that entrance test has been held for admission to LL.B. Three Years degree Course by the University. The University had decided that even for candidates undergoing the entrance test, those who have obtained at least 45% marks at the graduation level would alone be eligible for being considered for admission.

8. Learned counsel for the appellant submits that such prescription of higher marks does not violate any of the provision of the circular of the Bar Council of India and is legally permissible. In support thereof, he has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **State of Tamil Nadu & Anr. vs. S.V. Bratheep (Minor) & Ors**., reported in *(2004) 4 SCC 513*.

9. Learned counsel for respondent no.1 opposing the contention raised on behalf of the University submits that requirement of at least 45% marks at the graduation level by the University for being eligible for being considered for admission to LL.B. Three years degree course is contrary to the circular issued by the Bar Council of India. He submits that the circular issued by the Bar Council of India is binding upon all the Universities so far as law courses are concerned. He clarifies that the petitioner-respondent no.1 had not concealed or misrepresented any fact at the time of filling of the admission form. The University ought to have rejected the form itself, if the petitioner was not eligible and should not have permitted the respondent no.1 to appear in the entrance test. Having permitted the respondent no.1 to undertake the entrance test, the University cannot deny admission on the plea that respondent no.1 does not fulfil the prescribed qualification.

10. We have considered the submissions made by the learned counsel for the parties and have gone through the records.

11. There is no dispute that the Bar Council of India vide circular dated 19th September, 1997 has provided as follows:

"If there is entrance test, the percentage should be 40 but if there is no entrance test the percentage should be 45 for LL.B. Admission."

The marks obtained by the respondent no.1 at graduation level are admittedly less than 45%.

12. The issue which is up for consideration is as to whether when an entrance test is conducted for admission to LL.B. Three Years Degree Course, the required percentage at the graduation level as per the Bar Council of India's Circular should be 40% or, whether additional condition of having 45% marks in graduate level examination can be introduced by the University, and whether such additional prescription by the University would contravene the provisions of the circular of the Bar Council of India.

13. The statement of the learned counsel for the appellant that such prescription of an additional qualification by the University is legally justified is well founded and squarely answered by the Hon'ble Supreme Court as detailed below.

14. The question as to whether the State Authorities who are conducting admission to Post Graduate Medical Courses can prescribe any qualification in addition to those laid down by the Medical Council of India came up for consideration before the Constitutional Bench of the Hon'ble Supreme Court of India in the case of **Dr. Preeti Srivastava**

& anr. vs. State of M.P. & Ors. reported in *(1999) 7 SCC 120*. The Hon'ble Supreme Court in the said case held that although the Medical Council has power to lay the minimum qualification with regard to admission to various courses but prescription in addition thereto by the State Government will not be illegal. The State Government was held entitled to lay down any additional or requisite qualification in the said case.

15. Following was laid down by the Hon'ble Supreme Court in the case of **Dr. Preeti Srivastava (Supra)** specially in paragraphs-45 and 46:

"**45**. *In Ambesh Kumar (Dr) v. Principal, L.L.R.M. Medical College a State order prescribed 55% as minimum marks for admission to postgraduate medical courses. The Court considered the question whether the State can impose qualifications in addition to those laid down by the Medical Council of India and the regulations framed by the Central Government. The Court said that any additional or further qualifications which the State may lay down would not be contrary to Entry 66 of List I since additional qualifications are not in conflict with the Central regulations but are designed to further the objective of the Central regulations which are to promote proper standards*. The Court said: *(SCC p. 552, para 26)*

"The State Government by laying down the eligibility qualification namely the obtaining of certain minimum marks in the MBBS Examination by the candidates has not in any way encroached upon the regulations made under the Indian Medical Council Act nor does it infringe the Central power provided in Entry 66 in List I of the Seventh Schedule to the Constitution. The order merely provides an additional eligibility qualification."

None of these judgements lays down that any reduction in the eligibility criteria would not impinge on the standards covered by Entry 66 of List I. All these qualifications --- qualifications in addition to judgements dealt with additional what was prescribed by the Central regulations or statutes.

46 *……Of course, once the minimum standards are laid down by the authority having the power to do so, any further qualifications laid down by the State which will lead to the selection of better students cannot be challenged on the ground that it is contrary to what has been laid down by the authority concerned. But, the action of the State is valid because it does not adversely impinge on the standards prescribed by the appropriate authority ....."*

It would be worthwhile to reproduce paragraph-9 of the judgment of the Hon'ble Supreme Court relied upon by the learned counsel for the appellant in the case of **State of Tamil Nadu & Anr. (Supra)**, which reads as follows:

"9. Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of admission but if certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards fixed by the State in exercise of powers under Entry 25 of List III insofar as they adversely affect the standards laid down by the Union of India or any other authority functioning under it. Therefore,

what is to be seen in the present case is whether the prescription of the standards made by the State Government is in any way adverse to, or lower than, the standards fixed by AICTE. It is no doubt true that AICTE prescribed two modes of admission--one is merely dependent on the qualifying examination and the other, dependent upon the marks obtained at the common entrance test. The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the Qualifying examination in order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by AICTE, can it be said that it is in any manner adverse to the standards fixed by AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by AICTE would allow admission only on the basis of the marks obtained in the qualif0ng examination, the additional test made applicable is the common entrance test by the State Government. If we proceed to take the standard fixed by AICTE to be the common entrance test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either even, the streams proposed by AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr. Preeti Srivastava case. It is no doubt true, as noticed by this Court in Adhiyaman case that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of A/CTE in the present case are such which are not attainable to which are not within the reach of the candidates who seek admission for engineering colleges. It is not a very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by a series of decisions of this Court including Dr. Preeti Srivastava case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education."

16. The aforesaid judgement relied upon by the learned counsel for the appellant specifically answers the issue which has been raised in the present special appeal. In the case of **State of Tamil Nadu (Supra)** the Hon'ble Supreme Court examined the standard prescribed by AICTE with regard to the examination and eligibility criteria for appearing in the common entrance test. In paragraph-9 of the judgement as quoted above, it has been laid down by the Hon'ble Supreme Court that for the common entrance test, the standard fixed by the State Government of having obtained certain marks higher than the minimum by the AICTE are legally justified.

17. In view of the ration laid down by the Hon'ble Supreme Court in above two cases, it is clear that the prescriptions by the University of having at least 45% marks in the qualifying examination i.e. graduation course is an additional qualification which is fully supported by the ratio of the judgement of the Hon'ble Supreme Court in the case of **Dr. Preeti Srivastava (Supra)** and **State of Tamil Nadu (Supra)**.

18. Learned counsel for the respondent no.1 submits that once the University has issued an Admit Card to a candidate, it cannot reject the candidature of such candidate at a later stage. In support thereof he has placed reliance upon the judgement of the Hon'ble Supreme Court in the case of Shri Krishan vs. The Kurukshetra University, Kurukshetra reported in AIR 1976 SC 376, paragraph-7.

19. The judgement relied upon by the learned counsel for respondent no.1 is with reference to a different set of circumstances. In that case candidate was granted admission and thereafter he was also permitted to undertake the first course and then to take the examination of Part-I of LL.B. Course in April, 1972, subsequently the University cancelled his candidature. The Hon'ble Supreme Court in these facts held that if the University acquiesced to the infirmities which existed at the time of admission and allowed the appellant to undertake the course and then to appear in Part I examination in April, 1972, then with reference to the University Statute, the University had no power to withdraw the candidature of the appellant. In the present case, the University has not granted admission to the respondent no.1 in LL.B. Three years Degree Course and he has been denied such admission on the ground that respondent no.1 does not fulfil the minimum eligibilities as detailed in brochure published by the University at the threshold of admission.

20. Learned counsel for the appellant has also referred to the brochure which has been annexed as Annexure C.A.-1 to the writ petition specifically paragraph 10 read with paragraph 19 under the heading of "Aharta Sambandhi Niyam". It contains a specific condition that for permitting a candidate to appear in the entrance examination, the minimum eligibility is of having passed qualifying 'examination with 45%. The University has not admitted the respondent no.1 in the LL.B. Three Years Degree Course, because of lack of the said eligibility. The principle of promissory estoppel cannot be pressed by the learned counsel for the respondent no.1 for evading the requirements so prescribed. It is not the case of respondent no.1 that he has been granted admission in LL.B. Three Years Degree Course and he is not being permitted to appear in Part-I examination after he has completed his first year course.

21. We may also refer to the other judgment, reliance whereof has made by the respondent no.1 i.e. the judgement of the Hon'ble Supreme Court in the case of Dolly Chhanda vs. Chairman, JEE and Ors. reported in 2004 (10) SBR 424.

22. The Hon'ble Supreme Court in the said case itself has laid down that the general rule is that while applying for any course of study or a post, a person must possess the eligibility qualification on the last date fixed for such purpose and that

there can be no relaxation. The judgment relied upon by the learned counsel for respondent no.1 whereby the Hon'ble Supreme Court held that every infraction of the rule relating to submission of proof need not necessarily result in rejection of candidature. The said case is clearly distinguishable in the facts of the present case and does not help the respondent no.1.

23. Respondent no.1 being not possessed of the minimum eligible qualification prescribed, the denial of admission to him by the University is justified. No principle of promissory estoppel can be pressed by the respondent no.1 in support of his admission.

24. Therefore, the judgment and order of the Hon'ble Single Judge dated 11th November, 2008 cannot be legally sustained and is hereby set aside,:

25. The present special appeal is allowed. The writ petition filed by respondent no.1 is dismissed. No order is passed as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.02.2009

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 2975 of 2009

Ramji Shukla ...Applicant
Versus
State of U.P. and another
...Opposite Parties

Counsel for the Applicant:
Sri Beni Madhav Pandey
Sri K.K. Mishra

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

Code of Criminal Procedure-Section 210-complaint dismissed by Magistrate on ground for same occurrence FIR lodged-police submitted charge sheet-complaint for same offence-not maintainable-held-illegal-charge filed for allegation of murder of his son-without allegation of rash and negligence-direction issued to proceed with complaint on merit.

Held: Para 8

In above view, C.J.M., Allahabad committed a manifest error of law in dismissing the complaint of the applicant under Section 203 Cr.P.C. for the reason that the police has submitted the charge sheet in respect of the same incident. Happening of the same incident is not material for applicability of Section 210 Cr.P.C. for conducting a single trial. What is important is that the offence alleged is the same. Consequently rejection of complaint by C.J.M., Allahabad by passing the impugned order is wholly illegal and cannot be sustained in law. The charge which was leveled by the applicant in his complaint were that of causing murder of his son by repeatedly crushing him under the vehicle. The said charge of murder is an independent charge of causing death but not by rash and negligence act.

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

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

2. The applicant complainant Ramji Shukla has approached this Court with the prayer to quash the impugned order dated 3.10.2008 passed by C,J.M., Allahabad in complaint case no. 23676/2008 (Ramji Vs. Sonu Agrawal), under Sections 279, 304-A, 427 I.P.C., P.S. Naini, District Allahabad.

3. A perusal of the complaint instituted by the applicant, vide annexure No. 1 to this application, before C,J.M., Allahabad, registered as complaint Case NO. 23676/2008 (Ramji Vs. Sonu Agrawal), indicates that the allegations leveled were that of causing murder of son of applicant Shivanshu aged about 16 years by crushing him under vehicle no. UP 70 AV 2700.

4. It transpires that when the complaint was filed on 14.8.2008, C.J.M., Allahabad was apprise of the fact that in respect .pf the said incident, a FIR vide crime no. 371 of 2008, under sections 279, 304 A, 427 I.P.C. was already registered which is pending investigation. C.J.M., Allahabad, therefore, stopped the proceedings of the complaint case and called for a report from the police who reported that crime was investigated and a charge sheet had already been submitted against the accused persons on 20.7.2008 for offences mentioned.

5. After receiving the police report in respect of filing of charge sheet, C.J.M., Allahabad dismissed the complaint of the applicant under Section 203 Cr.P.C. for the reason that the police has submitted the charge sheet in the above noted offences of causing death by rash and negligence act punishable under Sections 304, 379, 427 I.P.C.

6. The controversy involved in this case revolves around the applicability of Section 210 Cr.P.C. For a clear understanding Section 210 Cr.P.C. is reproduced herein below:

"(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject-matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

7. Above phraseology of Section 210 Cr.P.C. indicate that what is sine quo non for applicability of the said Section is commission of the same offence. If the offence is different, then Section 210 Cr.P.C. does not have any application at all for clubbing the prosecution. This aspect is clear from conjoint reading of Sections 210 (1) and 210 (3) Cr.P.C.

8. In above view, C.J.M., Allahabad committed a manifest error of law in dismissing the complaint of the applicant under Section 203 Cr.P.C. for the reason that the police has submitted the charge

sheet in respect of the same incident. Happening of the same incident is not material for applicability of Section 210 Cr.P.C. for conducting a single trial. What is important is that the offence alleged is the same. Consequently rejection of complaint by C.J.M., Allahabad by passing the impugned order is wholly illegal and cannot be sustained in law. The charge which was leveled by the applicant in his complaint were that of causing murder of his son by repeatedly crushing him under the vehicle. The said charge of murder is an independent charge of causing death but not by rash and negligence act.

9. In view of what I have observed above, the impugned order dated 3.10.2008 passed by C.J.M., Allahabad cannot be sustained at all and is hereby set aside. C.J.M., Allahabad cannot be sustained at all and is hereby set aside. C.J.M., Allahabad is directed to proceed with the complaint case instituted by the applicant in accordance with law as the charge sheet submitted against the accused persons by the police is in respect of different offences all together.

With the aforesaid directions, this application is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 14225 of 2003

Shahid Ahmad Khan ...Petitioner
Versus
Deputy Labour Commissioner, Agra Region, Agra and another ...Respondents

Counsel for the Petitioner:
Ms. Biushra Maryan
Sri K.P. Agarwal
Suman Sirohi
Sumati Rani Gupta

Counsel for the Respondents:
Sri Dhruva Narayan
S.C.

Industrial Dispute Act 1947-Section 10 (1)-petitioner working as sales representative in Pvt. Company after termination approached before Labour Commissioner-who refused to refer the dispute as petitioner is not for work man-held-it is for the court or Tribunal and to conciliation officer who works as representative of Govt.-who exceeded to jurisdiction-order can not be sustained.
Held: Para 9 & 10

In a similar matter in TELCO Convoy Drivers Mazdoor Sangh & Anr. Vs. State of Bihar & Ors., 1989 (3) SCC 271, the Supreme Court held that the dispute, as to whether the persons raising the dispute, are the workmen or not, the same could not be decided by the Government in exercise of its administrative function under Section 10 (1) of the Industrial Disputes Act. The said judgment is squarely applicable to the present facts and circumstances of the case.

The Court is of the opinion that the State Government exceeded its jurisdiction and has attempted to usurp the power of the Tribunal by adjudicating a dispute which power was not vested with the government.

Case law discussed:
1985 (51) FLR 71, 2002 (4) SCC 490, 2005 (2) UPLBEC 1181, 1970 (20) FLR 297, 1953 SCR 834, 1978 (36) FLR 195, 1989 (3) SCC 271

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

1. Heard Ms. Bushra Maryan, the learned counsel for the petitioner and Shri

Dhruva Narayan, the learned Senior Counsel appearing for respondent no. 2.

2. It is alleged that the petitioner was working as a sales representative in the industrial establishment of respondent no. 2, which is a pharmaceutical company and that, the provisions of Sales Promotion Employees (Condition of Service) Act, 1976 was applicable to the petitioner. It is alleged that the services of the petitioner was terminated by an order dated 26th of October, 2002 and the petitioner, being aggrieved, raised a conciliation proceeding under the Industrial Disputes Act. It is alleged that there was a failure in the conciliation proceedings and the Deputy Labour Commissioner, after considering the matter, issued an order dated 13th March, 2003, declining to refer the dispute for adjudication under Section 4-K of the U.P. Industrial Disputes Act on the ground that it was not expedient to refer the dispute for adjudication. The reason for declining to refer the dispute was that the petitioner does not come under the category of the definition of the word "workman" as defined under the U.P. Industrial Disputes Act. The petitioner, being aggrieved by the order of the Deputy Labour Commissioner, has filed the present writ petition.

3. The learned counsel for the petitioner submitted that the Deputy Labour Commissioner, which is the delegated authority of the State Government, has committed a manifest error in declining to refer the dispute, and that the authority had no power or jurisdiction to decide the question as to whether the petitioner was a workman or not under the U.P. Industrial Disputes Act and that the power to decide this question only remains with the Labour Court or the Industrial Tribunal. The learned counsel submitted that the State Government or its delegated authority was vested with the power only to a limited area, namely, as to whether an industrial dispute existed or was apprehended between the parties. The question, whether the petitioner was a workman or a sales promotion employee, was not within the domain of the State Government to consider or decide this matter.

4. In support of her submission, the learned counsel placed reliance upon a decision of the Supreme Court in **Ram Avtar Sharma & Ors. Vs. State of Haryana and Anr.,** 1985 (51) FLR 71 and in the case of **Sharad Kumar Vs. Government of NCT of Delhi**, 2002 (4) SCC 490. The learned counsel also placed reliance upon a decision of this Court in **Radhey Shyam Mishra Vs. State of U.P. & Ors.**, 2005 (2) UPLBEC 1181.

5. On the other hand, the learned counsel for the respondent submitted that the State Government was justified in refusing to refer the dispute on the ground that the petitioner was not a workman and that the authority had satisfied itself subjectively on the basis of the material evidence, that was brought before it, to come to a conclusion that it was not expedient to refer the dispute for adjudication. The learned counsel submitted that since the petitioner was not a workman under the Industrial Disputes Act, no reference could be made for adjudication under Section 4-K of the U.P. Industrial Disputes Act.

6. In **Western India Match Company Ltd. Vs Western India Match Co. Workers Union & Ors.**, 1970 (20)

FLR 297, the Supreme Court, following the ratio of the decision in **State of Madras Vs. C.P. Sarathy,** 1953 SCR 834, held that the State Government only issues an administrative order while exercising its powers. The Supreme Court held that the Government could not go into the merits of the dispute and that its functioning was only to refer a dispute for adjudication so that the industrial relations between the employer and its employees may not continue to remain disturbed, and that the dispute, if any, is resolved through a judicial process as speedily as possible. This decision was considered by the Supreme Court again in **Shambu Nath Goyal Vs. Bank of Baroda, Jullundur,** 1978 (36) FLR 195, in which it was held that a reference under Section 10 of the Industrial Disputes Act was an administrative act of the government, on the basis of an opinion formed by the Government as to the factual existence of an industrial dispute.

7. In **Ram Avtar Sharma** (Supra), the Supreme Court again reiterated that the Government only performs an administrative act while making or refusing to make a reference under Section 10 of the Industrial Disputes Act, and that it cannot delve into the merits of the dispute or take upon itself the determination of the lis between the parties. The Supreme Court held that the appropriate Government could only refer when a dispute existed or was apprehended, and for that purpose, the State Government was permitted to determine, prima facie, whether an industrial dispute existed or that the claim was frivolous or bogus. Similar view was again reiterated by the Supreme Court in **Sharad Kumar's** case (Supra).

8. In the light of the aforesaid decisions, it is necessary to examine the reason given by the authority to ascertain as to whether the reasons given was germane to the issue or not. From a perusal of the impugned order, it is clear that the State Government has declined to raise the dispute on the ground that the petitioner was not a workman under the Industrial Disputes Act. In my opinion, the reasons given by the authority tantamount to an adjudication, which is impermissible. Adjudication is the function of the Tribunal or the Labour Court, and the State Government or its delegated authority cannot remit to itself that function, which is exclusively vested with the Industrial Tribunal or the Labour Court. Consequently, the State Government was not competent to hold that the petitioner was not a workman within the meaning as defined under the U.P. Industrial Disputes Act. Such a matter could only be adjudicated or decided by the Tribunal or the Labour Court on the basis of the material placed before it by the parties.

9. In a similar matter in **TELCO Convoy Drivers Mazdoor Sangh & Anr. Vs. State of Bihar & Ors.**, 1989 (3) SCC 271, the Supreme Court held that the dispute, as to whether the persons raising the dispute, are the workmen or not, the same could not be decided by the Government in exercise of its administrative function under Section 10 (1) of the Industrial Disputes Act. The said judgment is squarely applicable to the present facts and circumstances of the case.

10. The Court is of the opinion that the State Government exceeded its jurisdiction and has attempted to usurp the

power of the Tribunal by adjudicating a dispute which power was not vested with the government.

11. In view of the aforesaid, the impugned order, passed by the Deputy Labour Commissioner, declining to refer the dispute cannot be sustained and is quashed. The writ petition is allowed. The matter is again remitted to the authority concerned to exercise its powers and refer the dispute for adjudication if the industrial dispute exists or is apprehended. The order shall be passed by the authority within eight weeks from the date of the production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 78117 of 2005

Bhrigu Nath Pandey ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioner:
Sri Salil Kumar Rai

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

Constitution of India-Art. 226-cancellation of bid-for fisheries Rights-on ground of inadequate amount-bid accepted-petitioner deposited ½ amount-before cancellation notice or show cause not required.

Held: Para 8

In view of the aforesaid, the impugned order cancelling the auction does not suffer from any error of law. In fact, the Supreme Court in the case of Ram and Shyam Company (Supra) held that the Government was entitled to reject the highest bid if it found that the price offered was inadequate. The Supreme Court, further held, that after rejecting the offer, it was obligatory upon the Government to act fairly, and that at any rate, it should not act arbitrarily.

Case law discussed:
(1985) 3 SCC 267, 2004 (97) RD 675

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

1. Heard Shri Salil Kumar Rai, the learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. An advertisement dated 5th of September, 2005 was issued by the Deputy District Magistrate, Sahjanwa, District Gorakhpur, in which it was notified that an auction would be held on 14th of September, 2005 for grant of fisheries' rights in various villages, which included Village Bikora, Post Bikora, Tehsil Sahjanwa, District Gorakhpur having an area of 0.713 hectares. It is alleged that the petitioner participated in the said auction and his bid of Rs.12,500.00 was the highest, and, at the fall of the hammer, deposited a sum of Rs.3,125.00, being 1/4th of the bid amount. Before the auction could be finalised, the Deputy District Magistrate, by an order dated 27th of September, 2005, cancelled the auction, on the ground that the bid was inadequate, and directed that a fresh auction should be held. The petitioner, being aggrieved by the re-auction and the rejection of his bid, has filed the present writ petition.

3. At the time of the filing of the writ petition, it was urged by the petitioner that there was no irregularity in the publication of the auction and that the petitioner made an offer of Rs.75,000.00 instead of Rs.12,500.00. On that basis, the Court, by an interim order dated 23rd of December, 2005, stayed the re-auction till the next date of listing, provided the petitioner deposited a further sum of Rs.19,000.00 before the Tehsildar to prove his bona fides. The learned counsel for the petitioner submitted that pursuant to the interim order, the petitioner had deposited the amount of Rs.19,000.00.

4. The learned counsel for the petitioner submitted that there was no irregularity in the publication of the auction, and consequently, the auction could not have been cancelled on the sole ground that the consideration was inadequate. The learned counsel further submitted, that assuming without admitting, that the auction could be cancelled on account of inadequacy of the consideration, in that event, before cancelling, the petitioner should have been given an opportunity to revise his bid. Further, the learned counsel submitted that the impugned order cancelling the auction was violative of the principles of natural justice, and that, an opportunity of hearing was required to be given, which was also contemplated and provided under Rule 115-S of the U.P. Zamindari Abolition and Land Reforms Rules, 1952. In support of his submission, the learned counsel has placed reliance upon a decision of the Supreme Court in Ram and **Shyam Company Vs. State of Haryana & Ors.,** (1985) 3 SCC 267, wherein the learned counsel placed emphasis upon the observation made by the Supreme Court in paragraphs 13 and 18 of its judgment, which provided that an opportunity ought to have been given to the petitioner to improve his bid when his bid was rejected on the ground that it did not represent the adequate market consideration.

5. Having heard the learned counsel for the petitioner and having perused the counter affidavit filed by the State, the Court is of the opinion that the submissions raised by the learned counsel for the petitioner is patently misconceived and bereft of merit. The judgment cited by the learned counsel is not applicable to the present facts and circumstances of the case. In **Ram and Shyam Company** (supra), the Supreme Court found that the petitioner's bid was the highest but was rejected on the ground that another competitor arbitrarily gave an enhanced bid subsequently. It was, in that light, that the Supreme Court held that an opportunity of hearing should have been provided to the petitioner to enhance his bid, but, this is not the case in the present scenario.

6. In the present case, the bid has been cancelled by the State authorities on the ground that the bid was inadequate. No doubt, detailed reasons have not been given in the impugned order, but the counter affidavit reveals the ground for cancellation of the auction. The State has come out with the stand that the High Court had delivered a judgment in **Babban Vs. State of U.P. through the Principal Secretary, Revenue Department & Ors.,** decided on 6th October, 2004, reported in 2004 (97) RD 675, in which the Court had directed that the fisheries' lease in future should be granted at the minimum rate of Rs.10,000.00 per hectare per year. This

judgment was delivered prior to the advertisement issued in the present case. Since the direction of the Court was violated, the advertisement itself became incorrect. The reasoning given by the authority in the impugned order was correct, namely, that the bid was inadequate, though detailed reasons were not given, but that became immaterial, since a direction of the Court was not followed by the authorities.

7. Admittedly, the area of the pond is less than a hectare and a fisheries' right for 10 years' was required to be auctioned. Consequently, the bid given by the petitioner to the tune of Rs.12,500.00 was grossly inadequate.

8. In view of the aforesaid, the impugned order cancelling the auction does not suffer from any error of law. In fact, the Supreme Court in the case of **Ram and Shyam Company** (Supra) held that the Government was entitled to reject the highest bid if it found that the price offered was inadequate. The Supreme Court, further held, that after rejecting the offer, it was obligatory upon the Government to act fairly, and that at any rate, it should not act arbitrarily.

9. In the present case, the authorities have cancelled the auction on the ground that the price bid was grossly inadequate and has directed that a fresh auction should be held. No illegality or arbitrariness has been committed by the State authorities in directing re-auctioning of the fisheries' right.

10. In so far as the provisions of Rule 115-S of the U.P.Z.A. & L.R. Rules is concerned, this Court finds that the initiation of the auction though the advertisement itself was incorrect and against the directions of the High Court given in the judgment of **Babban** (Supra). Consequently, the stage of Rule 115-S had not as yet started.

11. The learned counsel for the petitioner in the end submitted that he was willing to pay a price of Rs.75,000.00 for the fisheries' rights and that his bona fides has been tested since he has deposited 1/4th of the amount as per interim order of the Court. In my view, the mere fact that the petitioner has deposited some amount pursuant to an interim order of the Court only prima facie proves his bona fides, but this, by itself, could not entitle the petitioner to get the fisheries' right, especially when other bidders are not before the Court to match the price offered by the petitioner. The law is very clear, namely, that the fisheries' right has to be settled by auction. An offer given by the petitioner before the Court does not become a public auction, especially when other bidders are not before the Court. The Court had entertained the writ petition by directing the petitioner to deposit the amount as an interim measure to show his bona fides. By entertaining the writ petition, the Court did not mean that a fisheries' right would eventually be granted. Now, the version of the State is before the Court and, one finds the reason for the cancellation of the bid which was done in terms of the directions of the Court in the case of **Babban** (supra).

12. In view of the aforesaid, this Court does not find any error in the impugned order. The writ petition fails and is dismissed. It is however clarified that the amount so deposited by the petitioner pursuant to the fall of the hammer and pursuant to the interim order

of the Court, shall be refunded to the petitioner within four weeks from the date of moving such an application along with a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2009

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

Civil Misc. Habeas Corpus Writ Petition
No. 52691 of 2008

Kanak Khandelwal and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Pankaj Kumar Shukla

Counsel for the Respondents:
Sri Anil Kumar Pandey
Sri J.K. Chakraverty
A.G.A.

Constitutions of India Art. 226-Habeas Corpus Writ-Custody of minor child-by grand father-minor living happily with Nana Nani getting education in English School-minor son the only eye witness of the murder of his mother-Father already in jail-welfare of minor parampunt-consideration-custody of such minor can not be handed over to the grand father.

Held: Para 8

From the facts and circumstances of the case, it appears that petitioner no. 1 is the only witness of murder of his mother, which is alleged to have been committed by the father of petitioner no. 1. He has already deposed under section 164 Cr.P.C. against his father and on the basis of his statement the father of petitioner no. 1 has been detained in custody. If the child is handed over to his grand father i.e. the father of Ravi Khandelwal, the possibility that the evidence in the case shall be destroyed cannot be over ruled. It has also born out from the facts and circumstances of the case that the child has not been illegally detained and he is happily living with his Nana and Nani. I do not find it fit to hand over the custody of the child to petitioner no. 2, the grand father of petitioner no. 1.

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

1. Petitioners Kanak Khandelwal (minor) and Shyam Sundar Khandelwal filed this Habeas Corpus Writ Petition for issuance of a writ order or direction in the nature of mandamus directing the respondents to produce the corpus of petitioner no. 1 Kanak Khandelwal who is in illegal custody of respondent no. 2 to 7.

2. Present petition has been preferred on the ground that the daughter of Suresh Chand Khandelwal, respondent no. 2 was married with Ravi Khandelwal son of petitioner no. 2 on 4.3.03. After the marriage Ravi Khandelwal and daughter of Suresh Chand Khandelwal lived happily and petitioner no. 1 Kanak Khandelwal was born out of the wedlock on 2.3.2004. Petitioner no. 2 admitted petitioner no. 1 in Euro Kids Play School Radhapuram, National Highway 2, Mathura, Kanak is still studying. It is alleged that in the night of 20/21-6-2008 some unknown persons had committed murder of the mother petitioner no. 1 Kanak. Ravi Khandel, the father of petitioner no. 1, lodged a F.I.R. at P.S. Highway, District Mathura about the occurrence, which was registered as case crime no. 268 of 2008 against unknown persons. After the occurrence, the Media had taken interview of respondent no. 2 to 7, who stated before the Media that they

had no complaint against the husband and his family members. They have never tortured the daughter of respondent no. 2, who was married to Ravi Khandelwal. It is further alleged that the wife of Ravi Khandelwal was cremated with the mutual consent of the parties. Respondent no. 2, his wife Smt. Shyam Lata Khandelwal respondent no. 3, Pawan Khandelwal respondent no. 4 son of respondent no. 2, Rachna Khandelwal wife of Pawan Khandelwal respondent no. 5, Pankaj Khandelwal son of Suresh Khandelwal respondent no. 6 and Sonu Khandelwal respondent no. 7 forcibly took away petitioner no. 1 after cremation. Petitioner no. 2 being real grand father of petitioner no. 1 is entitled to the custody of petitioner no. 1. Notices were issued to the respondents to produce petitioner no. 1 before this court on 16.2.09.

3. Counter affidavit has been filed. As per the counter affidavit the case of the respondents is that daughter of respondent no. 2 was married to Ravi Khandelwal on 4.3.03. Ravi Khandelwal tortured his wife for demand of cash and car etc. During investigation statement of petitioner no. 1 was recorded in the case registered on the basis of the report lodged by Ravi Khandelwal regarding murder of his wife. Petitioner no. 1 in his statement under section 164 Cr.P.C. has specifically stated that on the day of occurrence. Ravi Khandelwal accompanied by one boy came to the house. The boy accompanying Ravi Khandelwal tied the hands of petitioner no. 1 with a Chunni, locked the gate of the house and his father committed the murder of his mother by throttling. It has further been contended that petitioner no. 1 is living with his Nana and Nani as per his own free will. Ravi Khandelwal is confined in jail in the murder of his wife, the mother of petitioner no. 1.

4. Statement of petitioner no. 1 Kanak was recorded before this court, who has deposed that he is living with his Nana and Nani and receiving education in Adarsh Vidya Mandir. He was not forcibly taken by his Nana and Nani. He wants to stay with them. He further stated that if he goes with his Dada and Dadi, they would kill him in the manner they killed his mother.

5. Learned counsel for the petitioner has contended that petitioner no. 1 is under the influence of his Nana and Nani. Petitioner no. 2 is real grand father who has retired from the Bank services and if the child is left in his company, he would happily go with petitioner no. 2. However, at the time of hearing petitioner no. 2 was not present in court. A request was made that the child be put in some Hotel at Allahabad, so that petitioner no. 2 may come and meet him on the next date of hearing.

6. Per contra learned counsel for the respondents pleaded that it is clear from the facts and circumstances of the case that petitioner no. 1 is only the witness of the murder of his own mother. As per his statement the murder was committed by his father. He is happily living with his Nana and Nani and his receiving education. If the custody of child is handed over to petitioner no. 2 who is father of the accused Ravi Khandelwal, the accused of the murder of his wife, the evidence in the can be destroyed either by eliminating the child or by tutoring him. There is nothing on record to suggest that

petitioner no. 1 is in illegal custody of the respondents.

7. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

8. From the facts and circumstances of the case, it appears that petitioner no. 1 is the only witness of murder of his mother, which is alleged to have been committed by the father of petitioner no. 1. He has already deposed under section 164 Cr.P.C. against his father and on the basis of his statement the father of petitioner no. 1 has been detained in custody. If the child is handed over to his grand father i.e. the father of Ravi Khandelwal, the possibility that the evidence in the case shall be destroyed cannot be over ruled. It has also born out from the facts and circumstances of the case that the child has not been illegally detained and he is happily living with his Nana and Nani. I do not find it fit to hand over the custody of the child to petitioner no. 2, the grand father of petitioner no. 1.

9. The writ petition is devoid of merit and is liable to be dismissed.

10. The petition is dismissed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.02.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 63409 of 2005

State of U.P. and another...Petitioners
Versus
Ram Chandra Ram and another
...Respondents

Counsel for the Petitioners:
Sri Ajay Kumar
Sri Amit Sthalekar
S.C.

Counsel for the Respondents:
Sri Dhananjay Kumar Rai

U.P. Retirement Benefit Rules 1961-Section 2 (c)-readwith civil Services classification Regulation-Regulation 368-work charge employer appointed in 1968 Regularised on 31.12.93 retired on 31.08.01-gratuity w.e.f. Regulation-till the date of retirement given but the initial date of appointment not included-authorised controller found entitled the period of initial appointment in work charge establishment be counted-held-the status of work charge employee a govt. employee holding substantive post-provisions of payment of gratuity Act not applicable-order passed by authorized controller without jurisdiction-However the employee may approach before the state authority for redressal of grievances-gratuity if payable w.e.f. 1968 to till the retirement-same be given within 2 month.

Held: Para 6

A perusal of the aforesaid definition of the word employee clearly indicates that employee in an establishment, factory, etc. will not include a person who holds a post under a State Government and is

governed by any Act or by any Rules which provides for the payment of gratuity. The amount of gratuity under the Act is determined under Section 7 and only a person who is eligible for payment of gratuity can file such an application. Section 4 of the Act contemplates that gratuity shall be payable to an employee on termination of his employment. A conjoint reading of Section 4 read with Section 7 of the said Act coupled with the definition clause of the word "employee" as defined in Section 2 (e) will make it absolutely clear that a Government employee who is governed by separate Act and Rules relating to payment of gratuity is not entitled to file an application under the Payment of Gratuity Act. Consequently, the impugned order passed by the controlling authority cannot be sustained and is quashed. The writ petition is allowed. Any amount deposited by the petitioner, before the controlling authority, is liable to be refunded to the petitioner.

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

1. Heard Sri S.S. Sharma, the learned standing counsel for the petitioner and Sri Dhananjai Kumar Rai, the learned counsel for the respondents.

2. The petitioner has challenged the orders dated 15.2.2005 and 27.6.2005 passed by the controlling authority under the Payment of Gratuity Act, 1972. The facts as culled out from the record is, that respondent No.1 was appointed as a work charged employee in the petitioner's establishment on 1.9.1968 and his services was regularized w.e.f. 31.12.1993. The petitioner retired from the service on 31.8.2001 and at that time, an amount of Rs.17, 160/- was paid as gratuity, taking the period of service from 31.12.1993 till the date of his retirement dated 31.8.2001. The respondent No.1, being aggrieved by the non-inclusion of the period from 1968 to 1993, i.e., the period when he had started working as a work charged employee, filed an application, for computation of the gratuity, before the controlling authority under the Payment of Gratuity Act. The controlling authority, after considering the matter, passed an order dated 15.2.2005 holding that, the period from 1.9.1968 to 31.12.1993 was also to be included as period spent in service while computing the gratuity and, accordingly directed the petitioner to pay the balance amount of Rs.57,412/- along with interest @ 10% p.a. The petitioner, being aggrieved, has filed a review application which was also rejected by an order dated 27.6.2005. The petitioner thereafter has filed the present writ petition.

3. A preliminary objection was raised that the petitioner has an alternative remedy of filing an appeal under Section 7(7) of the Act. No doubt the petitioner has a remedy of filing an appeal but considering the facts and the circumstances of the case that has been brought on record coupled with the fact that the writ petition was entertained in the year 2005, this Court is of the opinion, that it is a fit case where the Court should exercise the writ jurisdiction under Article 226 of the Constitution of India since the Court finds that the question with regard to the applicability of the Act is involved in the present writ petition and which goes to the root of the matter.

4. According to the petitioner, the respondent No.1 is an employee of the State Government and therefore, the Payment of Gratuity Act 1992 is not applicable and that U.P. Retirement Benefit Rules, 1961 is applicable which

has been framed in exercise of the powers conferred under Article 309 of the Constitution of India.

5. According to the petitioner the respondent No.1 is an employee of the State Government and holds a substantive post as per Regulation 368 of the Civil Service Regulations and consequently, the U.P. Government Benefit Rules, 1961 becomes applicable upon the respondent No.1 and gratuity is required to be paid as per the said Rules. Section 2(e) of the Payment of Gratuity Act defines as under:-

"(e) "employee" means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by an rules providing for payment of gratuity]."

6. A perusal of the aforesaid definition of the word employee clearly indicates that employee in an establishment, factory, etc. will not include a person who holds a post under a State Government and is governed by any Act or by any Rules which provides for the payment of gratuity. The amount of gratuity under the Act is determined under Section 7 and only a person who is eligible for payment of gratuity can file such an application. Section 4 of the Act contemplates that gratuity shall be payable to an employee on termination of his employment. A conjoint reading of Section 4 read with Section 7 of the said Act coupled with the definition clause of the word "employee" as defined in Section 2(e) will make it absolutely clear that a Government employee who is governed by separate Act and Rules relating to payment of gratuity is not entitled to file an application under the Payment of Gratuity Act. Consequently, the impugned order passed by the controlling authority cannot be sustained and is quashed. The writ petition is allowed. Any amount deposited by the petitioner, before the controlling authority, is liable to be refunded to the petitioner.

7. The matter does not end here. According to the respondent, he is liable to be paid gratuity on the basis of the period of service which he had put in from 1968 till the date of his retirement in 2001. On the other hand, the petitioners have calculated the gratuity from the date when the respondent was treated as a regular employee. No reason has been given by the employers as to why the period from 1968 to 1993 has not been included under Rule 3(8) of the U.P. Government Benefit Rules 1961. Consequently, it would be open to the respondent No.1 to move an appropriate application for payment of the remaining amount of gratuity before the employers concerned. If such an application is filed, the employers will consider his application and pass a fresh order within two months from the date of the production of a certified copy of this order. If respondent No.1 is entitled for payment of gratuity, taking his service from 1968 onwards till his date of

retirement, the arrears would be calculated and paid within two months thereafter.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2009

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 52720 of 2007

Roop Chandra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Awadh Narain Rai

Counsel for the Respondents:
S.C.

Constitution of India-Art. 226-Pension and gratuity-petitioner working as class 4th employee in Intermediate College running under grant in-aid-retired on 31.10.05-G.O. dated 19.4.2006 for the first time provides benefit of gratuity and pension to the non teaching staff-denied on the ground of retirement date prior to the enforcement of provision--mis-conceived-petitioner held entitled for benefit of G.O. 19.4.06-direction for payment of post retired benefit with 15% interest given.

Held: Para 12

From the above proposition of law laid down by the Apex Court and this Court it is clear that the benefit of the Government Order dated 19.4.2006 cannot be denied to the employees who retired prior to 19.4.2006 and such benefits are also available to them, including the petitioner. The notification is always read prospectively unless it is made retrospective. The Government Order dated 19.4.2006 has been further clarified by the Government Order dated 23.11.2007 which says that the benefit is available w.e.f. 19.4.2006. In this view of the matter, the petitioner is entitled for the benefit of the Government Order dated 19.4.2006 w.e.f. 19.4.2006 and prior to that.

Case law discussed:
1983 (1) SCC-305, 1998 (2) UPL.BEC-1525, 2001 (4) ESC-1589, 2004 (3) ESC-1690, 2002 (1) ESC-136

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

1. By means of present petition, the petitioner is seeking a direction to the respondents to grant gratuity and other retiral benefits.

2. The petitioner was appointed as Class IV employee on 7.8.1971 by a competent authority in a institution named as Mahamana Malviya Inter College Khekhada, District Aligarh imparting secondary education and is under grant-in-aid by the State Government. The provision for payment of salary of 1971 is applicable. The petitioner attained the age of superannuation at the age of 58 years on 31.10.2005. Admittedly, when the petitioner retired he was not entitled for gratuity and other retiral benefits. The State Government by the Government Order dated 19.4.2006 provided the benefits of gratuity and other retiral benefits to the non-teaching Class I V employees. The petitioner claimed the benefit of gratuity and post retiral benefits on the basis of the Government Order dated 19.4.2006 and accordingly filed a representation in this regard. The representation has not been decided. The petitioner has filed the present writ petition.

3. The respondent has filed the counter affidavit stating therein that the

petitioner is not entitled for the gratuity and other retiral benefits as he has retired prior to 19.4.2006 and under the Government Order dated 19.4.2006 only those non-teaching staffs are entitled for the benefit of the gratuity and post retiral benefits, who retires after 19.4.2006. This position has been clarified by the Government Order dated 23.11.2007.

4. Learned counsel for the petitioner submitted that the Government order dated 19.4.2006 is applicable to those employees also who have retired prior to 19.4.2006. Thus, the petitioner is entitled for the benefit of gratuity and other post retiral benefits under the Government Order dated 19.4.2006. In support of the contention he relied upon the decision of the Apex Court in the case of **D.S. Nakara and others Vs. Union of India reported in 1983 (1) SCC-305, Dhanraj and others Vs. State of Jammu and Kashmir and others, reported in 1998 (2) UPL.BEC-1525, Shanti Devi (Smt.) Vs. State of U.P., reported in 2001 (4) ESC-1589** and **Mohan Lal Sharma and etc. Vs. State of Rajasthan and another, reported in 2004 (3) ESC-1690**.

5. Learned Standing Counsel states that the petitioner is not entitled for the gratuity and post retiral benefits as the Government Order dated 19.4.2006 was prospective and the benefit of post retiral benefits and gratuity is available only to those who retired after 19.4.2006. In alternative he submitted that if the Government Order dated 19.4.2006 is made applicable to those who retired before 19.4.2006, the retired employees would be entitled for the benefit only w.e.f. 19.4.2006 and not prior to that, which is also clear from the Government Order dated 23.11.2007.

6. Heard learned counsel for the parties.

7. I have given my anxious consideration to the rival submissions and also perused the relevant Government Orders. The Government Order dated 19.4.2006 and a subsequent clarificatory Government Order dated 23.11.2007 read as follows:

संख्या-1221/15-8-06-3003(15)/04

"प्रेषक,

एच०एल०गुप्ता,
विशेष सचिव,
उ०प्र० शासन।

सेवा में,

शिक्षा निदेशक (मा०),
उ०प्र०, लखनऊ।

शिक्षा (8) अनुभाग लखनऊः दिनांकः 19 अप्रैल, 2006

विषयः अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में कार्यरत शिक्षणेत्तर कर्मचारियों को 60 वर्ष की अधिवर्षता आयु पर ग्रेच्युटी व अन्य सेवा नैवृत्तिक लाभ अनुमन्य किए जाने विषयक।

महोदय,

उपर्युक्त विषयक निदेशक के पत्रांक-पेंशन (2)/2167/2005-2006 दिनांक 29 नवम्बर 2005 के संदर्भ में मुझे आपसे यह कहने का निर्देश हुआ है कि प्रदेश के अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में शासन द्वारा अनुमोदित पदों पर विधिवत नियुक्त होकर कार्यरत सीधी/पूर्णकालिक समस्त शिक्षणेत्तर कर्मचारियों को 58 वर्ष की अधिवर्षता आयु पर सेवा निवृत्त होने के समय पूर्व से अनुमन्य विकल्प चुनने की सुविधा समाप्त करते हुए उन्हें 60 वर्ष की अधिवर्षता आयु पर ग्रेच्युटी व अन्य सेवा नैवृत्तिक लाभ अनुमन्य किए जाने की श्री राज्यपाल महोदय सहर्ष स्वीकृति प्रदान करते हैं।

२- इस संबंध में पूर्व में निर्गत समस्त शासनादेश उक्त सीमा तक संशोधित समझे जायेंगे तथा उनकी शेष शर्तें यथावत रहेंगी।

३- उ०प्र० इण्टरमीडिएट एजूकेशन ऐक्त के संगत नियमों आवश्यक संशोधन की कार्यवाही शासनादेश के निर्गत होने के अधिकतम तीन माह की अवधि में सुनिश्चित कर ली जायेगी।

४- ये आदेश वित्त विभाग के अशासकीय सं०-यू०ओ०/ई-1/1045/दस-2006 दिनांक 18-4-06 में प्राप्त उनकी सहमति से जारी किए जा रहे हैं।

भवदीय,
एच०एल०गुप्ता,
विशेष सचिव।

सेवा निवृत्त शिक्षणेत्तर कर्मचारियों को किस तिथि से लाभ देय संख्या-2242/15-8-07-3003 (15)/04

प्रेषक,
एफ०एन० प्रधान
संयुक्त सचिव,
उत्तर प्रदेश शासन।

सेवा में,
शिक्षा निदेशक (मा०) उ०प्र०
शिक्षा पेंशन-२ अनुभाग,
इलाहाबाद/लखनऊ।

शिक्षा (8) अनुभाग लखनऊः दिनांकः 23 नवम्बर, 2007

विषयः-माध्यमिक विद्यालयों में कार्यरत शिक्षणेत्त कर्मचारियों को 60 वर्ष की अधिवर्षता आयु पर ग्रेच्युटी व अन्य सेवानिवृत्तिक लाभ अनुमन्य किए जाने हेतु कट-आफ डेट निर्धारित किए जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषयक आपके पत्रांक पेंशन-2/2351/2007-08 दि० 08-10-07 के संदर्भ में मुझे यह कहने का निर्देश हुआ है कि प्रश्नगत प्रकरण में निर्गत शासनादेश संख्या-21/15-8-2006-3003 15/04 दिनांक 19-4-2006 उसी तिथि से लागू/प्रभावी, है, जिस तिथि से उक्त शासनादेश निर्गत हुआ है। इस प्रकार शासनादेश दिनांक 19-4-2006 द्वारा अनुमन्य लाभ भी शासनादेश निर्गत होने के दिनांक से ही देय है।

भवदीय,
(एच०एन० प्रधान)
संयुक्त सचिव।"

8. In the case of **Shanti Devi (Smt.) Versus State of U.P. and others (Supra)** the family pension was provided vide Government Order dated 24.2.1989 w.e.f. 1.1.1989. The family pension was denied to the petitioner Shanti Devi on the ground that her husband who was the Class IV employee in the State aided Junior High School died on 20.11.1987 i.e. before 1.1.1989. This Court following the decision in the **Writ Petition No. 34835 of 1995 Mahmooda Begum and Writ Petition No. 23609 of 1995 Smt. Akhtari Begum Vs. Director of Education** held that the petitioner was entitled for the benefit of family pension in view of the Government Order w.e.f. 1.1.1989. Similar view has also been taken by another learned single Judge in the case of **Rajmuni Devi Versus District Inspector of Schools, Ghazipur and others, reported in 2002 (1) ESC-136.** In this case also the benefit of family pension was denied on the ground that husband of the petitioner who was the employee died on 31.8.1987 prior to 1.1.1989. Learned single Judge has held that denial of family pension to the petitioner on the aforesaid ground is illegal following the decision of the Apex Court in the case of **D.S. Nakara Vs. Union of India (Supra).**

9. In the case of **Dhan Raj and others Vs. State of Jammu & Kashmir and others (Supra),** the question was whether the drivers and conductors of Jammu & Kashmir State Road Transport Corporation who retired prior to 9th June, 1981 were entitled for the benefit of the pension under the Government Order dated 3.10.1986 granting pension w.e.f. 9th June, 1981. The Apex Court held that the drivers and conductors of Jammu & Kashmir State Road Transport Corporation who retired prior to 9th June, 1981 are also entitled for the benefit of the pension under the Government Order dated 3.10.1986 in as much as denial of the pension to those drivers amounts to

discrimination and violative of Article 14. Relying the decision of Constitution Bench of the Apex Court in the case of **D.S. Nakara and others Vs. Union of India (Supra)** wherein it has been held that the criterion of date of enforcement of the revised scheme entitling benefits of the revision to those retiring after specified date while depriving the benefits to those retiring prior to that date was violative of Article 14. The Apex Court further held that even otherwise, while considering the question of grant of pensionary benefits the State has to act to reach the constitutional goal of setting up a socialist State as stated and the assurance as given in the Directive Principles of State Policy. A pension is a part and parcel of that goal, which secures to a person serving with the State after retirement of his livelihood. To deny such a right to such a person, without any sound reasoning or any justifiable differentia would be against the spirit of the Constitution.

10. In the case of **Mohan Lal Sharma and etc. Vs. State of Rajasthan and another (Supra),** the Rajasthan High Court has also held that there was no justification in denying the pensionary benefits to those who retired prior to 1.10.1987 and granting benefits to those who retired after 1.10.1987.

11. In the case of **D.S. Nakara and others Vs. Union of India (Supra)**, the Constitution Bench of the Apex Court held that all the pensioners have equal right to receive the benefits of liberalised pension scheme. Pensioners form a class as a whole and cannot be micro-classified by an arbitrary, unprincipled and unreasonable eligibility criterion for the purpose of grant of revised pension. Criterion of date of enforcement of the revised scheme entitling benefits of the revision to those retiring after that date while depriving the benefits to those retiring prior to that date, held, violative of Article 14.

12. From the above proposition of law laid down by the Apex Court and this Court it is clear that the benefit of the Government Order dated 19.4.2006 cannot be denied to the employees who retired prior to 19.4.2006 and such benefits are also available to them, including the petitioner. The notification is always read prospectively unless it is made retrospective. The Government Order dated 19.4.2006 has been further clarified by the Government Order dated 23.11.2007 which says that the benefit is available w.e.f. 19.4.2006. In this view of the matter, the petitioner is entitled for the benefit of the Government Order dated 19.4.2006 w.e.f. 19.4.2006 and prior to that.

13. In the result, writ petition is allowed in part. The respondent is directed to allow the benefit of the Government Order dated 19.4.2006 to the petitioner w.e.f. 19.4.2006 if till date nothing has been paid to the petitioner, the entire dues may be paid forthwith preferably within a period of two months from the date of presentation of the certified copy of the order along with simple interest at the rate of 5%.

14. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2009

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

Civil Misc. Writ Petition No.55336 of 2006

Dr. Khetpal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava

Counsel for the Respondents:
Sri V.P. Varshney
Sri Yogendra Kumar Yadav
Sri Amrit Lal Yadav
Sri R.K. Tiwari
Sri M.A. Qadir
S.C.

High Court Rule-Chapter XII-Rule 7- Successive writ Petition-misleading Court by twisting and camouflage can not be ignored-petition dismissed with exemplary cost of Rs.10,000/-.

Held: Para 15

We do not find any merit in this writ petition. On the contrary, we find that the petitioner is guilty of not only filing successive writ petition but also of misleading this Court by twisting and camouflages. Such an approach by the petitioner who is well educated person and had good legal assistance also is nothing but gross abuse of the process of law besides wastage of Court's precious time which could have been utilized for deciding other deserving cases. Such an attitude of the litigant deserves to be curbed. It is a fit case where this Court must impose exemplary costs so that such persons may deter from wasting precious public time which may be utilized for other substantial matters where the litigants are waiting for their turn to get justice.

Case law discussed:
1996 (3) ESC 186, Writ petition No. 34 of 1996 (SB) (Dr. Triloki Singh Vs. State of U.P. & others), 2292 of 1997 (Dr. Yogendra Pratap Singh and others Vs. State of U.P. and others), A.I.R. 1996 SC 2687; A.I.R. 1997 SC 1005; A.I.R. 1998 SC 1297=1998 (3) SCC573, 2006 (2) AWC 1545, A.I.R. 2007 SC 1151, , AIR 2005 SC 565 (Para-12, AIR 2006 SC 1142 (Para-8).

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

1. Heard Shri Anil Kumar Srivastava, learned counsel for the petitioner at great length, Shri V.P. Varsheney, learned counsel for the U.P. Public Service Commission assisted by Shri Yogendra Kumar Yadav and learned Standing Counsel.

2. The petitioner by means of the present petition filed under Article 226 of the Constitution has sought the following relief:

"(i) Issue a writ, order or direction in the nature of mandamus directing the respondents to treat the petitioner selectee and to provide the appointment on the post in question.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondents to pay the salary to the petitioner according to law with all emoluments month to month.

(iii) Issue any other writ, relief to which this Hon'ble Court may deem fit and proper may be awarded in favour of petitioner."

3. The facts which are not disputed, as apparent from the record are that in 1989 U.P. Public Service Commission

published an advertisement for making recruitment to the post of Homoeopathic Medical Officers inviting application from the recognized Degree and Diploma Holders in Homeopathy. It appears that the aforesaid advertisement also provided that the Degree Holders shall be given preference in making selection over the Diploma Holders. The said condition was challenged in some of the writ petitions. In ***Dr. Sheo Narayan Singh and others Vs. State of U.P. and others, 1996 (3) ESC 186***, a Division Bench of this Court held that the said preference is valid and the Degree Holders can be given preference over to the diploma Holders. The selection was finalized and the result/select list was declared on 16th September, 1996 containing names of 84 candidates. The final selection was challenged in several writ petitions before this Court as Allahabad as well as at Lucknow. **Writ petition No. 34 of 1996 (SB) (Dr. Triloki Singh Vs. State of U.P. & others)** filed before the Lucknow Bench of this Court. The Division Bench on 9th January 1996 granted time to the respondents to file counter affidavit and observed that the appointment made, if any, shall be subject to the further orders of this Court. Some of the writ petitions were filed at Allahabad, namely, writ petition no. 9653 of 1996, (Dr. Jagat Prakash and another Vs. State of U.P. and othes) and writ petition No. 9086 of 1997 (Dr. Arun Kumar Saxena Vs. State of U.P. and others). Both the writ petitions filed at Allahabad were dismissed by a Division Bench on 19th March, 2002 on the ground that the petitioners have challenged selection of 1989 without impleading the persons who have been selected and they are necessary parties and, therefore, in the absence of such persons, the writ petitions challenging the selection is not maintainable. It is submitted by the learned counsel for the petitioner that in writ petition No.9653 of 1996, he has filed recall application which is pending.

4. However, so far as the judgment of this Court in Writ Petition No. 9086 of 1997 is concerned, the same has attained finality as neither any application for recall of such order is pending before this Court nor we are informed that any appeal was taken before the Apex Court.

5. In the meantime, one more writ petition i.e. ***No.2292 of 1997 (Dr. Yogendra Pratap Singh and others Vs. State of U.P. and others)*** filed by some persons who were holding degree in Homeopathy came up before this Court complaining that some of the persons who were Diploma Holders were also selected though the advertisement provided for preference to the Degree Holders, and the petitioner in that writ petition being Degree Holder was not selected though he was entitled for preference. This Court vide its judgment dated 31st January, 2001 allowed the writ petition observing that since the preference to Degree Holders was upheld by this Court in the case of **Dr. Sheo Narain Singh** (supra), therefore, it was incumbent upon the Commission to act according to the said condition of advertisement and to the extent Diploma Holders were declared successful in the select list of 1995, the vacancies, if any available, may be made available to the Degree Holders also. The writ petition, therefore, was allowed with the following directions:

"It is not clear out of 80 posts, how many posts have been filled by the Diploma Holders. The petitioners to the

extent of the posts, which have been filled by the Diploma Holders are entitled to be given appointment to the posts of Homoeopathic Medical officers, in accordance with merit amongst the Degree Holders.

Sri Pushpendra Singh, learned counsel for the commission submitted that the posts are not vacant. Sri Raj Mani Chaudhary has filed counter affidavit on behalf of the State Government and in para 9 of the counter affidavit it has been stated that 47 posts of the Homeopathic Medical officers are lying vacant at present in which two posts are of female Homeopathic Medical Officers is also included.

The writ petition is allowed and the petitioners shall be considered for appointment to the posts of Homoeopathic Medical Officers, keeping in view the above observations. The respondent no. 1 shall pass appropriate order within one month of production of certified copy of this order.
Sf/-Sudhir Narain
Sd./-Bhagwan Din"
Dt. 31.1.2001"

6. The present petitioner Dr. Khetpal Singh in 2005 filed a writ petition No.67559 of 2005 (Dr. Khetpal Singh Rajpoot Vs. State of U.P. & others) with the following reliefs:

"1. A writ, direction or order in the nature of writ of certiorari quashing the impugned result dated 16.9.1995 (Annexure-8 of the writ petition) on the basis of substantial question raised in para 7 of the petition.

2. A writ, direction or order in the nature of writ of certiorari declaring the Rule 8 of the U.P. Homeopathic Medical Service Rules 1990 ultravires (Annexure 5 of petition) on the basis of resolution dated 9-3-1990 communicated vide letter dated 31.1.1991 (Annexure-11 of petition), letter of respondent no. 1 (Annexure-4 of the petition), and consent of respondent no. 3 itself (Annexure-6 of the petition).

3. A writ, direction or order in the nature of writ of mandamus directing the respondents to delete the Rule 8 from U.P. Homeopathic Medical Service Rules, 1990.

4. A writ, direction or order in the nature of writ of mandamus directing the respondents to treat B.M.S. equivalent in respect of appointment in service and in service condition, on the basis of aforesaid Resolution and consent.

5. A writ, direction or order in the nature of writ of mandamus directing the respondents to appoint the petitioner on the post in question.

Or

Any other writ, order or direction to the respondents to protect the right and justice of the petitioner and compensating the damage of the petitioner of being deprived of so many years its legal right of appointment on the post in question.

6. Any other relief which this Hon'ble Court may deem fit and proper may be awarded in favour of the petitioner.

7. The cost of the petition may also be awarded in favour of the petitioner."

7. The said writ petition was heard by a Division Bench and was dismissed vide judgment dated 25.10.2005 on the ground of laches as well as non-joinder of necessary parties. It would be appropriate to reproduce the said order, which is as under:-

"This is a writ petition against selection made in year 1996.

We have heard counsel for the petitioner, the standing counsel and Sri V.P. Varshney for the respondents.

This writ petition has been filed after ten years of the selection. The persons who have been selected are not impleaded as party. In the circumstances, it is not a fit case to interfere.

The writ petition is dismissed.

Sd./- Yatindra Singh, J.

Sd./- R.K. Rastogi, J.

Dated: 25.10.2005"

8. Thereafter, the petitioner now has filed the present writ petition. Comparing the reliefs sought in the earlier writ petition and the present one, we find that the relief Nos. 4 and 5 in the earlier petition are similar to that of the present writ petition. The submission of the learned counsel for the petitioner that the present writ petition is not based on the similar facts and reliefs but cause of action is different and relief is also different, is not correct and in fact contrary to record. We find that the relief sought in this writ petition in substance included the relief sought in the earlier writ petition which has already been dismissed. Besides seeking mandamus for appointment and treating the petitioner in service, in the earlier writ petition, he also challenged the select list as well as vires i.e. validity of Rule 8 (2) of the Service Rules and further mandamus to appoint him. Mere exclusion of some relief sought in the earlier writ petition which has already been decided and seeking in substance similar relief in successive petition would not make the second petition different from the earlier one. It is now well settled that successive writ petitions for the same cause of action are not maintainable and cannot be entertained by this Court as held in ***Buddhi Kota Subbarao Vs. Dr. V.K. Parasaran and others,*** **A.I.R. 1996 SC 2687; T.N. Eclectricity Board and another Vs. N. Raju Reddiar and another, A.I.R. 1997 SC 1005; K.K. Modi Vs. K.N. Modi and others, A.I.R. 1998 SC 1297=1998 (3) SCC573 and Major Jasbinder Singh Bala Vs. IInd A.D.J., Ghaziabad & others, 2006 (2) AWC 1545**.

9. In fact, we find that not only the relief and prayer sought by the petitioner in the present writ petition is similar which was made in the earlier one but in fact in a camouflage manner, the second writ petition has been drafted covering the issue which this Court has already declined.

10. Chapter XII Rule 7 of the Rules of the Court does not permit filing of second writ petition in respect of same relief.

11. Besides it, we also find that the petitioner is guilty of serious delay and laches. It is not in dispute that selection was notified in 1989 which was finalized in the year 1995 and the appointments pursuant to the said selection have already been made long back. The present writ petition has been filed in September 2006. The petitioner is seeking selection and appointment pursuant to the advertisement made in the year 1989 i.e. after 17 years.

12. Instead of referring to the catena of decision on this question, we propose to mention a recent decision in **Vyalikaval House Building Co-op. Society Vs. V. Chandrappa and others,**

A.I.R. 2007 SC 1151, wherein the Apex Court after referring earlier judgments on the point, has said where the petitioner is guilty of serious delay and laches, he lose his substantive right to get relief from the Court; and under Article 226 of the Constitution, the Court cannot ignore the matter of delay and laches; and in case where the petitioner is found guilty of such laches, the writ petition has to be dismissed.

13. Even on merits, we do not find any reason to interfere and in our view the issues having already been settled at rest, this writ petition is thoroughly misconceived and ill advised. The petitioner is admittedly a Diploma Holder. The question as to whether the Degree Holders can be validly given preference over the Diploma Holders, has been settled favourably by the Division Bench in **Dr.Sheo Narain Singh** (Supra) which has been held valid in **Dr. Yogendra Pratap Singh** (supra). Once that issue has already been finalized, and the petitioner being Diploma Holder was not selected, he has no right to rake up the same issue again and again by filing successive writ petitions.

14. Further submission that since some of the Diploma Holders have been selected, the petitioner should also have been selected is also thoroughly misconceived. Petitioner's counsel submitted that he derived this fact for the first time from the judgment of this Court in **Dr. Yogendra Pratap Singh (Supra)** and, therefore, to this extent the cause of action arose to him only in 2005 and writ petition filed in 2006 is not bad on account of delay and laches. The submission is thoroughly misconceived. It appears that the petitioner has completely failed to appreciate consequences of judgment in ***Dr. Yogendra Pratap Singh (supra)***. This Court did not approve selection and appointment of Diploma Holders without considering the question of preference to other Degree Holders but what it said is that if some Diploma Holders have actually been appointed in that case to the extent vacancies are available, the degree Holders in the light of the conditions of advertisement be considered for appointment. This judgment therefore firstly do not apply and provide any assistance to the petitioner who is not a degree Holder and secondly merely because some Diploma Holders were appointed, the petitioner cannot claim *suo motu* selection. It is not his case that the Diploma Holders selected were less meritorious to the petitioner and, therefore, the petitioner be deemed to have been selected. In the absence of any such averment and material on record, if some Diploma Holders having higher merits are selected, the petitioner cannot have any complaint. Thirdly, if some mistake has been committed by the respondent Commission in selecting Diploma Holders though Degree Holders with the claim of preference were available, that would not entitle the petitioner to seek a writ of mandamus inasmuch as this Court will not issue a writ of mandamus to the authorities to commit mistake again and again. It is well settled that Article 14 of the Constitution has no application for claiming parity in respect to an illegal or wrong act. Two wrongs does not make one right (***M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 565 (Para-12) and Kastha Niwarak G.S.S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142 (Para-8).***

15. We do not find any merit in this writ petition. On the contrary, we find that the petitioner is guilty of not only filing successive writ petition but also of misleading this Court by twisting and camouflages. Such an approach by the petitioner who is well educated person and had good legal assistance also is nothing but gross abuse of the process of law besides wastage of Court's precious time which could have been utilized for deciding other deserving cases. Such an attitude of the litigant deserves to be curbed. It is a fit case where this Court must impose exemplary costs so that such persons may deter from wasting precious public time which may be utilized for other substantial matters where the litigants are waiting for their turn to get justice.

16. The writ petition is, therefore, dismissed with cost of Rs.10,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2009

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 30188 of 2008

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

Counsel for the Petitioner:
Sri K.R.Sirohi
Sri Ramesh Pundir
Smt. Rekha Pundir
Sri Brijesh Yadav

Counsel for the Respondents:
Sri A.S.Diwakar
Sri Govind Saxena
Sri Raj Kumar
S.C.

Punchayat Raj Act 1947-Section 95 (g)-ceasure of financial Power of elected village Pradhan-order passed by authority other than the Distt. Magistrate- Preliminary as well as final Inquiry conducted by same authority-even the explanation given by Pradhan not considered- held-the authorities acted wholly arbitrary manner-order not sustainable- cost of Rs.50,000/- imposed

Held: Para 19

Democracy in out country begins at the grass root level with elections of Gram Pradhan in villages and the same is the very foundation of out democracy. No doubt, the District Magistrate has the power to either cease the financial and administrative powers or oust the democratically elected Gram Pradhan under Section 95 (1) (g) of the Act, but the said power is to be exercised with utmost caution and not in a routine manner at the whims and fancies of the administrative authorities, without following the procedure prescribed under the Act and the Rules. The present case is a glaring example where action has been taken in gross violation of the Act and the Rules of 1997 framed thereunder and a democratically elected Pradhan has been wrongly kept away and deprived of this elected office for several months.

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

1. The petitioner is an elected Pradhan of Gram Panchayat Sapnawat, District Ghaziabad. By an order dated 14.3.2008 passed by the District Magistrate, Ghaziabad the financial and administrative powers of the petitioner had been ceased. Challenging the said order, the petitioner filed writ petition no. 16368 of 2008 in which a detailed reasoned interim order dated 01.4.2008

had been passed whereby the effect and operation of the order dated 14.03.2008 passed by the District Magistrate, Ghaziabad had been stayed. The said writ petition is pending and the interim order is also continuing. While passing the interim order dated 01.4.2008, this Court had permitted that the formal inquiry may go on and be concluded expeditiously. Thereafter, a final enquiry report was submitted on 12.5.2008. The District Magistrate then issued a show cause notice to the petitioner on 17.5.2008, which was served on the petitioner on 27.5.2008 to which the petitioner submitted his reply on 11.6.2008. Then, by means of the impugned order dated 16.6.2008, passed under Section 95)(1)(g) of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act') the petitioner has been removed from the post of Pradhan. Challenging the order dated 16.6.2008 passed by the District Magistrate, Gahziabad, this writ petition has been filed. Subsequently, by an order, passed under Section 12 (J) of the Act, one Rajveer Singh has been nominated as Pradhan of the Gram Panchayat in question.

2. I have heard Sri K.R.Sirohi, learned Senior Advocate assisted by Sri Ramesh Pundhir on behalf of the petitioner and learned Standing Counsel appearing for the respondent. Pleading have been exchanged and with the consent of learned counsel for the parties, this petition is taken up for final disposal at this stage. Sri A.S. Diwakar along with Sri Raj Kumar, learned counsel, who appear for Rajveer Singh, have also been heard.

3. Sri K.R. Sirohi, learned Senior Advocate appearing for the petitioner has summarized his arguments in five points, which are as follows:

(i) The complaint against the petitioner was not accompanied by an affidavit which is in violation of Rule 3 of U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhan and Members) Enquiry Rules 1997 (hereinafter referred to as 'the Rules of 1997') . It is also stated that the complaint was also not presented to the District Magistrate directly but to a political person, who had forwarded the same to the District Magistrate.

(ii) The preliminary enquiry in the matter had been directed by the Chief Development Officer and not by the District Magistrate and thus the same was in violation of Rule 2(c) read with Rule 4 of the Rules of 1997.

(iii) Both, preliminary enquiry as well as the final enquiry were conducted by the same enquiry officers, which is in violation of Rule 5 of the Rules of 1997.

(iv) Neither any charges were framed against the petitioner nor any opportunity to him to rebut the charges against him, which was in violation of Rule 6 of the Rules of 1997.

(v) After submission of final enquiry report the petitioner had submitted his reply to the District Magistrate on 11.6.2008, which has not been considered while passing the impugned order.

4. Learned Standing Counsel had, however, submitted that the preliminary

enquiry as well as the final enquiry, were conducted in accordance with the procedure prescribed and after it was found that the petitioner was guilty of embezzlement of over Rs.1.5 lacs, the District Magistrate has passed the impugned order, which is perfectly justified in law and does not call for interference by this Court.

5. Sri Diwakar, who appears on behalf of the nominated Pradhan, has however submitted that even if there was violation of the provisions of any Rule, no prejudice has been caused to the petitioner as during the conduct of preliminary enquiry report, he had been given notice on 19.2.2008 and as such, this Court should not interfere with the impugned order merely on technical grounds.

6. As regard the first point raised by the petitioner, which is with regard to the violation of Rule 3 of the Rules of 1997, it would be appropriate to notice the aforesaid rule, which is as under:

3. Procedure relating to complaints:- *(1) Any person making a complaint against a Pradhan or Up-Pradhan may send his complaint to the State Government or any officer empowered in this behalf by the State Government.*

(2) Every complaint referred to in sub-rule (1) shall be accompanied by the complainant's own affidavit in support thereof and also affidavits of all persons from whom he claims to have received information of facts relating to the accusation, verified before a notary together with all documents in his possession or power pertaining to the accusation.

(3) Every complaint and affidavit under this rule as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908,for the verification of pleadings and affidavits, respectively.

(4) Not less than three copies of complaint as well as each of its annexures of this rules shall not be entertained.

(5) It shall not be necessary to follow the procedure laid down in the foregoing provisions of this rule, if a complaint against a Pradhan or Up-Pradhan is made by a public servant.

7. Sub-rule (2) of Rule 3 of the Rules of 1997 clearly provides that every complaint shall be accompanied by the complainant's own affidavit in support thereof. In the present case, admittedly, the complaint is undated and even though it is addressed to the Chief Minister and the District Magistrate, but the same was not given to the District Magistrate directly but was forwarded to him by the President of a political party, on which action was initiated. In para 24 of the writ petition, it has been categorically stated that the said complaint was neither accompanied by an affidavit of the complainant nor the complainant had shorn the same before the Notary. It has further been stated that the complaints were not duly verified nor three copies of the complaint were filed, as required under Sub-rule (3) and (4) of Rule of 1997. Reply to the said paragraph has been given in para 19 of the counter affidavit filed by the State in which a bald denial has been made, without giving any specific reply as to whether the complaint

was accompanied by an affidavit or properly sworn or as to whether compliance of Sub-rule 3,4 and 5 of Rule 3 of the Rules of 1997 had been done or not.

8. In such view of the matter, the ground raised by the petitioner that the complaint itself was in violation of Rule 3 of the Rules of 1997 appears to be correct. This Court in the case of Mahak Singh Vs. State of U.P. 1999 (90) RD 433 has in para 6 of the judgement, held that "the complaint was necessarily to be accompanied by the complainant's own affidavit in support thereof verified before a Notary". In another decision of this Court, passed in Writ Petition No. 36889 of 2008 Smt. Bhoori Devi Vs. State of U.P. DECIDED ON 28.7.2008 this Court has held that "The complaint can be entertained only when the procedure prescribed in Rule 3 of the Rules 1997 is specified.....Any complaint which does not specify the procedure prescribed under Rule 3 has to be thrown out as not entertainable."

9. In such view of the matter, since in the present case, the complaint itself was not in accordance with the procedure prescribed under Rule 3 of the Rules of 1997, the authorities ought not to have taken any action on the basis of such complaint. As such, this Court is of the view that the entire action initiated under Section 95(1)(g) of the Act, in the present case, was in violation of the procedure prescribed under law.

10. As regards the **second point** raised by the petitioner, which is with regard to the appointment of the enquiry officer by the Chief Development Officer and not by the District Magistrate, Rule 2 (c) of the Rules of 1997 itself specifies that "Enquiry Officer" means the District Panchayat Raj Officer or any other district level officer, to be nominated by the District Magistrate."

11. In the present case, admittedly, it was the Chief Development Officer who had nominated the enquiry officer and not the District Magistrate. This would be clear from the reading of the impugned order itself, as well as from the preliminary enquiry report (annexure 3 to the writ petition) which specifies that the enquiry officers (the District Panchayat Raj Officer and the Assistant Engineer) had submitted the report on being appointed as enquiry officer by the Chief Development Officer by his order dated 29.11.2007. Along with the counter affidavit, the respondents have filed a notification dated 30th April, 1997 which states that 'the Governor is pleased to delegate all the powers of the State Government under clause (g) of sub-section (1) of Section 95 of the said Act no. 26 of 1947, to all the District Magistrate in Uttar Pradesh within the local limits of their respective jurisdiction.' As such, it is clear that it is the District Magistrate alone, who can initiate proceedings under Section 95 (1)(g), including directing holding of enquiry, and not any other officer. Accordingly, the very initiation of enquiry, in the present case, which has been done by the Chief Development Officer and not by the District Magistrate, was against the prescribed procedure under the Rules of 1997.

12. With regard to **third-point** raised, which relates to preliminary and final enquiry being conducted by the same enquiry officer in violation of Rule 5 of

Rules of 1997, the said rule 5 may be noticed, which is as under:

Enquiry Officer.- *Where the State Government is of the opinion on the basis of the report 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 by proviso to clause (g) of sub-section (1) of Section 95 of the Act and by an order ask on Enquiry Officer, other than the Enquiry Officer nominated under sub-rule(2) of Rule 4, to hold the enquiry.*

(emphasis supplied)

13. The later part of the rule specifies that for the purpose of final enquiry, the enquiry officer should be other than the enquiry officer nominated under sub-rule 2 of Rule 4, which relates to the preliminary enquiry. In the present case, admittedly, the preliminary enquiry was conducted by G. Chandra, District Panchayat Raj Officer and V.K.Malik, Assistant Engineer. The same officers conducted the final enquiry and submitted the final enquiry report. As such, in the present case, there has been clear violation of Rule 5 of the Rules of 1997 also in the holding of enquiry against the petitioner.

14. As regard the **fourth point**, which is with regard to non-compliance of Rule 6 of the Rules of 1997, inasmuch as non framing of charges and consequently, non service of any charge sheet and no opportunity being given to the petitioner to rebut the charges, specific averments in this regard have been made in paras 28, 29, 30 and 31 of the writ petition, to which there is a vague denial in paras 23, 24, 25 and 26 of the counter affidavit. It appears that the author of the counter affidavit had not understood the contents made in the paragraph of the writ petition and while replying to the allegation with regard to non submission of charge sheet and affording of para 25 of the counter affidavit is that the show cause notice dated 17.5.2008 had been issued to the petitioner, which was sufficient compliance. A show cause notice was issued to the petitioner after the submission of the final enquiry report on 12.5.2008. In the counter affidavit it has not been stated that any charge sheet was ever given to the petitioner or any opportunity was given to him by the enquiry officer to rebut the charges. As such, it is clear that the enquiry was held in violation of provisions of Rule 6 of the Rules of 1997, which gives a detailed procedure, including the enquiry officer providing the petitioner with copy of the complaints and drawing of charges, which were required to be delivered to the petitioner and opportunity be given to the petitioner to submit his reply and file his written statement of defence and produce his witnesses etc.

15. From the above, it is clear that the enquiry was conducted in violation of the provisions of Rule 6 of the Rules of 1997.

16. As regards the last point raised by the petitioner, that after submission of the final enquiry report, the petitioner had submitted his reply, which was not considered by the District Magistrate while passing the impugned order dated 16.6.2008, the specific case of the petitioner is that after having receiving the show cause notice dated 17.5.2008 on 27.5.2008, a reply was submitted by the

petitioner on 11.6.2008 9 a copy of which has been filed as annexure 12 to the writ petition, with the endorsement of receipt by the office of the District Magistrate, Ghaziabad). The petitioner has specifically averred in paragraphs 15 and 16 that the reply was submitted on 11.6.2008. Reply to the same has been given in para 11 of the counter affidavit to the effect that there is no need to reply to the same and in paragraph 12 to the effect that enquiry was got conducted and an enquiry report was submitted without any political pressure. However, it has not been denied that the reply to the show cause notice was submitted by the petitioner on 11.6.2008. However, in the impugned order, it has been mentioned that no reply had been submitted to the show cause notice given to the petitioner and thus it was stated in the impugned order that the petitioner had nothing to say and the charge of embezzlement of over Rs.1.5 lacs against the petitioner stood proved.

17. It is unfortunate that even though it is not denied that the reply to the show cause notice had been received on 11.6.2008, in the impugned order it has been mentioned that no reply had been submitted by the petitioner. It is thus clear that the District Magistrate proceeded to decide the matter without considering the reply given by the petitioner to the show cause notice dated 17.5.2008.

18. From the aforesaid, it is clear that besides the appointment of the enquiry officer being made in total violation of provisions of Rule of 1997, the entire preliminary enquiry as well as final enquiry had also been conducted in violation of the Rules and in arbitrary manner. Further, even the final order passed by the District Magistrate on 16.6.2008 is totally unjustified, inasmuch as, the same has been passed without considering the reply of the petitioner submitted on 11.6.2208. It is further absolutely clear from the aforesaid that the entire action against the petitioner was motivated and with predetermined mind to oust the petitioner. This Court does not want to go into the question as to whether there was any political pressure on the authorities, as has been alleged in the writ petition, but the entire action against the petitioner and the order passed by the District Magistrate clearly shows that the same has been done without having any regard for the procedure prescribed under the Act and the Rules.

19. Democracy in out country begins at the grass root level with elections of Gram Pradhan in villages and the same is the very foundation of out democracy. No doubt, the District Magistrate has the power to either cease the financial and administrative powers or oust the democratically elected Gram Pradhan under Section 95 (1) (g) of the Act, but the said power is to be exercised with utmost caution and not in a routine manner at the whims and fancies of the administrative authorities, without following the procedure prescribed under the Act and the Rules. The present case is a glaring example where action has been taken in gross violation of the Act and the Rules of 1997 framed thereunder and a democratically elected Pradhan has been wrongly kept away and deprived of this elected office for several months.

20. For the reason hereinabove, this writ petition deserves to be allowed and is accordingly allowed. The order dated 16.6.2008 is hereby quashed. The

respondents are directed to ensure that charge of Pradhan of the village is question is handed over to the petitioner forthwith.

21. Besides allowing this petition, since this Court is of the firm view that the respondents authorities acted in an arbitrary manner and passed the order under Section 95(1)(g) of the Act in complete violation of the provisions of the Rule of 1997, due to which the petitioner had to suffer and remain out of office for a considerably long period. In the facts of this case, this Court liable to pays costs to the petitioner. In the facts of this case, this Court quantifies the cost at Rs.50,000/- which would be adequate. This amount of Rs.50,000/- shall be paid by the respondents to the petitioner within two months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.03.2009

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 19196 of 2008

Social Upliftment of Village Down Trodden and Health Action, Jaunpur and others ...Petitioners

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.K. Srivastava
Sri Dhiraj Srivastava

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.

Indian Stamps Act, 1899, as amended by Act No, 9 of 01-Lease deed of agricultural plots for a period of 30 years-with increase of premium at the rate of 10% after expiring of 10 years-stamp duty paid as per section 2(16)-objection that stamp duty payable as per valuation of land-apart from contravention of Section 156 and 157 of UPZALR Act-held-as per Bal Krishna case-considering guiding principle-stamp duty properly paid-demand of addition duty as well penalty-illegal.

Held: Para 17:

Keeping in mind the above proposition of law, I find sufficient force in the instrument in question is a 'lease deed' for agricultural land. The fact that the said lease has been executed in violation of the provisions of U.P.Z.A.& L.R. Act will not affect the relevant Article relating to the lease for the purposes of determining the stamp duty. The said lease may be void or invalid under the provisions of U.P.Z.A.& L.R.Act or under any other Act, but so far as the Stamp Act is concerned, the instrument shall be chargeable as a 'lease deed'.

Case Law Discussed:
U.P., AIR 1976 Allahabad 476, 1965 SC 1092, 1970 MP 74, 1961 Supreme Court 1047.

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

1. The present writ petition arises out of the proceedings initiated against the petitioners under the provisions of Indian Stamp Act. The sole point for consideration is whether the instrument in question which is a lease deed is chargeable to stamp duty under Article 35(v) or under Article 35 (vi) of Schedule 1-B of the Indian Stamp Act, 1899 as amended in the State of U.P by U.P. Act No. 9 of 2001 w.e.f. 25.4.2001. The petitioner is a society registered under the provisions of Societies Registration Act. The aims and objects of the society is to render effective services to the poor and

down trodden classes residing in villages, in almost every field. The petitioner no.2 claims himself as President of the society and the petitioner nos.3 and 4, according to their own showing, have nothing to do with the society. Mahant Subhash Chandra claiming himself chela Bajrangdas Siwaith/Manager of Sri Ram Janki Mandir situate in village Kataibna Tehsil Aurai District Sant Ravidas Nagar executed a lease deed dated 29-11-2005 in favour of the petitioners for a period of 30 years for doing plantation and gardening etc. and a sum of Rs.12,000/- per year is payable as premium subject to increase of rent at the rate of 10% after every 10 years. The lease deed is for a period of 30 years and it also contains a clause for its cancellation and execution of de novo lease deed. Gata nos. 96/2, 97, 172/8,220/5,172/2, 172/3, 172/12,172/7,220/4 and 221, total 10 plots, are subject matter of the lease. The stamp duty was paid in terms of Section 2(16) of the Indian Stamp Act as per Article 35(a)(v) of Schedule 1-B. Notice under Section 33/47-A(as amended in the State of U.P.) was issued by the stamp department on the allegations that the said lease deed being in violation of Sections 156 and 157 of U.P.Zamindari Abolition and Land Reforms Act, 1950, the stamp duty is payable on the market value on the property as the said lease is void under Section 164 of the U.P.Z.A.& L.R.Act and the transferee would become bhumidhar with non transferable right under Section 164 of the said Act. The contention of the petitioners, that the provisions of U.P.Z.A.& L.R. Act to determine the duty on the instrument in question i.e. lease deed cannot be invoked, has not been found favour by either of the two authorities below. The Assistant Inspector General (Registration) by his order dated 29.12.2006 found that the document in question is deficient by Rs.5,90,286/- towards the stamp duty and Rs.4,200/- towards registration fee and a sum of Rs.10,000/- has been levied as penalty. The said order has been confirmed in stamp appeal no. 140 of 2006-07 by the Chief Controlling Revenue Authority, vide order dated 23.5.2007 and the review application to review the said order has been dismissed by the order dated 4.2.2008. By means of the present petition, the petitioner have sought for quashing of all the aforesaid orders.

2. When the petition came up for consideration before this Court, the following order was passed on 18.4.2008:-

"*Prima facie the document of lease treated to be conveyance for the purpose of stamp duty appears to be of doubtful. The lessor (a religious institution) does not appear to have taken permission of the District Judge for lease of 30 years. The second party has not been properly described. The status of petitioner nos. 3 and 4 in the sale deed is not clearly given. The clause 12(for renewal) is absolutely vague.*

Sri B.K. Srivastava submits that the document is in respect of the barren land and is lease, and that Section 164 of the UPZA & LR Act is not attracted. He further submits that the Assistant Inspector General (Registration) has not been conferred powers as Asstt. Commissioner (Stamps).

The appellate authority has found that document violates Section 156 and 157 and that under Section 165 if it is for more than 12-1/2 acres the consequences

of void transfer by bhumidhar will follow, which are given out in Section 167.

Shri B.K.Srivastava prays for and is granted a week's adjournment to make further submission.

Put up/list on 24th April, 2008."

Sri B.K. Srivastava, learned Senior Counsel appearing on behalf of the petitioners in support of the present writ petition raised the following two points:-

(1) The Assistant Inspector General (Registration) has not been conferred power as Assistant Commissioner (Stamp). There being no such notification or delegation, the order passed by the said authority is void and illegal.

(2) The provisions of alleged statute cannot be taken into consideration while determining the applicability of a particular Article for the purposes of payment of stamp duty. In other words, the provisions of U.P.Z.A. & L.R .Act were invoked by the authorities below to hold that the instrument in question is chargeable under Article 35(vi) of Schedule 1-B of the Act.

3. The learned Standing Counsel, on the other hand, supports the impugned orders and submits that there has been a notification conferring power and Assistant Commissioner (Stamp) also holds the designation of Assistant Inspector General (Registration).

4. Considered the respective submissions of the learned counsel for the parties and perusal the record.

5. Taking the question in seriatim, it may be noted that 'Collector' has been defined by Section 2(9) of the Act which includes besides other things a Deputy Commissioner and any officer whom the State Government may, by notification in the official gazette, appoint in this behalf. A notification has been issued in the official gazette by invoking said power, conferring power of Collector on the Assistant Commissioner (Stamp) also. When these things were pointed out, the argument was thereafter given up and was not pursued. Apart from the above, no such plea was raised before either of the two authorities below. Even otherwise also, the order of the Assistant Inspector General (Registration) having been merged in the order of Chief Controlling Revenue Authority in appeal, the defect of jurisdiction, if any, stands cured.

6. The next submission is more vital. A copy of the lease deed has been annexed as Annexure-1 to the writ petition. A plain reading of the said document would show that Shebait of the temple let out the said property on an yearly rent of Rs.12,000/- with a view to augment the income of the temple. A sum of Rs. 50,000/- has been paid by the lessee to the lessor as a security money which would form part of rent and the said money shall be spent on the maintenance of the temple property and to meet the litigation expenses. In case of default in payment of rent, the amount of arrears of rent will be adjusted from the said security amount. Clause 4 of the lease deed provides periodical enhancement of rent by 10% after every 10 years. It has been further provided that the said lease is for a period of 30 years and will commence from 29-11-2005, the date on which it was registered. Clause 12

of the said lease provides that the parties to the agreement may mutually agree to cancel the said lease prior to the expiry of the period and a fresh lease deed may be registered, subject to fresh conditions.

7. The authorities below proceeded to hold that the document is insufficiently stamped on the ground that such a lease of agricultural land is not permissible under the provisions of U.P.Z.A. & L.R. Act. If a lease deed is executed in violation of the provisions of U.P.Z.A. & L.R.Act, the lessor will become bhumidhar with non transferable right if the total area of land held by him together with land held by his family including the land let out to him does not exceed 12-1/2 acres and where the total area exceeds 12-1/2 acres the provisions of Section 154 and 163 of U.P.Z.A. & L.R. Act will apply. Section 154 of the U.P.Z.A. & L.R. Act provides that no bhumidhar shall have the right to transfer by sale or gift any land other than tea gardens to any person where the transferee shall, as a result of such sale or gift, become entitled to land which together with land if any, held by his family will, in the aggregate, exceed 12.50 acres in Uttar Pradesh. It has been found that in the present case the lessor has executed the lease deed in violation of the provisions of Section 156 of U.P.Z.A. & L.R. Act, the consequence as provided under sections 156 and 157 of the U.P.Z.A.& L.R. Act will ensue. It has been found that the said lease deed in view of the various provisions of U.P.Z.A. & L.R. Act, already referred to above, will amount to a sale deed and, therefore, the stamp duty shall be payable on the market value of the subject matter of the instrument, as applicable to a deed of conveyance.

8. Challenging the aforesaid orders, the learned Senior Counsel submits that the provisions of U.P.Z.A. & L.R. Act cannot be taken into consideration while deciding a dispute under the Stamp Act. Reliance has been placed on a Special Bench decision of this Court in **Banney Khan Vs. The Chief Inspector of Stamp, U.P., AIR 1976 Allahabad 476.** In this case the question was with regard to the applicability of the correct Article in respect of toll auction. The case of the auction purchaser was that such a transaction does not amount to lease as defined under Transfer of Property Act while on the other hand, the case of the stamp department was that it amounts a 'lease' as defined under Section 2(16) of the Indian Stamp Act and the duty was chargeable under Article 35(b) of Schedule 1-B of U.P. Stamp (Amendment) Act, 1962. The Court posed the question whether the document is a lease deed falling under Section 2(16) of the Indian Stamp Act or is a licence and also a bond under Section 2(5) of the Stamp Act and is chargeable with duty as a bond under Article 15 Schedule 1-B of the Act. In the above context, the following observation, which were relied upon by the learned Senior Counsel here, were made:-

"*...Therefore, the Stamp Act also being an Act to consolidate and amend is exhaustive and indicates that all the former Acts on the subject of stamps have been collected and the law embodied therein altered and for determining the nature of a document, the provisions of this Act alone will be taken into consideration.*"

9. Ultimately, it was held that in view of definition of 'lease' given in

Section 2(16)(C) of the Stamp Act duty is chargeable under Article 35(b) of Schedule 1-B of the Stamp Act, as amended in U.P.

10. It is an acknowledged legal position that there are two guiding principles for applicability of the Stamp Act in respect of a particular document. They are:-

(1) The Court is not bound by the apparent tenor of an instrument, is shall decide according to the real nature or substance or the document; and
(2) The duty is on the instrument and not on the transaction.

11. To answer as to under what Article the instrument falls, the first thing to be looked into is the document itself in order to determine the character thereof. Applying the above principle of law, in my considered view, for the purpose of determining the stamp duty, the document should be taken into account and not the transaction. If the said purpose is applied on the facts on the present case, on a plain reading of the instrument, evidently it is nothing but a lease deed. It has not been found by any of the authorities below that from the tenor of the document it is other that a lease deed. What would be the effect of a particular statute on such instrument is another question which does not fall within the purview of the Stamp Act.

12. Stamp Act, as pointed out above by Special Bench decision in the case of **Banney Khan(supra)** is exhaustive on the subject relating to chargeability of stamp duty. The word 'lease' for the purposes of the Stamp Act would mean 'lease' as defined under the Stamp Act. The lease as understood in any other Act is completely out of context for the purposes of controversy involved under the Stamp Act.

13. It is equally well settled that Stamp Act is taxing statute. It must be construed strictly, and if two meaning are equally possible, the meaning in favour of the subject must be given effect to. (See **Board of Revenue Vs. Rai Saheb Sidhnath, AIR 1965 SC 1092**).

14. The stamp duty payable upon an instrument must be determined by referring to the terms of the document and the Courts is not entitled to take into consideration evidence de-hors the instrument itself. In determining whether a document is sufficiently stamped with reference to its admissibility in evidence the document itself must be looked at as it stands without having recourse to collateral circumstances to be proved by extraneous evidence.

15. The word 'instrument' has been defined under Section 2(14) of the Act which includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.

16. In **Bal Krishna Vs. Board of Revenue, AIR 1970 MP 74,** it has been held that the following principles govern the application of Stamp Act to the instrument:-

(i) *The first rule is that duty is payable on the instrument and not on the transaction.*

(ii) The second rule is that the Court is not (Sic) by the apparent tenor of

the instrument, it is the real nature of the transaction which will determine the stamp duty.

(iii) The third rule is that the Court must look at the document itself as it stands and it is not permissible to show, by evidence, any collateral circumstances.

(iv) The fourth rule is that in determining the stamp duty, the substance of the transaction as disclosed by the whole of the instrument has to be looked to, and not merely the operative parts of the instrument.

(v) The fifth rule is that stamp duty is payable on an instrument according to its tenor and it does not matter that it cannot be given effect to for some independent cause.

(vi) The sixth rule is that there can be no objection to a device effectuating a transaction in a manner that lower rate of duty is attracted.

The goodness or badness of a vendor's title in no way affects the question of stamp duty. The instrument has to be stamped according to its true intent and meaning of the transaction which it represents."

17. Keeping in mind the above proposition of law, I find sufficient force in the instrument in question is a 'lease deed' for agricultural land. The fact that the said lease has been executed in violation of the provisions of U.P.Z.A.& L.R. Act will not affect the relevant Article relating to the lease for the purposes of determining the stamp duty. The said lease may be void or invalid under the provisions of U.P.Z.A. & L.R. Act or under any other Act, but so far as the Stamp Act is concerned, the instrument shall be chargeable as a 'lease deed'.

18. In interpreting a taxing statute, it has been said time and again, that equity has no role to play. Equitable consideration are entirely out of place. Nor can taxing statutes be interpreted on any presumption or assumptions. The Court must look squarely at the words or the statute and interpret them. It must be interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency. (See **Commissioner of Sale Tax, U.P. Vs. Modi Nagar Mills Ltd., AIR 1961 Supreme Court 1047**)

19. In view of the above discussion, the impugned orders cannot be sustained. It is held that the instrument in question was duly stamped and demand of additional stamp duty, levy of penalty and additional registration fee are, therefore, unjustified and are hereby quashed.

20. In the result, the writ petition succeeds and is allowed. All the three impugned orders, referred to above, are hereby quashed. Any amount already deposited in pursuance of the impugned orders shall be refunded to the petitioners within a period of one month from the date of production of certified copy of this order. In case of default, the respondents shall be liable to pay interest at the rate of 12% per annum from the date of deposit to the date of actual refund.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 27795 of 2008

Kalrav Agarwal and another ...Petitioner
Versus
State of U.P. and others. ...Respondents

Counsel for the Petitioner:
Sri Anoop Trivedi

Counsel for the Respondents:
Sri Prabhakar Awasthi
S.C.

Constitution of India Article-226-Writ jurisdiction-Election of Society-can be challenged by ¼ member of Society under Section 25 of the Societies Registration Act- two members do not represent ¼ member-writ petition at the instance of two member-held not maintainable.

Held: Para 7 & 8:

In Dr. P.P. Rastogi and others Vs. Merrut University, Merrut and another, 1997(1) U.P.L.B.E.C. 415, a Division Bench of this Court held that an individual member of the Committee of Management had not locus standi to file an application and that if every member of the Committee of Management was permitted to file such application, it would create of lot of problems.

Consequently, this Court is of the opinion that a writ petition filed by and individual member which does not represent ¼ members of the Society cannot be entertained. The judgements cited by the learned counsel for the petitioner has no application with regard to the maintainability of the writ petition. The said judgement talks about the validity of the election conducted by a Committee after the expiry of the stipulated period conducted by a Committee after the expiry of the stipulated period contemplated under it s rule or bye laws.

Case law discussed:
43508 of 2006, 2000 (1) ESC 870, 2002 (1) AWC 771, 1997 (1) U.P.L.B.E.C. 415.

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

1. Heard Sri Anoop Trivedi, the learned counsel for the petitioner and Sri Prabhakar Awasthi, the learned counsel for the respondent no. 6.

2. Two members of a society know as Dharm Samaj Society Inter College and Sanskrit Pathshala, Aligarh, has filed the present writ petition challenging the order dated 3rd May, 2008 passed by the Deputy Registrars, Firms, Societies and Chits, Agra under Section 4 of the Societies Registration Act. By this order, the office bearers of the managing body has been registered.

3. At the outset, the writ petition filed by two members of the Society is not maintainable. A dispute with regard to the election of the office bearers of a Society can be challenged by ¼ members of the Society under Section 25 (1) of the Act. The provisions of ¼ members of the Society was deliberately incorporated for a purpose and one such reason is, that frivolous dispute may not be raised by an individual and that a majority of the members of the society, if aggrieved by the election could raise a dispute under Section 25 which could be decided by an authority in a summary manner.

4. In the light of the aforesaid provision and the embargo placed under

Section 25 for raising a dispute, this Court is of the opinion that a writ petition challenging the election of a Society or of the Managing Committee of the Society cannot be maintained in a writ jurisdiction. The learned counsel for the petitioner has placed reliance upon a decision of the Court in **Yogendra Singh Vs. State of U.P. and others** decided on 7th May, 2007 passed in writ petition no. 43508 of 2006 and submitted that an individual member is competent to file a petition. For facility, the relevant paragraph which has been relied upon is quoted hereunder.

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"It is settled law that every valid member or the general body has a right to participate in the elections, which are to take place for constituting the Committee of Management. Such right of participation, if taken away without following due procedure provided by law give a cause to the individual member concerned to question the election specifically in the circumstances, when the election are held by a person not competent to hold election.

This Court may record that right to participate in the elections includes a right to contest the elections. If a valid member is deprived of his participation, he alone gets a right to question his ouster and denial of right of participation. Ousting of a person from the electoral college without any justifiable cause vitiates the entire elections. In such circumstances, it cannot be said that merely because of a life member elections, he loses his right to challenge the elections held. Legal right of member to question such illegal elections cannot be taken away under any principle of law."

5. The learned counsel has also placed reliance upon a decision of another decision of this Court in **Committee of Management A.K. College and another Vs. State of U.P. and others 2000(1) ESC 870 and Sewa Samiti Allahabad and another Vs. Assistant Registrars Funds Societies and Chits Allahabad and another 2002(1)AWC 771**.

6. In my opinion, the judgement in **Yogendra Singh** (supra) is not applicable since the judgment is not under the Societies Registration Act nor the Court had noticed the provision of Section 25(1) of the said Act. Under Section 25 of the Act, ¼ members of a Society can make a reference to the Registrar Challenging the election of the office bearers of the managing body. The law recognizes a right to raise a dispute and such dispute can only be raised by ¼ members of the Society. The same principle would equally apply if a writ is entertained questioning a dispute with regard to the election of the Managing Committee and individual member of the general body cannot be allowed to raise a dispute, inasmuch if it is allowed, it would open a flood gate of litigation.

7. In Dr. P.P. Rastogi and others Vs. Merrut University, Merrut and another, 1997(1) U.P.L.B.E.C. 415, a Division Bench of this Court held that an individual member of the Committee of Management had not locus standi to file an application and that if every member of the Committee of Management was permitted to file such application, it would create of lot of problems.

8. Consequently, this Court is of the opinion that a writ petition filed by and individual member which does not

represent ¼ members of the Society cannot be entertained. The judgements cited by the learned counsel for the petitioner has no application with regard to the maintainability of the writ petition. The said judgement talks about the validity of the election conducted by a Committee after the expiry of the stipulated period conducted by a Committee after the expiry of the stipulated period contemplated under it s rule or bye laws.

9. In view of the aforesaid, writ petition is dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2009

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE R.N. MISRA, J.

Criminal Misc. Writ Petition No. 4983 of 2009

Pradeep Tyagi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Diptiman Singh
Sri S.D. Singh

Counsel for the Respondents:
A.G.A.

Constitution of India-Art. 226-Criminal Writ-Challenging FIR seeking stay of arrest-offence u/s 420, 423 and 424 IPC read with U.P. Sugarcane (Regulation of Supply and purchased Act 1953 Section 22-A-inspection by Sugarcane Inspector-Notices several discrepancies in waittage of loaded sugarcane trolly and empty trolly-termed as fraud-challenged on numerous grounds being compoundable offence-court declined to interfere but issued general mandamus to all the judicial officer for strict compliance of the guide lines given by Apex Court in Lal Kamal Pratap Singh as well as the full Bench in Amarauti Case by letter and sprit.

Held: Para 11

In the light of the aforesaid observations of the Apex Court in Lal Kamlendra PratapSingh v. State of U.P. and the observations of the Full Bench of this Court in Amarawati it is provided that if an application is moved before the competent Magistrate within 3 weeks, a date may be fixed for appearance of the petitioner in about a week thereafter. The petitioner may not be arrested without permission of the Magistrate between the date of moving of the application for surrender and the date fixed for his appearance in the Court. The concerned Court may direct the Public Prosecutor to obtain instructions from the investigating officer by the date fixed and thereafter dispose of the bail application at the earliest in accordance with the decision in Amarawati's case. It will also be open for the Court concerned to release the petitioner on interim bail in an appropriate case on such terms and conditions that the concerned Court deems fit and proper till the next date of hearing of the bail application, if the hearing of the case is adjourned or the Court for any reason is not in a position to finally dispose of the bail application on that day, or some further instructions are needed.

Case law discussed:
AIR 1952 SC 12, AIR 1965 SC 745, Criminal Appeal No. 538 of 2009, 2005 Cri.L.J. 755.

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

1. Heard learned counsel for the petitioner and the learned AGA.

2. This writ petition has been filed for quashing an FIR at case crime No. 22 of 2009, under sections 420, 423 and 424 IPC read with Section 22-A of the U.P. Sugarcane (Regulation of Supply and Purchased Act, 1953, (hereinafter referred to as the Sugarcane Act), at PS Pahasu, District Bulandshahr.

3. The FIR in this case was lodged by the District Sugarcane Officer, Bulandshahr on 10.2.2009 at 8.30 am. The allegation in the FIR were that an inspection was conducted on 6.2.2009 at 3.10 pm in M/s. Triveni Sugar Mills, Sabitgarh, a sugar-mill run by the company of which the petitioner was the occupier. It was found that there was a discrepancy of 15 kg between the weighment in the sugarcane loaded trollies in the weighbridge No. 2 compared to the empty trollies weighed by the weigbridge No. 4. The agriculturalists were wrongly not given the slips prepared by the weighment committes but were given challan nos. 156720 and 152387. Since 4.2.2009 the payment for sugarcane was made by cash and not by cheque. Payments for the sugarcane purchase between 15.1.2009 and 3.2.2009 have not been made. All these activities were described as a fraud on the agriculturalists and the occupier (the petitioner) was held liable for the same.

4. It is argued by the learned counsel for the petitioner that the petitioner, Pradeep Tyagi, was the occupier and he has wrongly been named as D.K. Tyagi in the FIR. In view of section 23 of the Sugarcane Act there could be no prosecution under the aforesaid Sugarcane Act, except on a complaint made by or under the authority of the Cane Commissioner or the District Magistrate concerned. Under section 23(2) there was also a provision for compounding of the offence on payment of composition fee and that prosecution ought not have been lodged against the petitioner without giving an opportunity. Some inaccuracies in weighment are permissible under Rule 33 of the Rules, 1954, framed under the said Sugarcane Act.

5. Our attention was also drawn to the entries in the weighment register (Annexure 4) maintained by the mill for conteding that if at all the weighment as per the said record showed that an excess amount was noted therein, hence the petitioner could not be held guilty defrauding the farmers by underweighment. No complaint has been made by any farmer or cane grower.

6. As there are allegations also of commission of offences under sections 420, 423 and 424 IPC apart from section 22-A of the Sugarcane Act, hence the legal impediment, if any in the application of the Act will provide no ground for quashing of the FIR. The value of the defence material, i.e. notings regarding the calibration of the weighbridge (annexure-4) and as to whether they resulted in overweighment or underweighment, and the extent of discrepancies in weighment, and whether they fall in permissible limits are all matters for consideration by the investigating agency or the trial court and this Court cannot adjudicate on these questions of fact in this writ petition.

7. On a plain reading of the FIR therefore it cannot be said that *prima facie* no cognizable offence is disclosed or that there are any legal fetters on the conduct

of the investigation. As on the facts of the present case, the final relief of quashing of the FIR cannot be granted, the ancillary relief of stay of arrest during investigation can also not be granted (vide the Constitution Bench decisions in *State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12*, (para 6) and "*Under Article 143, of the Constitution of India; In the matter of*," *AIR 1965 SC 745* (para 137).

8. It is significant however that no complaint has been made by any cane-grower or purchaser and taking an overall view of the matter the offences and breaches, if any, appear more to be of a technical nature.

9. In a recent decision of the Supreme Court dated 23.3.09 in *Criminal Appeal No. 538 of 2009**, Lal Kamlendra Pratap Singh v. State of U.P***., which has been directed to be circulated in the High Court and in subordinate Courts in U.P. it has been observed that in appropriate cases the Court concerned may consider releasing an accused on interim bail, pending consideration of his regular bail, and that arrest was not a must in each case when an FIR of a cognizable offence was lodged.

10. The Full Bench of the Allahabad High Court in *Amarawati v. State of U.P., 2005 Cri.L.J. 755* has been specifically approved in this decision. In this regard the Full Bench has held in Amarawati :

i) Even if a cognizable offence is disclosed in the FIR or complaint the arrest of the accused is not a must, rather the police officer should be guided by the decision of the Supreme Court in Joginder Kumar v. State of U.P., 1994 Cr LJ 1981, before deciding whether to make an arrest or not.

ii) The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that would be interfering with the judicial discretion of the Court hearing the bail application. However, as stated above, when the bail application is under Section 437, CrPC ordinarily the Magistrate should himself decide the bail application the same day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under Section 439, CrPC it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.

11. In the light of the aforesaid observations of the Apex Court in Lal Kamlendra PratapSingh v. State of U.P. and the observations of the Full Bench of this Court in Amarawati it is provided that if an application is moved before the competent Magistrate within 3 weeks, a date may be fixed for appearance of the petitioner in about a week thereafter. The petitioner may not be arrested without permission of the Magistrate between the date of moving of the application for surrender and the date fixed for his appearance in the Court. The concerned Court may direct the Public Prosecutor to obtain instructions from the investigating officer by the date fixed and thereafter dispose of the bail application at the earliest in accordance with the decision in Amarawati's case. It will also be open for

the Court concerned to release the petitioner on interim bail in an appropriate case on such terms and conditions that the concerned Court deems fit and proper till the next date of hearing of the bail application, if the hearing of the case is adjourned or the Court for any reason is not in a position to finally dispose of the bail application on that day, or some further instructions are needed.

12. It is made clear that the order granting interim bail pending hearing of a regular bail application may be passed in appropriate cases, but it ought not to be passed where:

(i) The case involves a grave offence like murder, dacoity, robbery, rape etc., and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims and society at large and for protecting witnesses.

(ii)The case involves an offence under the U.P. Gangsters Act and in similar statutory provisions

(iii) The accused is likely to abscond and evade the processes of law.

(iv) The accused is given to violent behaviour and is likely to commit further offences unless his movements are brought under restraint.

(v) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

(vi) The offence is in the nature of a scam, or there is an apprehension that there may be interference with the investigation or for any other reason the Magistrate / Competent Court feels that it is not a fit case for releasing the appellant on interim bail pending the hearing of the regular bail.

(vii) An order of interim bail can also not be passed by a Magistrate who is not empowered to grant regular bail in offences punishable with death or imprisonment for life or under the other circumstances enumerated in section 437 Cr.P.C.

(viii) If the Public Prosecutor/ investigating officer can satisfy the Magistrate/ Court concerned that there is a bona fide need for custodial interrogation of the accused regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime, or for obtaining information leading to discovery of material facts, it may constitute a valid ground for not granting interim bail, and the Court in such circumstances may pass orders for custodial interrogation, or any other appropriate order.

13. These directions are necessary as the need to grant plenary powers to the police to investigate and unravel the circumstances of a crime are as important as the need to protect a respectable person from being unnecessarily sent to jail or for restraining the police from taking persons in custody for minor isolated offences where it may strictly not be necessary for the police to arrest an accused at the stage of investigation.

14. It is expected that in all cases where the Magistrate is not restrained from granting bail under section 437 Cr.P.C, where an accused moves an application for consideration of his prayer for bail through his counsel, even without orders of the High Court, the Magistrate may fix a convenient date for the appearance of the accused, and direct the Public Prosecutor to seek instructions

from the investigating officer in the meanwhile. Between the date of moving of the surrender application and the date fixed for appearance of the accused by the Magistrate, the accused may not be arrested without permission of the Court concerned. In case the Magistrate is not in a position to finally dispose of the bail on the date fixed, he may consider releasing the appellant on interim bail till the date of final hearing of the bail application in the light of the observations hereinabove. This direction is needed to prevent all accused persons whose cases do not fall within the interdict of section 437 Cr.P.C. rushing to this Court seeking protection, and for this Court having to pass orders in each individual case, creating a huge back log of criminal writ petitions, which then engage the attention of a number of benches, and come in the way of disposal of the large number of pending division bench murder and other appeals.

15. With these observations the petition is disposed of.

16. Copy of this order may be circulated to all District Judges for communication to all subordinate Courts, so that the directions given by the Apex Court in *Lal Kamlendra Pratap Singh v. State of U.P.*, the Full Bench in Amarawati and hereinabove may be followed by all subordinate Courts in letter and spirit.

17. Copy of the order may be issued to the parties on usual charges within 24 hours.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2009

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

Civil Misc. Writ Petition No. 48406 of 2006

V.K. Upadhyaya ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Srivastava

Counsel for the Respondents:
Sri Ravi Ranjan
Sri Barun P. Singh
S.C.

Constitution of India-Art.226-Recovery of excess payment-petitioner not guilty of concealment of fact or fraud pleaded-after long period such amount cannot be recovered.

Held: Para 6:

In the instant case, after more than a decade the amount of alleged excess payment is being sought to be recovered from the petitioner, though it is not disputed that for the said payment the petitioner is not at fault and there is no allegation of fraud or misrepresentation.

Case Law Discussed:
1979 ALJ 1184, 1994(2) SCC 521,1979 ALJ 1184, 1994(2) SCC 521, (1)SCC 149, 1997(1) SC 353, 2002(3) SCC 302, 2006(1) UPLBEC 399, 2006(10) SCALE 1999.

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

1. Aggrieved by the impugned order dated 10th March 2006 (Annexure-1 to the writ petition) and consequential order dated 29.6.2006 whereby pay fixation of

the petitioner w.e.f. 01st July, 1986 has been re-fixed on the ground that it was earlier wrongly fixed and direction has also been issued to recover the amount allegedly paid in excess to the petitioner on account of aforesaid wrong fixation.

2. Learned counsel for the petitioner contended that there was no fraud or misrepresentation on his part. The mistake, if any, was committed by respondents on their own and in these circumstances after such a long time and that too after his retirement no recovery of the amount already paid, can be made, though the rectification in respect to fixation can always be done. He has placed reliance on the decision in ***B.N. Singh Vs. State of U.P. and another, 1979 ALJ 1184 and Sham Babu Verma & another Vs. Union of India & others, 1994(2)SCC 521.***

3. Respondents have filed counter affidavit and on the basis of the averments contained therein, learned Standing Counsel submitted that there was wrong fixation on pay w.e.f. 01st July, 1986 and after retirement of the petitioner when his retiral dues were sought to be calculated aforesaid mistake was detected and accordingly the impugned order has been issued. However, he could not show any pleading of the respondents that the aforesaid error was on account of any fraud and misrepresentation on the part of the petitioner.

4. We have heard learned counsel for the parties and perused the record. Learned counsel for the petitioner could not show that in law he was rightly paid by the respondents and he was entitled for payment of salary in the manner it was fixed w.e.f. 1.7.1986. However, the salary and other benefits paid to the petitioner after fixation w.e.f. 1.7.1986 is not on account of any fraud of misrepresentation on the part of the petitioner. If there is any error or mistake committed by the respondents, they may rectify the same but cannot recover the alleged excess amount already paid to the petitioner since the same has already been consumed in catering to the need of himself and his family members. Moreover, in view of the law laid down in **B.N. Singh Vs. State of U.P. and another 1979 ALJ 1184, Shyam Babu Verma & another Vs. Union of India & others, 1994(2) SCC 521 Gabriel Saver Fernandes & others Vs. State of Karnataka & others 1995 Suppl. (1)SCC 149, Mahmood Hasan Vs. State of U.P. JT 1997(1) SC 353, State of Karnataka &another Vs. Manglore University Non-Teaching Employees' Association & others 2002(3) SCC 302, Surya Deo Mishra Vs. State of U.P. 2006(1) UPLBEC 399, Purushottam Lal Das & others Vs. State of Bihar and others 006(10) SCALE 1999,** such amount cannot be recovered.

5. It has further been contended that in any case, no order adverse to the interest of the petitioner could be passed without affording any opportunity and thereof, the impugned order is in utter violation of principles of natural justice. In our view, once learned counsel for the petitioner could not show that the salary and other benefits which were paid to him could be sustained having sanction of law under any Rules or Regulations applicable to the petitioner, in the circumstances, it cannot be said that salary and other benefits paid to the petitioner were being paid rightly and the same could not have been corrected/rectified by the

respondents by passing an appropriate order. If there is any error or mistake committed by the respondents in fixation of pay or payment of salary to its employees such mistake can always be rectified and principle of estoppel or waiver etc. shall not apply in such cases. Similarly in such a case, even the principle of natural justice shall not be attracted where the facts and legal position is not disputed, the action or order of the authority cannot be said to be illegal for mere non compliance of principles of natural justice. But where simultaneously it is found that an employee has been given certain monetary benefits or salary by the employer on its own or by its own mistake and for which, the employee is not responsible or has not played any fraud or misrepresentation, the amount paid in excess on account of such lapse or mistake or employer should not be recovered from the employee, particularly after a long time. It is worthy to notice that relief, i.e., restraining recovery of excess amount is granted by Courts not because of any right in the employee but in equity, in exercise of judicial discretion, to relieve the employee from the hardship that he would suffer if recovery is implemented. Looking to this aspect of the matter in **Col. (Retd.) B.J.Akkara Vs. Government of India and others, JT 2006(9)SC125,** the Apex Court has observed:

"Such relief, restraining recovery back of excess payment, is granted by Courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardships that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

6. In the instant case, after more than a decade the amount of alleged excess payment is being sought to be recovered from the petitioner, though it is not disputed that for the said payment the petitioner is not at fault and there is not allegation of fraud or misrepresentation.

7. In the circumstances, the writ petition is allowed. The impugned orders dated 10.03.2006 and 29.06.2006 are hereby quashed only to the extent they have directed for recovery of excess payment made to the petitioner. There shall be no order as to costs. It is made clear that for other purpose namely calculation of the retrial benefits etc. for the period subsequent to the impugned order, the order impugned in this petition shall have full effect and the payment would be calculated accordingly.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.04.2009

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

Criminal Misc. Bail Application No.8873 of 2009

Shri Krishna Balmiki ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri P.K.Singh

Counsel for the Opposite Party:
Sri V.Singh
Sri L.K.SINGH
A.G.A.

Code of Criminal Procedure-Section 439-Bail Application offence under Section 303/366/504/506/376 I.P.C.-Objection by complainant regarding finding recorded in Habeas Corpus petition in which the girl found minor-custody given to her father-held-no procedure adopted regarding determination of age-simple an observation-can be decided only in trail-no allegation of threatening the witness or affecting trail any manner-held-entitled for bail.

Held: Para 12

The contention of the learned counsel for the complainant therefore cannot be accepted that the proof of the age of the victim stands finally accepted and recorded without anything more to be done during trial. The acceptance of the said argument would be defiance of law as expressed by the Apex Court extracted above. The learned Single Judge also cannot be presumed to have adopted such a course that would actually affect the trial. A writ petition of the nature of Habeas Corpus cannot partake the character of an alternative remedy of a regular criminal trial or as a substitute parallel proceeding for remedies under the statutory provisions of the Criminal Procedure Code.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard learned counsel for the applicant Sri P.K.Singh and Sri V. Singh for the complainant and the learned A.G.A.

2. Learned counsel for the applicant contends that the applicant has been implicated and as a matter of fact Habeas Corpus Writ Petition No. 61371 of 2008 was filed by the father of the victim in which an interim order was passed on 16.12.2008, copy whereof is Annexure 9 to the application.

3. The matter proceeded and the applicant who was the respondent no. 3 in the said writ petition was present in the court along with the victim Laxmi Devi. Whatever transpired in Court has been recorded in the aforesaid order and learned counsel for the applicant contends that the victim had disclosed her age as 22 years and that she had married the applicant Krishna Balmiki.

4. Learned counsel for the complainant Sri V.Singh alleges that the applicant is a married person and that he has enticed away a minor daughter of the complainant which is a serious offence and, therefore, he does not deserve bail. It is contended that when the aforesaid writ petition was finally heard on 22.01.2009 this Court allowed the petition and handed over the custody of Laxmi Devi is held to be a minor being under 17 years of age. On the strength of the said finding Sri V.Singh has vehemently urged that the bail should be rejected as the offence is

clearly made out. A copy of the order dated 22.01.2009 is Annexure 10 to the application.

5. Learned counsel for the applicant on the other hand contends that when the medical report indicates that the age of the girl is 19 years then in such view of the matter, prima facie, there was sufficient evidence to contradict the age of the victim as projected by the prosecution on the contradict of the High School certificate. It is submitted by Sri P.K. Singh learned counsel for the applicant that such a finding which has been recorded in the Habeas Corpus petition violates the fundamental and statutory rights of the applicant inasmuch as the trial of the applicant would be jeopardized. He contends that the entire evidence pertaining to the age of the victim is yet to be assessed and, therefore, the aforesaid finding recorded in the order dated 22.01.2009 would be treated to be prima facie and not final, subject to evidence in the trial. He contends that in case that is not understood, then the entire trial of the applicant would be infructuous. It is further submitted that a variation with regard to the age is present, keeping in view the discloser of the age by the victim herself before this court as 22 years, and by the opinion of the Medical Officer to be 19 years.

6. The question before this Court is as to whether the applicant should be granted or should not be granted bail at this stage. There is nothing on record to indicate that the applicant has attempted to tamper with the witnesses or influence them in any way. The criminal antecedents of the applicant have been explained in Paras 18 and 19 of the application. It has also been pointed out that the trial is yet to proceed and evidence assessed on the question of the age of the victim. An observation made by the Court while disposing of the Habeas Corpus petition in respect of the age of the victim would obviously be prima facie and cannot be taken to be a final opinion in view of the fact that the evidence with regard to the age of the victim is yet to be assessed. It is further relevant to point out that the victim had made a statement before this Court that she was 22 years of age as recorded in the order dated 16.12.2008 and that reflects her age of maturity. Even otherwise she will be presumed to have substantially understood the pros and cons of this litigation when she has travelled up to this court and thereafter she has been sent into the custody of her parents.

7. The procedure to be followed in a Habeas Corpus petition is prescribed under Rule 10 of Chapter 21 of the Allahabad High Court Rules, 1952, which is as follows:-

"Procedure- All question arising for determination under this Chapter shall be decided ordinary upon affidavits, but the Court may direct that such question as it may consider necessary be decided on such other evidence and in such manner as it may deem fir and in that case may if follow such procedure and pass such orders as may appear to it to be just. "

8. The court has therefore been given wide powers to adopt a procedure as it may consider necessary but all question arising are to be decided ordinarily on the strength of affidavits. In the instant case the order dated 22.01.2009 primarily rests on the conduct of the applicant who was not found fit to

retain the custody of the detenue and she was handed over to her father. However while arising at this conclusion the court made observations on the basis of the High School certificate depicting the date of birth of the detenue.

9. The question with regard to her age vis-a-vis medical reports are yet to be assessed by the trial court. Therefore, in my opinion, learned counsel for the applicant appears to be right in saying that the opinion expressed in the order dated 22.1.2009 would only be a prima facie observation for the purpose of disposal of the Habeas Corpus petition as this Courts does not enjoy the jurisdiction of a trial court to record an evidence in a matter where the criminal trial is still pending before the appropriate court.

10. In a recent decision of the apex court in the case of State of Punjab Vs. Paramjeet Kaur decided on 25.03.2009, the court had been approached by the State questioning the correctness of the directions of the High Court in a Habeas Corpus petition awarding compensation for a person missing from custody inspite of a criminal case pending trial and also indicated the police officials for the same. It was argued before the Supreme Court that the trial would be affected once the findings have been recorded by the High Court. The Judgment of the High Court was reversed by observing as follows:-

"We agree with learned counsel for the appellant and the respondent police officials that when the matter is pending adjudication in a trial before a criminal court, the High Court should not have made any observation which would have effect on the trial by the trial court. We therefore, dispose of this appeal with the direction that even if payment has been made pursuant to the High Court's order by the State Government, that shall not be construed to be a concession to the allegation made. The trial before the criminal court shall be conducted in accordance with law, without being influenced by any observation made by the High Court about the remissness and neglect in duty is by the police officials. The appeal is accordingly disposed of."

11. At best, a high school certificate has a presumptory value but the same is yet to be proved in trial and is subject to rebuttal. A presumption cannot take the shape of proof unless it is proved in a court of law during trial . This would be subject to examination and cross-examination as per the procedure of Chapter 18, 23 and 24 of the Cr. P.C. No such procedure appears to have been under taken in the Habeas Corpus petition. Witnesses are yet to be examined and cross-examined on the said document. Therefore this court cannot be resumed to have finally concluded something which is yet to be put during trial.

12. The contention of the learned counsel for the complainant therefore cannot be accepted that the proof of the age of the victim stands finally accepted and recorded without anything more to be done during trial. The acceptance of the said argument would be defiance of law as expressed by the Apex Court extracted above. The learned Singly Judge also cannot be presumed to have adopted such a course that would actually affect the trial. A writ petition of the nature of Habeas Corpus cannot partake the character of an alternative remedy of a regular criminal trial of as a substitute parallel proceeding for remedies under the

statutory provisions of the Criminal Procedure Code.

13. In the absence of any element or material to indicate that the applicant would misuse the bail and in view of the aforesaid position as discussed, let the applicant Sri Krishna Balmiki involved in case crime no. 498 of 2008 under section 363,366,323,504,506 &376 IPC Police Station Mangalpur district Kanpur Dehat be enlarged on bail on his executing a personal bond and furnishing who sureties each in the like amount to the satisfaction of the concerned Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.10318 of 1998

Assistant Project Engineer, Ganga Pollution Control Unit ...Petitioner
Versus
Presiding Officer, Labour Court and another ...Respondents

Counsel for the Petitioner:
Sri K.B.Mathur
Sri V.B.Mishra
Sri Avanish Mishra
Sri Rajeev Mishra

Counsel for the Respondents:
Sri K.P.Agrawal
Sri K.M.Suman Sirohi
Ms. Gajala Bano Kadri
S.C.

Industrial Dispute Act 1947-6-N- Retrenchment or worker-found illegal by Tribunal-ignoring the aspect regarding non service of notice, as well as without giving retrenchment compensation-held-retrenchment notice-challenged through union of –not be said notice not served-retrenchment allowed without giving compensation- it was offered in July 1997-no dispute raised regarding less compensation held -award by Tribunal can not sustained.

Held: Para 9:

The workman's services had not been terminated on 1st of July1994. He services had already come to an end pursuant to the retrenchment notice dated 22nd June, 1991. But the workman, on accounts of an interim order of the High Court dated 8th of July 1991, continued to work. Upon the dismissal of the writ petition, the retrenchment notice revived automatically, on account of which the services of the workman came to an end automatically.

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

1. Heard Shri V.B. Mishra, the learned counsel for the petitioner and Shri K.P.Agrawal, the learned Senior Counsel, duly assisted my Ms. Gajala Bano Kadri, the learned counsel for the respondent-workmen.

2. It transpires that the petitioner had engaged a large number of workers on muster roll in the Ganga Pollution Scheme. On account of shortage of funds, a decision was taken to retrench the services of muster roll employees in various Divisions of the Nigam, who were engaged on or after 31st of August 1989. In this regard, an order dated 20th May 1991 was issued directing the concerned officers to retrench the services of the muster roll employees in accordance with law. Based on the said directions, the services of a large number of muster roll employees were retrenched in June 1991. The respondent no. 2 was also a workman

employed on muster roll and was issued a notice dated 22nd June, 1991. An offer to pay retrenchment compensation in accordance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947 was also made.

3. It has come on record that the Union of the workers, namely, Jal Nigam Jal Sansthan Mazdoor Union, Mirzapur filed Writ Petition No, 18124 of 1991 challenging the retrenchment order, issued by the management to the muster roll employees, and an interim order dated 8th of July, 1991 was passed staying the retrenchment notice. Based on this interim order, respondent no, 2 continued to work. The said writ petition was ultimately dismissed on 13.04. 1994 on the ground that the petitioner has a remedy of raising an industrial dispute. Upon the dismissal of the writ petition, the interim order was vacated, and, accordingly, the workman was disengaged w.e.f. 01.07.1994. The workman raised an industrial dispute questioning the validity and legality of his termination w.e.f. 1st of July, 1994. The validity and legality of the order of the alleged termination dated 1st of July, 1994 was referred to the Labour Court for adjudication. The Labour Court, eventually gave an award dated 22nd October, 1997 holding that the workman had worked for more than 240 days in a calendar year and the provisions of Section 6-N of the U.P. Industrial Dispute Act was not compiled with by the management at the time when the service of the workman was dispensed with on 1st of July, 1994, and therefore, the dispensation of the service of the workman was in violation of the provisions of Section 6-N of the Industrial Dispute Act. The Labour Court, consequently, directed the reinstatement of the workman with continuity of his services and with full back wages. The petitioner, being aggrieved , has filed the present writ petition.

4. The Labour Court, while directing reinstatement, held that it was immaterial as to whether the retrenchment procedure was followed in the year 1991, inasmuch as the workman continued to work pursuant to the interim order of the High Court, and thereof, worked for mote than 240 days. The Labour Court further found that neither the notice of retrenchment nor compensation was received by the workman in June, 1991, and therefore, the Labour Court held that the provision of Section 6-N Industrial Dispute Act was not compiled with.

5. I have heard the learned counsel for the parties at some length and I have perused the record of Writ Petition No. 18124 of 1991. This Court is of the opinion that the Award of the Labour Court cannot be sustained. The Labour Court was swayed by the fact that the retrenchment notice was not served upon the workman, in as much as, there was no signature of the workman showing the receipt of the said notice. In my opinion, this finding is irrelevant, in as much as the receipt of the notice is proved by the mere fact that the union of the workers had filed a writ petition challenging the said notice of retrenchment. Consequently, the workman had knowledge of the notice. The record also indicates that the employer offered compensation to its workers and that the workman, in fact has accepted the compensation on 11th of July 1994 after he joined the work pursuant to the interim order granted by the High Court on 8th of July, 1994.

6. It is settled law that under the provisions of Section 6-N of the U.P. Industrial Disputes Act which is pari materia to the provisions of Section 25 F, a notice is required to be served upon the workman and there must be a positive evidence of offering compensation to the workman. It is irrelevant is the workman accepts or refuses to accept the compensation. This view has been well settled by the Supreme Court in **Bombay Union of Journalists & Ors. Vs. State of Bombay & Anr.,** 1964(8) FLR. 236, **M/s. National Iron and Steel Company Ltd. & Ors. Vs. State of West Bengal & Anr.,** AIR 1967 SC 1206 which is equivalent to 1967(14) FLR 356, and in the matter **of Sain Steel Products Vs. Naipal Singh & Ors**., 2001(89)FLR 356.

7. In the present case, the Court finds that from a reading of the evidence and the statements of the parties and from a perusal of the record of Writ Petition No, 18214 of 1991, that the notice of retrenchment was intimated to the workman, and even though he may not have signed the notice, there is sufficient evidence that he was served because of the writ petition that the workman had filed through his union. The evidence on record indicates that the compensation was also offered and that the workman received the compensation on 11th of July 1997. There is no allegation to indicate that less compensation was paid. The record suggests that the retrenchment compensation was paid to the workman.

8. In the light of aforesaid, the Court holds that the provision of 6-N of the Industrial Dispute Act was fully compiled with by the employer and the retrenchment notice on 22nd June 1991 was perfectly valid.

9. The workman's services had not been terminated on 1st of July1994. He services had already come to an end pursuant to the retrenchment notice dated 22nd June, 1991. But the workman, on accounts of an interim order of the High Court dated 8th of July 1991, continued to work. Upon the dismissal of the writ petition, the retrenchment notice revived automatically, on account of which the services of the workman came to an end automatically.

10. In my opinion, there was no termination of the services of the workman on 1st July 1994. The retrenchment had already been effected earlier, but was kept in abeyance on account of an interim order. Consequently, the Court finds that the reference with regard to the validity and legality of the order of termination dated 1st July, 1994 was patently erroneous since there was no termination on that date.

11. In view of the aforesaid, the impugned award cannot be sustained and is quashed. The writ petition is allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.04.2009

BEFORE
THE HON'BLE R.D.KHARE, J.

Criminal Misc. Application No.7494 of 2009

Naresh Kumar ...Applicant
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicant:
Sri Ajay Kumar Shukla

Counsel for the Opposite Party:
Sri Pankaj Mishra
Sri Sandeep Kumar Dubey
A.G.A.

Code of Criminal Procedure-Section-482-Quashing charge sheet-offence under Section 363,366 IPC concealment of material fact-amounts to abuse of the process of court-contention of applicant the opposite party no. 2 legally wedded wife-married with her free will-found false being minor-the applicant already married with his first wife Smt. Urmila-held-causing obstruction in administration of justice amounts-criminal contempt-application rejected with cost of Rs.10,000/-.

Held: Para 9 & 10

In Afzal & Anr. Vs. State of Haryana & Ors., AIR 1996 SC 2326; and Mohan Singh Vs. Late Amar Singh, (1998)6 SCC 686, the Apex Court held that a false and a misleading statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order, amounts to prejudice for interference with the due course of judicial proceedings, and it will amount to criminal contempt. The Court further held that every party is under a legal obligation to make truthful statement before the Court, for the reason that causing obstruction in the due course of justice "undermines and obstructs the very flow of the unsoiled stream of justice, which has to be kept clear and pure, and no one can be permitted to take liberties with it by soiling its purity.

In view of above, this application is dismissed with cost of Rs.10,000/-.

Case Law Discussed:
(1995) SCC 242, 1996 SC 2687, 1997 SC 1236, 1970 SC 898, 1977 SC 781, (1991) 1 SCC 271, 2003 AIR SCW 14, 2004 SC 2421, 1996 SC 2326, (1998) 6 SCC 686.

(Delivered by Hon'ble R.D. Khare, J.)

1. Heard learned counsel for the applicant, Sri Pankaj Mishra, learned counsel for the opposite party no. 2 and learned A.G.A. for the State.

2. The present 482, Cr. P.C. application has been filed for quashing the charge sheet no. 595 of 2008 dated 30.12.2008 submitted in case crime no, 789 of 2008 under Section 363, 366 IPC pending before Chief Judicial Magistrate, Varanasi.

3. Learned counsel for the applicant has submitted that the deponent Mr. Neha, being major, had married with the applicant out of her own freewill, as such, no office under the charged section is made out against the applicant and the criminal prosecution at the behest of opposite party no, 2 is nothing but gross misuse of process of Court.

4. Sri Pankaj Mishra, learned counsel appearing for the opposite party no.2 has stated that at the time when Neha was abducted by the applicant, she was minor aged about 17 1/2 years, therefore, offence under he charged section is made out against the applicant. He brought to the notice of the Court that applicant is already a married person and the proceeding with his first wife, namely, Smt. Urmila, is pending consideration before the Mediation Centre of this Court vide the order passed in criminal Misc. application no. 720 of 2009 and date is fixed for today, i.e. 1st April 2009 and therefore 13th April 2009 is fixed before this Court.

5. A bare perusal of the averments made in this application discloses that no

such facts have been detailed in the present application. Thus, it is apparent that the applicant has concealed the material facts before this Court in filing the present application.

6. The judicial process should not become an instrument of oppression or abuse of a means in the process of the Court to subvert justice. Easy access to justice should not be misused as a licence to file misconceived and frivolous petition. (Vide **Nooruddin Vs. Dr. K.L. Anand,** (1995) 1 SCC 242; **Dr. Budhi Kota Subbarao Vs. K. Parasaran & Ors**. AIR 1996 SC 2687; and **Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors**. AIR 1997 SC 1236.

7. In **Tilokchand Motichand Vs. H.B. Munshi**, AIR 1970 SC 898; **State of Haryana Vs. Karnal Distillery Co. Ltd.,** AIR 1977 SC 781; and **Sabia Khan & Ors. Vs. State of U.P. & Ors.** (1999)1 SCC 271, the Hon'ble Apex Court held that filing totally misconceived petition amounts to abuse of the process of the Court and such litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court.

8. In **Abdul Rahman Vs. Prasony Bai and another**, 2003 AIR SCW 14; and **S.J.S. Business Etnerprises(P) Ltd. Vs. State of Bihar & Ors**., AIR 2004 SC 2421, the Hon'ble Supreme Court held that whenever the Court comes to the conclusion that process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Court to deter a litigant from abusing the process of the Court by deceiving it. However, the suppressed fact must be material one in the sense that had it not been suppressed, it would have led to having a very different outcome on the merit of the case.

9. In **Afzal & Anr. Vs. State of Haryana & Ors.,** AIR 1996 SC 2326; and **Mohan Singh Vs. Late Amar Singh,** (1998)6 SCC 686, the Apex Court held that a false and a misleading statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order, amounts to prejudice for interference with the due course of judicial proceedings, and it will amount to criminal contempt. The Court further held that every party is under a legal obligation to make truthful statement before the Court, for the reason that causing obstruction in the due course of justice "undermines and obstructs the very flow of the unsoiled stream of justice, which has to be kept clear and pure, and no one can be permitted to take liberties with it by soiling its purity.

10. In view of above, this application is dismissed with cost of Rs. 10,000/-.

11. However, it is provided that if the applicant appears before the Chief Judicial Magistrate, Varanasi within a period of two weeks from today and moves appropriate application, as per law, then the same shall be considered and decided, expeditiously, in accordance with law, after hearing the parties provided the applicant deposits the cost in the court of C.J.M., Varanasi. The amount, so deposited, shall be paid over to the opposite party no. 2 after due

verification. It the amount is not deposited within the said period the Magistrate is free to pass appropriate orders, in accordance with law for realization of cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.03.2009

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No.33868 of 2008

Adesh Kumar and others ...Applicants
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicant:
Sri Amit Daga

Counsel for the Opposite Party:
Sri M.K.Rajvanshi
Sri Manoj Kumar
A.G.A.

Code of Criminal Procedure-Section-482-Quashing of charge sheet-offence under Section 420,467,468,471 IPC-on ground civil suit on same allegation going on-I.O. During investigation collected material-by which the Magistrate taken cognizance disclosing prima facie commission of offence-call for no interference-merely pendency of civil suit-can not be ground for quashing the charge sheet.

Held: Para 7

Considering the submission made by learned counsel for the applicants, the learned A.G.A., learned counsel appearing on behalf of O.P.2 and from the perusal of the record, it appears that the material collected by the I.O. during investigation, prima facie, discloses the commission of the offence. The fabric of the case is of purely criminal in nature, therefore, on the basis of pendency of the civil suit, the proceeding of this case not be quashed because the filing of the civil suit is a proper remedy for cancelling the sale deed. The I.O. has not committed any error in submitting the charge sheet because there is sufficient material to proceed further against the applicants. The learned Magistrate has also not committed any error in taking the cognizance and summoning the applicants to face the trial. So far as the withdrawal of the money from the Bank account of applicant nos. 1 and 2 is concerned, it may be a ground of defence which may be considered at the stage of the trial. The application filed by the applicants is having no substance, the prayer for quashing the charge sheet case crime no. 897 of 2008 under section 420,467,468 and 471 I.P.C. P.S. Jansath, District Muzaffar Nagar and the criminal proceedings arising out of charge sheet pending in the court of learned A.C.J.M. 1st Muzaffarnagar vide criminal case no. 3821 of 2008 is refused.

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

1. This application has been filed by the applicants Adesh Kumar, Vijay Singh, Suneel and Shree Niwas with a prayer to quash the charge sheet dated 14.8.2008 in case crime no. 897 of 2008 P.S. Jansath, District Muzaffar Nagar and the proceedings arising out of the charge sheet pending in the court of learned Addition Chief Judicial Magistrate Ist, Muzaffar Nagar in criminal case no. 3821/9 of 2008 under section 420,467,468 and 471 I.P.C.

2. The facts in brief, of this case are that the FIR of this case has been lodged by O.P.No. 2 Ram Pal on 14.9.2008 at 1.30 P.M. In respect of the alleged incident dated 11.6.2008 alleging therein that by playing a fraud after providing

liquor to the first informant, he was taken to Tehsil Jansath on the pretext of obtaining the money as accident claim, where a sale deed was executed and no consideration of alleged sale was given to O.P. No. 2, after investigation, the I.O. Has submitted the charge sheet against the applicants on which the learned Magistrate concerned has taken the cognizance and summoned the applicants to face the trial.

3. Heard Sri Amit Daga, learned counsel for the applicants, learned A.G.A. For the State of U.P. and Sri M.K. Rajvanshi, learned counsel appearing on behalf of O.P.No. 2.

4. It is contended by learned counsel for the applicants that O.P.No.2 has executed a sale deed with his free will and consent, no fraud has been played upon him and the proper consideration of the land purchased by the applicants has been given to O.P.No. 2. The amount of consideration has been withdrawn from the joint account of applicants Adesh Kumar and Vijay Singh from their Accounts No. 04362010040450 of Oriental Bank of Commerce. But without doing the fair investigation, the charge sheet has been submitted against the applicants, on which in a mechanical manner, the learned Magistrate has taken the cognizance and summoned the applicants.

5. It is further contended by learned counsel for the applicants that O.P. No.2 has filed Original Suit No. 325 of 2008 against the applicant Adesh Kumar in whose favour the sale deed was executed, for cancellation of the sale deed in the court of Civil Judge (Junior Division) Muzaffar Nagar, same is pending. During pendency of civil suit, the submission of the charge sheet is illegal. The issue involved in the present case, is purely of civil in nature, therefore, the prosecution of the applicants is illegal. The charge sheet submitted against the applicants and the further proceedings arising out of the charge sheet, pending in the court of learned A.C.J.M. Ist, Muzaffar Nagar in criminal case no. 3821/9 of 2008 may be quashed.

6. In reply to the above contentions, it is submitted by learned A.G.A. and learned counsel appearing on behalf of O.P.No. 2 that in the present case by playing a fraud the applicants have obtained a sale deed allegedly executed by O.P.No. 2 and no consideration of sale has been given to the applicants. During the investigation, the I.O. has collected cogent material disclosing the fact that consideration of the sale of land has not been given to O.P.No.2. After doing the proper investigation, the charge sheet has been submitted disclosing the offence punishable under sections 420,467,468 and 471 I.P.C. and there is sufficient material to proceed further against the applicants. Learned Magistrate has not committed any error in taking the cognizance and summoning the application to face the trial. There is no illegality in the prosecution on the applicants also. The O.P. No. 2 has availed a civil remedy for the purpose of cancelling the sale deed otherwise he shall not be able to claim his loss. On the basis of the pendency of the civil suit, the proceedings of the present case may not be quashed because the issue involved in the present case is not of civil in nature, it is an independent act done by the applicants disclosing the offence. At this stage, the material collected by the I.O. is

to be considered which is disclosing the offence. The present application is devoid of the merit, the same may be dismissed.

7. Considering the submission made by learned counsel for the applicants, the learned A.G.A., learned counsel appearing on behalf of O.P.2 and from the perusal of the record, it appears that the material collected by the I.O. during investigation, prima facie, discloses the commission of the offence. The fabric of the case is of purely criminal in nature, therefore, on the basis of pendency of the civil suit, the proceeding of this case not be quashed because the filing of the civil suit is a proper remedy for cancelling the sale deed. The I.O. has not committed any error in submitting the charge sheet because there is sufficient material to proceed further against the applicants. The learned Magistrate has also not committed any error in taking the cognizance and summoning the applicants to face the trial. So far as the withdrawal of the money from the Bank account of applicant nos. 1 and 2 is concerned, it may be a ground of defence which may be considered at the stage of the trial. The application filed by the applicants is having no substance, the prayer for quashing the charge sheet case crime no. 897 of 2008 under section 420,467,468 and 471 I.P.C. P.S. Jansath, District Muzaffar Nagar and the criminal proceedings arising out of charge sheet pending in the court of learned A.C.J.M. 1st Muzaffarnagar vide criminal case no. 3821 of 2008 is refused.

8. However, considering the facts, circumstances of the case and submission made by learned counsel for the applicants that the arrest of the applicants was stayed during investigation of the case by a Division Bench of this Court on 1.10.2008 in Criminal Misc. Writ Petition No. 18127 of 2008, it is directed that the applicants shall appear before the court concerned within 25 days from today, till then the bailable warrant/N.B.W., if any, issued against the applicants shall be kept in abeyance. In case they apply for bail, the same shall be heard and disposed of on the same day by the courts below.

9. With this direction, this application is disposed of finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.04.2009

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

Criminal Misc. Parole Application No. 80925 of 2009

Kamlesh Pathak ...Petitioner
Versus
District Magistrate, Auraiya and others. ...Respondents

Counsel for the Petitioner:
Sri Viresh Misra
Sri Nirvikar Gupta
Sri Amit Misra

Counsel for the Respondents:
Poonam Singh
Addl. Solicitor General Of India
A.G.A.

Constitution of India Article-226-Habeas Corpus Petition-challenging detention order-during pendency of petition-Parole application-on ground to contest the election of M.P. And for campaign of election held-grant of bail and parole are quite distinct–proceeding grant of bail

can not be grant for parole-application rejected.

Held: Para 19:

In view of the discussion attempted above, we are of the opinion that it is not such a rare case where parole should be granted to the petitioner for doing his election campaign which can be efficiently done by his party-men and so we are rejecting the application for grant of parole.

Case law discussed:

1998 CRI.L.J.1052, 2001(2) A.W.C. 1610, 7778 Of 2009 State of U.P. Vs. Atique Ahmad, 1980 Supreme Court Cases (Cri) 777, 1987 Supreme Court 1748, Sunil Fulchand Shah Vs. Union of India & others 2000 Cri. L.J. 1444, Kamleshkumar Ishwardas Patel Vs. Union of India & others 1996 Supreme Court Cases (Cri) 86, Santosh Anand Vs. Union of India 1981 SCC (Cri) 456.

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

1. This parole application has been moved by the petitioner Kamlesh Pathak on 26.3.09 for grant of parole of three months to enable him to contest the election for Lok Sabha.

2. The facts relevant for disposal of this application are that the petitioner has been a member of the Legislative Assembly from the Samajwadi Party in the State of U.P. on two occasions. He is an active worker of the Samajwadi Party and he has been declared as a candidate by the Samajwadi Party from Akbarpur Constituency in the ensuing Lok Sabha election. The petitioner's case is that some highly placed persons of the ruling Bahujan Samaj Party are inimical towards him and they wanted to taint his image. Hence, two cases were registered against him. The first was crime no, 487 of 2008 under Section 147, 148, 149, 307, 436, 336,332,353 IPC, Section 7 of Criminal Law Amendment Act & Section 3/6 Prevention of Damage to Public Property Act at police station kotwali, District Auraiya. This case was registered against thirty five accused persons. Out of them twenty five persons were arrested on the spot and ten persons were shown to have run away from the spot after the incident. The name of the petitioner finds place as accused No. 1 in the column of those accused persons who had allegedly run away from the spot. On the same day another FIR was also registered at police station kotwali, District Auraiya as crime No, 487 A of 2008 under Sections 147,148,149, 307,436,336,332,353 IPC, Section 7 of Criminal Law Amendment Act and were named as accused persons in this FIR and the name of the petitioner stated that 100 to 150 unknown has also participated in the incident. It may also be mentioned in connection with this FIR that ten persons who had been listed as accused No. 11 to 20 were arrested on the spot and the remaining accused persons No. 1 to 10 including the petitioner had allegedly run away from the spot. It was further alleged that due to these incidents public order was disturbed. Hence, on account of these two incidents as well as due to petitioner's prior involvement in case crime no. 43 of 1991 of police station kotwali, District Auraiya, in case crime no. 92 of 1985 police station Navagarh District Farrukjabad and in some other cases, a report was sent for his detention under the National Security Act by the SHO of police station Kotwali Auraiya to the District Magistrate Auraiya through proper channel and the District Magistrate Auraiya after considering this report as well as recommendations of the concerned authorities passed an order on 28.1.09 under section 3(2) of the National

Security Act for his detention. The petitioner moved his representation against the above order but since he did not receive favourable decision from the concerned authorities, he filed habeas corpus writ petition no. 13411 of 2009 challenging the detention order as well as the grounds of detention. It was also pleaded that the petitioner is a law abiding citizen and that he has not been convicted in any case so far, and he has been falsely implicated on account of political vengeance.

3. The petitioner had also moved an application fro parole along with the above petition. Objections on this application were invited and a date was fixed for its disposal. A counter affidavit of Sri D.K. Rai, C.O., City, Auraiya on behalf of respondent no. 2 the State of U.P. was filed in reply to the parole application. A counter affidavit was also filed by Sri Rajiv Kumar Singh, Deputy Jailor, District jail, Pilibhit on behalf of respondent no.3, but that is in reply to the petition and not the parole application. No counter affidavit or objections has been filed any other respondent. However, at the time of Government Advocate that under Section 15 of the National Security Act, the petitioner has got right to move an application for parole before the appropriate Government, and so he should first move the parole application before the Government, and his parole application moved before this Court was premature and not maintainable.

4. The Court agreeing with the above contention of the Government Advocate, rejected the above parole application as premature with this option to the petitioner to move his parole application before the Government, and a direction was also issued to the Government to decide the parole application of the petitioner at an early date preferably within a period of one week from the date of moving it before the Principal Secretary, Home UP Government; and a further direction was issued that this application should be decided by a speaking order. The above parole application moved before this Court stood decided in the aforesaid manner vide order dated 18.3.09.

5. On 26.3.09 the petitioner moved a fresh parole application which was registered as criminal misc. application No. 80925 of 2009 in which it was stated that he had moved the parole application before the Principal Secretary Home on 20.3.09 and since no order had been passed on that application, he was moving this fresh parole application before this Court. Objections to this parole application were invited and the State filed a reply mentioning that the parole application had been rejected by the Government on 30.3.09. Thereafter when this parole application was taken up for hearing, a preliminary objection was again raised by the learned Government Advocate that the parole application had not challenged the order passed by the Government on his parole application unless and until he challenges the order passed by the Government on the parole application. This plea was upheld by this Court vide order dated 31.3.09 and the petitioner was provided an opportunity to take suitable steps in the light of the order.

6. Then the petitioner filed a supplementary affidavit on 1.4.09 with which the rejection order dated 30.3.09 passed by the Government was enclosed

as Annexure SA 1 and it was challenged on the ground stated in para 3 that it had been passed without application of mind in an arbitrary manner with ulterior motives and malafide intentions. Thereafter arguments of both the parties were heard on this parole application on 1.4.09 and the order was reserved. Learned counsel for the parties wanted time to file photo copies of the rulings relied upon by them, and they were provided time upto 2.4.09 to file them.

7. There were holidays on 3.4.09, 4.4.09 & 5.4.09 and on 6.04.09 Sri Nirvikar Gupta, learned counsel for the petitioner appeared before us and stated that the petitioner had been granted bail in the case under the U.P. Gangster and Anti Social Activities (Prevention) Act, by this Court vide order dated 6.4.09 in criminal misc. bail application No. 8114 of 2009. He further submitted that the Special Judge (Gangsters Act) Kanpur Nagar had vide his order dated 21.3.09 in case crime No. 23 of 2009 under Section 2/3 of the U.P. Gangster Act of Police Station Kotwali, District Auraiya State Vs. Kamlesh Pathak permitted the petitioner to be taken to Akbarpur in police custody for filing his nomination papers on 5.4.09. He submitted that he may be granted time to file copies of these orders with a supplementary affidavit and so orders may not be passed on the parole application in the meantime. He was granted time for this purpose. Thereafter, he filed photo copies of these orders vide his supplementary affidavit dated 8.4.09. A copy of that supplementary affidavit was ordered to be given to the learned counsel for the Union of India as it had not been given to him by that time, and the date 10.4.09 was fixed for hearing of further arguments on the point. The argument of both the parties were heard on that date. Now we are deciding this parole application on merits.

8. Learned counsel for both the parties have also submitted their written arguments before us and filed photo copies of the rulings relied upon by them. It has also been argued by the learned counsel for the petitioner that the detention order had been passed out of political vendetta and no ground has been made out for detention of the petitioner under the National Security Act. We are of the view that these aspects which pertain to merits of the habeas corpus petition cannot be considered at this stage of consideration of the parole application and the only question which is to be considered at this stage is whether parole should be granted to the petitioner for the purpose of view by the following observation of a full bench of this court in **Jokhu Lal Vs. Superintendent Central Jail Naini, Allahabad and others** 1998 CRI. L.J.1052, the relevant portion of which has been underlined by us to lay emphasis on it;

"After considering various submissions made by learned counsel for the parties and going through all the aspects of this case as also the relevant case law, our answer to question no. 1 is in the negative and it is held that a person detained under a preventive detention law is not period of his detention is less than a month. However, we also make it clear that under a given circumstance in a rare case, it may be possible for the High Court in exercise of its jurisdiction under Art. 226 of the Constitution to direct release of a person detained under the preventive law <u>without entering into the question of validity of the detention order,</u>

if the Court finds that exigency of the situation demands release of the petitioner forthwith without considering the question of validity of the detention order."

9. It is thus clear that without entering into the question of validity of the detention order, we have to find out as to whether the exigency of the situation demands release of the petitioner forthwith. In this connection it is to be seen that the petitioner has already filed his nomination as a candidates from the Akbarpur Constituency of the Lok Sabha as permitted by the Special Judge (Gangsters Act) Kanpur Nagar. The Election is going to take place in the above constituency on 30th April, 2009 as stated by the learned counsel for the petitioner. Not the question is whether the petitioner should be released to enable him to do the election campaign as prayed by him.

10. It was contended by the learned Government Advocate that the petitioner is detained under the National Security Act and he is not an independent candidate who may have to arrange for his election campaign himself, but he is a candidate of the Socialist Party and the members of that party can efficiently do the election campaigning for him and there is no necessity of personal election campaign of the petitioner. He also submitted that as laid down in the above ruling of this Court parole is to be granted in a rare case only. He contended that election campaign is not such a ground as to come within the term "rare case" for which parole should be granted. He also cited before us a Division Bench Ruling of this Court in the case of ***Atique Ahmad Vs. Election Commission of India & Others 2001 (2) A.W.C. 1610***. In this case permission were refused to the petitioner Atique Ahmad for being taken to the office of the Returning Officer from the jail where he was detained at that time for filling the nomination, as their Lordships were of the view that there is no necessity of personal appearance of the candidate before the Returning Officer for filing the nomination papers if he is in jail. The same view has been followed by this Court in its order dated 29.3.09 in *Crl. Misc. No. 7778 of 2009 State of UP Vs. Atique Ahmad.*

11. Learned counsel for the petitioner has cited before us ruling of the Hon'ble Apex Court in the case of ***Icchu Devi Choraria Vs. Union of India*** (writ petition No. 2030 of 1980) decided on 9.9.1980 and in ***Sunil Batra (II) Vs. Delhi Administration 1980 Supreme Court Cases (Crl) 777***. Both these ruling are on the merits of the detention order and have got no application to grant of parole.

12. Learned counsel for the petitioner submitted before us that according to the detention order passed against the petitioner his activities are detrimental to public order in the district of Auraiya. Learned counsel for the petitioner also submitted that the petitioner is ready to give an undertaking that during the period of release on parole he shall not visit Auraiya. He further submitted that the Constituency of Akbarpur is situated at Kanpur Dehat at a distance from district Auraiya and during the period of release on parole, he shall remain busy in his election campaign at Akbarpur and so he will not get any opportunity or time to go to Auraiya and so there is no chance of detriment to

public order if he is released on short term parole to enable to him to do his election campaign at Akbarpur.

13. In reply the Government Advocate relied upon the following observations on the Hon'ble Apex Court in the case of ***Pushpadevi M. Jatia Vs. Additional Secretary, Government of India & others AIR 1987 Supreme Court 1748***;

"*Preventive detention is an extraordinary measure resorted to by the State on account of compulsive factors pertaining to maintenance of public life and the welfare of the economy of the country. The need for this extraordinary measure i.e. detention without trial was realised by the founding fathers of the Constitution as an inevitable necessity for safeguarding the interests of the public and the country and hence a specific provision has been made in clause (3) of Article 22 providing for preventive detention being imposed in appropriate cases notwithstanding the fundamental right of Constitution. The entire scheme of preventive detention is based on the bounden duty of the State to safeguard the interests of the country and welfare of the people from the canker of anti-national activities by anti-social elements affecting the maintenance of public order or the economic welfare of the country. Placing the interest of the nation above the individual liberty of the anti-social and dangerous elements who constitute a grave menace to society by their unlawful acts, the preventive detention laws have been made for effectively keeping out of circulation the detenus during a prescribed period by means of preventive detention. The objective underlying preventive detention cannot be achieved or fulfilled if the detenu is granted parole and brought out of detention. Even if any conditions are imposed with a view to restrict the movements of the detenu while on parole, the observance of those conditions can never lead to an equation of the period of parole with the period of detention. One need not look far off to see the reason because the observance of the conditions of parole, wherever imposed, such as reporting daily or periodically before a designated authority, residing in a particular town or city, travelling within prescribed limits alone and not going beyond etc. will not prevent the detenu from moving and acting as a free agent during the rest of the time or within the circumscribed limits of travel and having full scope and opportunity to meet people of his choice and have dealing with them, to correspond with one and all, to have easy and effective communication with whomsoever he likes through telephone, telex etc. Due to the speculator achievements in modern communication system, a detenu, while on parole, can sit in a room in a house or hotel and have contacts with all his relations, friends and confederates in any part of the country or even any part of the world and thereby pursue his unlawful activities if so inclined.*

14. Learned counsel for the petitioner submitted that the above ruling of the Hon'ble Apex in Pushpadevi has been overruled in the case of ***Sunil Fulchand Shah Vs. Union of India & others 2000*** Cri. L.J. 1444 and so no reliance should be placed upon it.

15. The learned Government Advocate submitted in reply that it had been held by the Hon'ble Apex Court in the case of ***Pushpadevi (supra)*** that the

period of parole is not to be counted as a part of the period of detention, and on that point the view taken by the Hon'ble Apex Court in ***Pushpadevi's case*** has been overruled in the case of ***Sunil Fulchand Shah*** but the entire ruling in the case of ***Pushpadevi*** has not been overruled and so the above observations which are on the point of effect and consequences of grant of parole still hold good. We have carefully gone through both these rulings of the Hon'ble Apex Court and we find sufficient force in the above contention of the learned Government Advocate. As such we are of the view that it is not possible to release the petitioner on parole on this condition that after his release on parole he shall not visit Auraiya.

16. Learned counsel for the petitioner further submitted that the petitioner is not a criminal, he has got no criminal history nor he has been convicted in any criminal case so far, and he has been falsely implicated in the cases under reference, only on account of political rivalry, and his activities are not detrimental to the security of the State, and the detention order passed against him is totally illegal and so parole should be granted to him. It is, however, to be seen that, as laid down by the Full bench of this Court in the case of ***Jokhu Lal Vs. Superintendent Central jail Naini, Allahabad and others (supra),*** the merits of the detention order are not to be considered at the stage of considering the matter of grant of parole to the detenu. The merit and demerits of the detention order will have to be considered at the appropriate stage while deciding the habeas corpus writ petition, but here at this stage while deciding the application for parole, the merits of the detention order are not to be considered as laid down in the aforesaid ruling of ***Jokhu Lal's case (supra)*** and so it is not possible to release the petitioner on parole on this ground that the detention order passed against him is illegal as alleged by him.

17. It was further submitted by the learned counsel for the petitioner that the petitioner has already been granted bail in the case under Section 2/3 of the Gangster Act by this very Court and he has also been permitted by the Special Judge (Gangster Act) Kanpur Nagar to go in police custody to the Returning Officer's office at Akbarpur for filing his nomination papers, and so he should also be permitted to do the election campaign. We do not find any force in this contention. It is to be seen that the criteria for grant of bail for an offence as well as for grant of parole under the preventive detention are quite different, and a detenu can not be granted release on parole on the ground that he has already been granted bail in any criminal case pending against him. So far as this fact is concerned that the Special Judge (Gangsters Act) had permitted the petitioner to go to the office of the Returning Officer for filing his nomination papers, it is to been that the correct legal position is that personal appearance of a candidate who is detained in jail is not necessary before the Returning Officer for filing his nomination papers as laid down by this Court in the case of ***Atique Ahmad Vs. Election Commission of India (supra).*** However, if he has been permitted to go to the Returning Officer's Office at Akbarpur for filing nomination paper on the basis of permission granted by the Special Judge (Gangster Act), he cannot claim on the basis of the above permission that he should now be granted

release on parole for election campaign also. It is also to be seen that during the entire process of going to the aforesaid Constituency from the District Jail Pillibhit, the petitioner remained constantly in custody of the police, but if he is granted parole, he shall come out of the police as well as judicial custody; and the permission to file nomination papers under police custody and he release on parole for short term for doing election campaign cannot be equated. Hence, we are of the view that the petitioner cannot get any benefit on the question of grant of parole by these facts that he has been granted bail in the case under the Gangster Act and that he has been permitted to go to the office of the Returning Officer, Akbarpur for filing his nomination papers.

18. Learned counsel for the petitioner also cited before us a ruling of the Hon'ble Apex Court in the case of ***Kamleshkumar Ishwardas Patel Vs. Union of India & others 1996 Supreme Court Cases (Cri) 86.*** In this case the petitioner who was detained under the COFEPOSA Act and whose period of detention was to expire shortly was ordered to be released on parole on certain conditions giving benefit of the decision of the Hon'ble Apex Court in ***Santosh Anand Vs. Union of India 1981 SCC (Cri) 456***. It is to be seen that in the above case the period of detention was to expire shortly while in the present case, the detention order was passed on 28.1.09 and the period of 2 months only has expired as yet, and so it cannot be said that the detention period is going to expire shortly, and so the above ruling is not applicable to this case and it does not render any help to the petitioner.

19. In view of the discussion attempted above, we are of the opinion that it is not such a rare case where parole should be granted to the petitioner for doing his election campaign which can be efficiently done by his party-men and so we are rejecting the application for grant of parole.

20. Let the case be listed in the next cause list for orders on the writ petition.
